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

(Updated 15 October 2020)

Summary of key points

This guidance is only valid during the COVID-19 pandemic and applies to those caring for adults who lack the relevant mental capacity to consent to their care and treatment. The guidance applies until withdrawn by the Department of Health and Social Care. During the pandemic, the principles of the MCA and the safeguards provided by DoLS still apply.

Decision-makers in hospitals and care homes, and those acting for supervisory bodies will need to take a proportionate approach to all applications, including those made before and during the pandemic. Any decisions must be taken specifically for each person and not for groups of people.

Where life-saving treatment is being provided, including for the treatment of COVID-19, then the person will not be deprived of liberty as long as the treatment is the same as would normally be given to any person without a mental disorder. The DoLS will therefore not apply.

It may be necessary, for a number of reasons, to change the usual care and treatment arrangements of somebody who lacks the relevant mental capacity to consent to such changes.

In most cases, changes to a person's care or treatment in these scenarios will not constitute a new deprivation of liberty, and a DoLS authorisation will not be required. Care and treatment should continue to be provided in the person's best interests.

In many scenarios created or affected by the pandemic, decision-makers in hospitals and care homes will need to decide:

- if new arrangements constitute a 'deprivation of liberty' (many will not)
- if the new measures do amount to a deprivation of liberty, whether a new DoLS authorisation may be required (in many cases it will not be)

This guidance, particularly the flow chart at annex A, will help decision-makers to make these decisions quickly and safely, while keeping the person at the centre of the process.

If a new authorisation is required, decision-makers should follow their usual DoLS processes, including those for urgent authorisations. There is a shortened Urgent Authorisation form at annex B which can be used during this emergency period.

Supervisory bodies who consider DoLS applications and arrange assessments should continue to prioritise DoLS cases using standard prioritisation processes first.

Face-to-face visits by professionals, for example for DoLS assessments, are an important part of the DoLS legal framework. These visits should only 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. In areas where the local COVID alert level is high or very high, visits should only occur in exceptional circumstances.

Use of the MCA and DoLS due to COVID-19

During the pandemic, the principles of the MCA and the safeguards provided by the DoLS still apply. This emergency guidance is for all decision-makers in England and Wales who are caring for, or treating, a person who lacks the relevant mental capacity. It applies to all cases during the pandemic. It applies until withdrawn by the Department for Health and Social Care ('the department'). The content of this guidance should not become the new norm beyond the pandemic.

During the pandemic, it may be necessary to change a person's usual care and treatment arrangements to, for example:

- provide treatment to prevent deterioration when they have or are suspected to have contracted COVID-19
- move them to a new hospital or care home to better utilise resources, including beds, for those infected or affected by COVID-19, and
- protect them from becoming infected with COVID-19, including support for them to self-isolate or to be isolated for their own protection

New arrangements may be more restrictive than they were, for the person, before the pandemic. It is important that any decision made under the MCA is made in relation to that individual; MCA decisions cannot be made in relation to groups of people.

All decision-makers are responsible for implementing the emerging government public health advice. Care and treatment arrangements may need to be adjusted to implement that advice. Specific guidance for social care providers during the pandemic has been withdrawn. Updated guidance has been published on:

- supported living services
- provision of home care

When making decisions during the pandemic, about the care and treatment of people who lack the relevant mental capacity, staff should seek consent on all aspects of care and treatment to which the person can consent.

Best interest decisions

If the person lacks capacity to provide consent, the decision-maker should where necessary make a best interests decision under the MCA regarding the care or treatment that needs to be provided. When doing so, they should consider all relevant circumstances, and in particular:

- whether it is likely that the person could regain capacity and if so whether the decision can wait
- ensuring participation if reasonably practicable
- the person's past and present wishes and feelings, and beliefs and values that would be likely to influence their decision
- the views of the person's family members and those interested in the person's welfare, if it is practicable and appropriate to do so

In many cases, it will be sufficient to make a best interests decision in order to provide the necessary care and treatment and put in place the necessary arrangements, for a person who lacks the relevant mental capacity to consent to the arrangements during this emergency period.

Decision-makers should consider whether a person has made a valid and applicable advance decision to refuse the specific treatment in question. If they have made such a decision, then relevant treatment, including for COVID-19, cannot be provided. Likewise, if the person has a donee appointed under a personal welfare lasting power of attorney or a court appointed deputy with a specific authority in relation to the proposed treatment, who is refusing consent to that treatment, then that treatment cannot be provided. Anyone with such authority must act in the person's best interests when making decisions about such treatment. If staff are not in agreement with the attorney's or deputy's determination of the person's best interests, then, unless the dispute cannot be resolved through other means, consideration should be given to an application to the Court of Protection.

The Social Care Institute for Excellence has also published advice about best interest decision-making during the pandemic.

