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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 7 September 2020

Contents

This publication is available at 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-additional-guidancea

Best interest decisions

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.

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, you should continue to represent and support the person who is or may be subject to the DoLS authorisation during the pandemic.

If necessary, RPR or IMCA should use remote techniques to remain in contact with the person. Face-to-face visits should occur if needed, for example to meet the person's specific communication needs, urgency or if there are concerns about their human rights.

Face-to-face visits by professionals are an important part of the DoLS legal framework. These visits should currently occur if needed, for example to meet the person's specific communication needs, urgency or if there are concerns about the person's human rights.

When deciding whether or not to visit in person, IMCAs and RPRs 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. Visitors must follow important local infection control policies in the setting that they visit, which are based on national government guidance.

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/uksi/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 public health powers

If someone who lacks relevant capacity needs to be isolated because they have symptoms and are not following public health advice

When a person who lacks relevant mental capacity is suspected or confirmed to have COVID-19, and they are presenting with symptoms, it is essential that the individual follows public health advice to prevent the spread of the disease and receives the necessary care available through the NHS and other care services. 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 care and treatment moving forward.

When a person who lacks relevant mental capacity is suspected to have COVID-19 but does not have classic symptoms of the disease or is vulnerable to contracting COVID-19 and should follow public health advice (for example, to self-isolate), 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. This includes requesting the support of the relevant carers, family and friends.

For individuals who lack the relevant capacity, the first options to explore are the MCA and/or the MHA. In some circumstances, it may be appropriate to seek further advice 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/).

How emergency health powers will be used if the person lacks the relevant mental capacity

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 public health officer (PHO) will first confirm with the referrer that all avenues of the MCA and, where appropriate, the MHA have been explored, as in most cases, the public health powers 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:

(a) receive information about and have regard to the person's past and present wishes and feelings

(b) 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

(c) always seek to provide appropriate support to enable the person to make the decision for themselves

(d) as far as possible, help the person to understand what is happening and involve them in each process

(e) consider communication needs of the person and adapting communication accordingly (the individual supporting the person may assist with this)

(f) when providing information to the person, provide this same information to the individual supporting the person in accordance with data protection requirements

(g) when assessing the person, the individual supporting them should attend the assessment, and where appropriate assist the person in answering the 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.