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Guidance

# The Mental Capacity Act (2005) (MCA) and deprivation of liberty safeguards (DoLS) during the coronavirus (COVID-19) pandemic: additional guidance

Updated 12 January 2021

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## Best interest decisions

### Offering a vaccine to someone who lacks the relevant mental capacity

Healthcare professionals offering a COVID-19 vaccine to someone who may lack the mental capacity to consent should take all practicable steps to support the person to make the decision for themselves.

Planning should happen in advance and information should be provided about the vaccine, the likely side effects, what administering the vaccine will involve, and when it will happen. This is so that, where possible, the person can make a decision for themselves. These actions should be recorded (for NHS workers in England there is a required field on the Pinnacle Point of Care system).

Where it has been established that the person lacks capacity to consent, an individual best interests decision should be taken in line with the best interest checklist in section 4 of the MCA. This means that the decision-maker (for example the healthcare professional offering the vaccine) must consider all the relevant circumstances, including the person's wishes, beliefs and values, the views of their family and what the person would have wanted if they had the capacity to make the decision themselves.

The decision maker should make a record of their best interests decision (for NHS workers in England there is also a required field on the Pinnacle Point of Care system).

Where appropriate, the person's advocates or those with power of attorney for health and welfare should be consulted. If there is a deputy or attorney with relevant authority then consent must be sought from them to be able to make a decision.

When making a best interest decision on a person's behalf, decision makers may want to consider the benefits of vaccines to the individual's health and potential alignment with a decision the person may have taken themselves if they had the relevant capacity.

Consideration should be given to the impacts of administering the vaccine which may inform a decision that receiving the vaccine may not be in the individual's best interest. Examples include, where administering the vaccine would be significantly traumatic, or where the decision to receive a vaccine would not be one the individual would make, if they had capacity.

These examples are not exhaustive and the decision maker will need to record how they arrived at a best interest decision.

### Testing someone who lacks the relevant mental capacity without their consent

In the first instance, all practicable steps should be taken to support the person to make the decision to be tested for COVID-19 for themselves. However, if this is not possible or is unsuccessful, then it may be appropriate to make a best interests decision under the MCA. When doing so, the decision-maker must consider all the relevant circumstances, including the person's wishes, beliefs and values, the views of their family and what the person would have wanted if they had the capacity to make the decision themselves. You should make a record of their decision. Best interests decisions should be made on an individual basis. No automatic assumption should be made that was in the best interests of one patient will be in the best interests of another, even if the 2 cases share similar characteristics.

For many people, a best interests decision to test for COVID-19 will align with the decision that we could have expected the person to have taken themselves if they had the relevant capacity. It is reasonable to conclude that most people leaving hospital for a care home, with the relevant mental capacity to take the

decision, would have agreed to testing, for the protection of their own health, and others around them.

In some cases, testing and other necessary measures will be needed for the purposes of procedures like elective surgery. For example, a person may lack the relevant mental capacity to consent to testing and self-isolation, before or after an appointment or surgery as an NHS inpatient. In this case, the decision-makers with responsibility for the person before and/or after the procedure, including family, care home staff and other professionals will need to work collaboratively with NHS professionals and consider what is in the person's best interests. They may conclude that it is in the person's best interests to follow infection control procedures mandated by the hospital, in order to ensure that the procedure goes ahead. Joint working and communication will be important in these cases, as the hospital will be dependent on these decision-makers, in care homes and other settings, to ensure that these decisions are taken and implemented at the right time.

There is currently no cure for COVID-19, but targeted treatment, based on a positive test result, can improve lives (by reducing the severity and duration of symptoms), and in some cases, save lives. Testing an asymptomatic patient at risk of infection, for example before they move to another setting, can also identify infection earlier and improve outcomes for that person. Decision-makers should consider this context when making best interests decisions about testing.

The Social Care Institute for Excellence has also published advice about best interest decision-making during the pandemic (<https://www.scie.org.uk/care-providers/coronavirus-covid-19/mca/best-interests-decisions>).

## **Life-saving treatment**

### **Providing 'life-saving treatment'**

Life-saving treatment refers to any treatment that is needed in order to stop the person from dying. In some cases, when a person becomes infected with COVID-19 this can be life threatening. There is no cure at present for COVID-19, and so in these cases treatment to prevent the deterioration of their condition will be life-saving. This only applies where a person would die without the relevant treatment.

### **Deprivation of liberty and providing life-saving treatment for someone who lacks the capacity to consent to their care or treatment (hereby known as 'relevant mental capacity') for COVID-19**

If life-saving treatment is being provided to a person who lacks the relevant mental capacity, including treatment for COVID-19, that prevents deterioration of their condition when a threat to life would result if it was not given, as long as the treatment is materially the same as would normally be given to those without a mental disorder, this will not amount to a deprivation of liberty.

During the pandemic, the department recognises that life-saving treatment is likely to occur in some care homes as well as hospitals, and therefore this principle can be applied in both settings.

The DoLS process will not apply to the vast majority of patients who need life-saving treatment, including those who need treatment to prevent deterioration with COVID-19. However, if further measures need to be put in place beyond that which would be put in place for a person who does not have a mental disorder then the acid test may need to be considered.

### **If the person has made advance plans about life-saving treatment**

Life-saving treatment cannot be given if it is contrary to a valid and applicable advance decision to refuse treatment made by the person. An attorney under a Lasting Power of Attorney (LPA) may have been given the appropriate power by the donor in the instrument to refuse life-saving treatment. The treatment cannot be given if the attorney has this power and refuses the treatment on the donor's behalf.

The person may have made advance written statements setting out their preferences, wishes, beliefs or values in relation to life-saving treatment when they had capacity. Best interests decision-makers must have regard to these.

Advance care planning allows plans to be put in place for future care and treatment. If a person has advance care planning arrangements in place, these should be considered and any wishes expressed in them taken into account. As well as care and treatment preferences, an advance care plan may include details of any advance decision to refuse treatment or LPA.

## Who can refuse life-saving treatment on behalf of someone

An attorney appointed under a LPA for health and welfare can only give consent or refuse life-saving treatment on behalf of the donor if the donor specifically stated in the instrument that they want the attorney to have this authority. A court-appointed deputy can never refuse life-saving treatment.

## Depriving a person of their liberty

### Interpreting the acid test

The acid test for a deprivation of liberty was set out in the Cheshire West ruling in 2014. The ruling stated that a person who lacks the relevant mental capacity to make decisions about their care or treatment arrangements is deprived of their liberty if they are:

- not free to leave the accommodation, and
- under continuous supervision and control

Subsequently, the Court of Appeal has commented that 'not free to leave the accommodation' means 'not free to leave the accommodation permanently'. This is set out in the 2017 Court of Appeal judgement in the Re D case and has since been supported by the Law Commission, the Law Society and subsequent court cases. See the relevant Re D judgement (<https://www.familylawweek.co.uk/site.aspx?i=ed182592>).

## Continuing to carry out your role as a DoLS independent mental capacity advocate (IMCA) or relevant person's representative (RPR)

If you're an IMCA or RPR (including an unpaid RPR), you should continue to represent and support the person who is or may be subject to the DoLS authorisation during the pandemic.

Face-to-face visits by professionals, for example to represent and support the person, are an important part of the DoLS legal framework. These visits can occur if needed, for example to meet the person's specific communication needs, in urgent cases or if there are concerns about the person's human rights.

To represent and support the person, remote techniques should be considered, such as telephone or video calls where appropriate to do so, and the person's communication needs should be taken into consideration. Views should also be sought from those who are concerned for the person's welfare.

A national lockdown began in England on Wednesday, 6 January 2021 and national lockdown: stay at home guidance (<https://www.gov.uk/guidance/national-lockdown-stay-at-home>) has been published detailing what you can and cannot do.

During the national lockdown in England, visits by professionals can occur if needed. Decisions around visiting are operational decisions and ultimately for the providers and managers of individual care homes and hospitals to make. DoLS professionals should work closely with hospitals and care homes to decide if visiting in person is appropriate, and how to do this safely. Visiting professionals should understand and respect their local visiting policies, including for individual hospitals and care homes.

The government's policy for family and friends visits to care homes has recently been updated and contains practical advice about how to facilitate safe visits (<https://www.gov.uk/government/publications/visiting-care-homes-during-coronavirus>), which will also be useful for DoLS professionals.

Similarly, professionals in Wales are required to comply with any additional setting guidance (<https://gov.wales/coronavirus>) or location specific guidance for Wales (<https://gov.wales/visits-care-homes-guidance-providers-html>) when considering professional DoLS visits.

## Hospitals and care homes

### **Reviewing a DoLS authorisation that covers someone's existing arrangements, if there's a change to those arrangements because of the pandemic**

During the pandemic, different arrangements may be put in place for a person under their existing DoLS authorisation. In many cases, changes to the person's circumstances will not need to be reviewed during this period as the authorisation that is already in place may already provide the legal basis for any arrangements providing they are not much more restrictive. For example, limiting the person's visits from family members or friends to prevent the spread of the virus but enabling them to contact them virtually instead would not be much more restrictive and would therefore not need to be reviewed during this period.

If the arrangements are much more restrictive, then you should inform the Supervisory Body as soon as possible. In all other cases, it would be proportionate to delay reviews until it is reasonably practical to carry out the review, but if a review cannot be delayed for whatever reason you should inform the Supervisory Body that a review needs to take place. If substantial conditions of the existing DoLS authorisations cannot be met during the pandemic, you should also consider a review.

### **Applying the principles of the MCA when a person is being discharged from hospital, to the first most appropriate care home available**

The government has published guidance on hospital discharge (<https://www.gov.uk/government/publications/covid-19-guidance-for-stepdown-of-infection-control-precautions-within-hospitals-and-discharging-covid-19-patients-from-hospital-to-home-settings>) during the unprecedented context created by the pandemic.

See also the government's action plan for adult social care in England (<https://www.gov.uk/government/publications/coronavirus-covid-19-adult-social-care-action-plan>). This provides further detail in relation to safe and appropriate care which should accompany hospital discharge, including advice on testing.

This guidance explains that, during the pandemic, people could face a reduced choice in their discharge setting and may be moved to an alternative setting ahead of their first choice of placement. In light of this, for an individual who lacks the relevant capacity, a best interests decision under the MCA should still be made. Even though the options for discharge are reduced, the decision-maker must make the best interests decision in respect of all the available options. In doing so, they must consider all the relevant circumstances. No one should be discharged to somewhere assessed to be unsafe. For some individuals, the first appropriate care home could be the safest and most appropriate available option for them. For these individuals, that placement is therefore likely to be in their best interests.

There's equivalent guidance for Wales (<https://gov.wales/hospital-discharge-service-requirements-covid-19>).

## Other settings

### Changes to the arrangements for someone without the relevant mental capacity in settings other than care homes or hospitals

The same legal framework, provided by the MCA, also applies in other settings such as supported living. This can be used for determining best interests decisions and deciding if a change constitutes a deprivation of liberty.

For example, someone who is not suspected to be infected with COVID-19 may not have the relevant mental capacity to make decisions about self-isolation and social distancing. You may need to make a best interest decision to consider if it is in the person's best interests to ensure that they self-isolate. Again, this must be based on the person's individual circumstances. The acid test will need to be considered if there is reason to believe that the arrangements amount to a deprivation of liberty.

If the arrangements do amount to a deprivation of liberty, then a referral should, in most cases, be made to the Court of Protection. The court has issued its own guidance for this emergency period and will continue to update it as needed. (<https://www.judiciary.uk/you-and-the-judiciary/going-to-court/family-law-courts/court-of-protection-guidance-covid-19/>)

## Supervisory bodies

### Considering previous assessments when an assessor is unable to undertake a new assessment

If an assessment has been carried out within the last 12 months (from when the new authorisation is being considered), then this may be relied upon without a further assessment taking place as long as the supervisory body is satisfied that there is no reason why the previous assessment may no longer be valid. However, great care should be taken in deciding to use a previous assessment and it should not be done routinely or without proper consideration of all the options. The older the assessment is (even within the previous 12 months), the less likely it is to be valid. It may not be appropriate to use previous best interests or capacity assessments again, without updating them, because normally they are more time- and context-specific than the others. Supervisory bodies should keep a record of cases where an older assessment (within the previous 12 months) is being relied upon, instead of a new assessment.

If an assessment was carried out prior to the last 12 months, then this can be considered as evidence to be taken into account for the purposes of the new assessment. The new assessment must be carried out by someone who meets the requirements set out in regulations for that assessment – in England

(<https://www.legislation.gov.uk/ukxi/2008/1858/contents/made>) and in Wales

(<https://www.legislation.gov.uk/wsi/2009/783/contents/made>).

## How supervisory bodies should manage the demand for DoLS authorisations, assessments and reviews during the pandemic

The MCA applies during the pandemic and supervisory bodies should continue to consider DoLS authorisation referrals. The guidance recommends a number of proportionate changes to MCA and DoLS practice specific to issues relating to the pandemic. These will reduce the number of DoLS authorisations that might otherwise have been requested, easing the pressure on supervisory bodies. These include:

- assessments to inform new, where appropriate
- reviews: carrying out reviews remotely where possible; thinking about whether the review can be delayed at all; and prioritising reviews using standard prioritising processes
- supervisory bodies who consider DoLS applications and arrange assessments should continue to prioritise DoLS cases using standard prioritisation processes first

Supervisory bodies should work collaboratively with hospital and care home staff. They should be mindful of their distinct, legal duties under DoLS.

## Emergency coronavirus health powers

At least 2 sets of coronavirus health powers may be relevant for people without relevant mental capacity. It is essential that everyone follows public health advice to the best of their ability to prevent the spread of COVID-19. That means that those caring for individuals without mental capacity to make decisions relating to public health advice need to consider how the emergency powers apply to the specific circumstances of the people they care for.

The Coronavirus Act 2020 (<https://www.legislation.gov.uk/ukpga/2020/7/schedule/21>) gives public health officers (PHOs) in England powers to impose restrictions and requirements on a person suspected or confirmed to be infected with COVID-19 who is not complying with public health advice. These powers are broadly replicated in Wales.

New regulations (<https://www.legislation.gov.uk/ukxi/2020/1045/made>) and guidance for self-isolation (<https://www.gov.uk/government/publications/covid-19-stay-at-home-guidance/stay-at-home-guidance-for-households-with-possible-coronavirus-covid-19-infection#fined>) were brought into force in England on Monday 28 September 2020. The regulations provide that a person may be committing a criminal offence and may be given a financial penalty if they do not stay at home and self-isolate when they are notified following a positive test result for COVID-19, or if they are contacted by specified professionals and instructed to self-isolate because of contact with someone who has had a positive test result.

If a person tests positive for COVID-19, it will also be an offence to knowingly provide false information about their close contacts to NHS Test and Trace or not to provide information about people in the same household. Failure to comply with these requirements without a reasonable excuse is a criminal offence and may result in a fine of up to £10,000. These powers do not apply in Wales.

In all cases, when a person who may lack the relevant capacity is being asked to make decisions relating to important public health rules or instructions, every effort should be made to ensure that they are supported in order to be able to understand what is being asked of them and therefore make the



decision for themselves.

If a person does not have mental capacity to make a decision for themselves, outside of cases where the Mental Health Act (1983) (MHA) is relevant, those caring for the person (professionally or personally) should explore the use of the MCA as far as possible.

## **If someone has symptoms**

When a person who lacks the relevant mental capacity is suspected or confirmed to have COVID-19, it is essential that the individual follows public health advice as far as possible to prevent the spread of the disease and receives the necessary care and treatment available through the NHS and other care services. Every effort should be made to ensure that they are supported in order to be able to understand what is being asked of them and therefore make relevant decisions for themselves. This includes requesting the support of the relevant carers, family and friends.

If they do not have mental capacity to make relevant decisions, outside of cases where the Mental Health Act (1983) (MHA) is relevant, those caring for the person should explore the use of the MCA as far as possible for decision-making in relation to public health advice.

In some circumstances, it may be appropriate to seek further advice on emergency public health powers in the Coronavirus Act, from Public Health England. In England, on the use of restrictions, please contact your local health protection team (HPT) (<https://www.gov.uk/health-protection-team>). In Wales, there is information about COVID-19 by Public Health Wales (<https://phw.nhs.wales/>) and contact details for the HPT (<https://phw.nhs.wales/services-and-teams/health-protection/health-protection-team/>).

## **Emergency powers that might apply when a PHO suspects or knows that a person is infected with COVID-19, most likely because they are displaying symptoms**

The Coronavirus Act 2020 gives PHOs in England power to impose restrictions and requirements on a person suspected or confirmed to be infected with COVID-19 who is not complying with public health advice. These powers are broadly replicated in Wales.

When a HPT is contacted to enact the emergency public health powers in relation to a person who lacks the relevant mental capacity, the appropriate PHO should first confirm with the referrer that all avenues of the MCA and, where appropriate, the MHA have been explored. In most cases, the public health powers in the Coronavirus Act will not be the most appropriate legal framework.

Where it is confirmed that public health powers are the most appropriate option for the person, the PHO will:

- request information about and have regard to the person's past and present wishes and feelings in accordance with data protection requirements
- seek someone appropriate who is close to the person, such as a family member, or someone involved in the person's care, such as an IMCA or their key worker, to assist in supporting the person to be involved in the process as far as possible
- always seek to provide appropriate support to enable the person to make the decision for themselves
- as far as possible, help the person to understand what is happening and involve them in each process

- consider the communication needs of the person and adapting communication accordingly (the individual supporting the person may assist with this)
- when providing information to the person, provide this same information to the individual supporting the person in accordance with data protection requirements

The P.H.O. should meet the person when deciding if the emergency powers are relevant to them. The person should be accompanied by those caring for them (professionally or personally). Where appropriate, those carers should assist the person in answering questions about their health and recent movements

## **The right to appeal if someone is subject to emergency health powers and lacks the relevant mental capacity**

The use of restrictions under the Coronavirus Act 2020 on potentially infectious individuals will rarely need to be applied in the case of individuals who lack the relevant mental capacity, as the MCA and, in some cases, the MHA provides the legal basis for making decisions in order to ensure that individuals can be tested for COVID-19 or to restrict the movement of individuals who have or are suspected to have the virus.

If restrictions or requirements under the Coronavirus Act 2020 are applied, an appeal may be brought to a magistrates' court by any person on whom a requirement or restriction is imposed. If someone lacks the capacity to make an appeal, it can be made by someone or some authority on their behalf. This may, in some cases, be necessary even if the person is not objecting or does not appear to understand that they can make a challenge.

## **If someone is instructed to self-isolate but does not necessarily have symptoms**

Following a positive test for coronavirus, a requirement to self-isolate for a set period can be imposed by a public health official such as Public Health England, an NHS Test and Trace contact tracer or local authority contact tracer. Contact may be by text message, e-mail, phone or in person. A carer or health or social care professional may already be aware of the individual's test through previous support with obtaining and completing the coronavirus test. They should anticipate the possibility of either a positive or negative result and help the individual to understand what actions are needed with either outcome.

Additionally, one of these officials may ask the individual to self-isolate if they are identified as a close contact of someone who has recently tested positive for coronavirus. They may also be asked to confirm the address at which they will be self-isolating.

If practical and appropriate, a carer or health or social care professional giving or explaining the notification to a person should first consider whether there are reasons to consider that the person may lack mental capacity to understand the notification and the consequences of following an instruction to self-isolate, or not. If a capacity assessment is justified they must follow the principles and duties of the MCA.

If a person without the relevant mental capacity receives a notification to self-isolate, whoever cares for or works closely with the person should help them to understand what this means and what they are required to do. Who this is may vary depending on individual circumstances and arrangements, but for example may include: a key worker, care worker, or close family member.

## **Emergency powers that might apply in England, when a person is notified that they must self-isolate, but does not necessarily have symptoms**

Emergency rules in England provide that a person may be committing a criminal offence and be subject to a financial penalty if they do not stay at home and self-isolate when they are notified following a positive test result for COVID-19, or if they are instructed to self-isolate because of contact with someone who has had a positive test result.

Following these measures in full may not always be possible if a person lacks the relevant mental capacity. In these circumstances, the individual that needs to take the actions to ensure that the person self-isolates, should consider making a best-interests decision under the MCA on their behalf. In a private residence, that is likely to be the person's family or friends. In a formal setting such as a care home, this is likely to be a member of staff.

It is highly likely that it will be in the person's best interests to follow the self-isolation rules. When making a best interests decision about self-isolation, the decision-maker must consider all the relevant circumstances, including the person's wishes, beliefs and values, the views of their family and what the person would have wanted if they had the capacity to make the decision themselves. They should also consider the important health benefits of self-isolation to the person and those close to the person. The decision-maker should make a record of their decision. Best interests decisions should be made on an individual basis. No automatic assumption should be made that what was in the best interests of one patient will be in the best interests of another, even if the two cases share similar characteristics.

In some limited circumstances, it may not be in the person's best interests to follow self-isolation rules, for example because doing so might cause them severe distress or other negative, personal consequences. In these circumstances, every effort should be made to ensure that the person follows any aspects of self-isolation that can still be followed, in their best interests – for example practicing social distancing measures or reducing the amount of times they leave the place that they live.

A person who does not follow all or some aspects of a notification to self-isolate does not commit an offence if they have a reasonable excuse for not doing so. If a person does not have mental capacity to make a decision to self-isolate, this is likely to mean that they will have a reasonable excuse not to follow all or some aspects of an instruction. In these cases, the person has not committed an offence.

## **The right to appeal if someone is subject to emergency powers relating to self-isolation, and lacks the relevant mental capacity**

In most cases, a best interests decision made in accordance with the MCA will mean that a person without the relevant mental capacity will comply with an instruction to self-isolate. In cases where self-isolation is not in their best interests, it is unlikely that the person has committed an offence because they lack the relevant capacity and therefore have a reasonable excuse not to follow the instruction.

If a person is instructed to self-isolate but they, or the person that cares for them thinks that the instruction could be based on incorrect information, they can raise this with the person giving the instruction.

Any conviction under these self-isolation regulations can be appealed in the normal way through the criminal courts. If someone lacks the capacity to make an appeal, it can be made by someone or some authority acting on their behalf. This may, in some cases, be necessary even if the person is not objecting or does not appear to understand that they can make a challenge.

## Self-isolation and deprivation of liberty

If someone who lacks the relevant mental capacity has been instructed to self-isolate, and this has been determined to be in their best interests, it may be necessary to change a person's usual care and treatment arrangements to facilitate the self-isolation. If these changes constitute a deprivation of liberty, then the Deprivation of Liberty Safeguards (DoLS) may apply or a Court of Protection Order may be needed.

Keep in mind that during the pandemic, the principles and legal framework of the MCA and the safeguards provided by DoLS still apply. Decision-makers in hospitals and care homes, and those acting for supervisory bodies should take a proportionate approach to all applications, and in many cases will need to decide:

- if the new arrangements constitute a 'deprivation of liberty'
- if the new measures do amount to a deprivation of liberty, whether a new DoLS authorisation may be required

If a new authorisation is required, prior to any action to self-isolate an individual, decision-makers should follow their usual DoLS processes, including those for urgent authorisations. There is a shortened Urgent Authorisation form

([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/892408/Annex\\_B\\_DoLS\\_urgent\\_authorisation\\_form\\_Covid19.odt](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892408/Annex_B_DoLS_urgent_authorisation_form_Covid19.odt)).

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