Delivering life-saving treatment: application of the Ferreira judgement

Where life-saving treatment is being provided in care homes or hospitals, including for the treatment of COVID-19, then this will not amount to a deprivation of liberty, as long as the treatment is the same as would normally be given to any patient without a mental disorder. This includes treatment to prevent the deterioration of a person with COVID-19. During the pandemic, it is likely that such life-saving treatment will be delivered in care homes as well as hospitals, and it is therefore reasonable to

apply this principle in both care homes and hospitals. The DoLS process will therefore not apply to the vast majority of patients who need life-saving treatment who lack the mental capacity to consent to that treatment, including treatment to prevent the deterioration of a person with COVID-19.

This means that, for example, a person who is unconscious, semi-conscious or with acute delirium, and needs life-saving treatment (for COVID-19 infection or anything else), is highly unlikely to be deprived of liberty. They must be treated based on a best interests decision. (The exception to this is people described above.)

If additional measures are being put in place for a person who lacks the relevant mental capacity when they are receiving life-saving treatment, for example to stop them from leaving the place of treatment, then the 'acid test' set out in Cheshire West (set out below) should be considered. If the acid test is not met, then the person is not deprived of their liberty and the DoLS will not be necessary.

Depriving a person of their liberty

In cases where the Ferreira judgement does not apply, decision-makers must determine if someone is, or will be, 'deprived of their liberty' as a result of the arrangements for their care and treatment. If this is the case, then legal authorisation is required and it is important that decision-makers comply with their legal requirements for this. For adults residing in a care home or hospital, this would usually be provided by the DoLS. If the person is residing in any other settings, then an application to the Court of Protection should be considered.

Decision-makers should always consider less restrictive options for that person. They should avoid depriving someone of their liberty unless it is absolutely necessary and proportionate to prevent serious harm to the person. In most cases, a best interests decision will be appropriate and the person will not need to be deprived of the liberty.

The Cheshire West ruling stated that a person who lacks the relevant mental capacity to make decisions about their care or treatment is deprived of their liberty if, as a result of additional restrictions placed upon them because of their mental disorder, they are:

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

This is known as the acid test. Subsequently, the Court of Appeal has commented that 'not free to leave' means not free to leave that accommodation permanently.

If the proposed arrangements meet the acid test, then decision-makers must determine how to proceed. The starting point should always be to consider whether the restrictions can be minimised or ended, so that the person will not be deprived of liberty. If this is not possible, then the key principles to consider are:

- does the person already have a DoLS authorisation, or for cases outside of a care home or hospital does the person have a Court Order? If so, then will the current authorisation cover the new arrangements? If so, in many cases changes to the person's arrangements for their care or treatment during this period will not constitute a new deprivation of liberty and the current authorisation will cover the new arrangements, but it may be appropriate to carry out a review
- are the proposed arrangements more restrictive than the current authorisation? If so, a review should be carried out
- if the current authorisation does not cover the new arrangements, then a referral for a new authorisation should be made to the supervisory body to replace the existing authorisation. Alternatively, a referral to the Court of Protection may be required

In many cases, where a person has a DoLS authorisation or Court Order then decision-makers will be able to put in place new arrangements to protect the person within the parameters of the authorisation or Order. Decision-makers should avoid putting more restrictive measure in place for a person unless absolutely necessary to prevent harm to that person. DoLS cannot be used if the arrangements are purely to prevent harm to others.

Hospitals and care homes

As stated above, many changes to arrangements around a person's care or treatment linked to the pandemic (see examples above), will not constitute a deprivation of liberty and a best interest decision would be the reasonable course of action.

In some cases, a new authorisation may be needed. In such cases, an urgent authorisation can come into effect instantly when the application is completed and lasts for up to a maximum of 7 days, which can be extended for a further 7 days if required.

During the pandemic, only the shortened form at annex B is needed to grant an urgent authorisation and request an extension to that urgent authorisation, from the supervisory body. This should be submitted as soon as is practically possible after the deprivation of liberty has been identified and started. This guidance makes no changes to the process for a standard authorisation, which must be followed as usual, when required.

Any authorisation in force (urgent or standard) is still applicable if the person moves within the same setting, for example a change of ward. If the person moves to a totally different setting, a new authorisation may be needed.

The department recognises the additional pressure the pandemic will put on the DoLS system. Fundamentally, it is the department's view that as long as providers can demonstrate that they are providing good-quality care and 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.

Where the person is receiving end-of-life care, decision-makers should use their professional judgement as to whether DoLS assessments are appropriate and can add any value to the person's care or treatment.

Any other setting

The same framework for determining best interest decisions and depriving a person of their liberty set out in the guidance above should be applied when considering the arrangements for care or treatment for a person who lacks the relevant capacity in other settings such as supported living.

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 their own guidance for this emergency period and will continue to update it as needed.

Supervisory bodies (local authorities in England, and local health boards and local authorities in Wales)

The department recognises that supervisory body staff may need to be deployed elsewhere to deal with other urgent front-line adult social care matters during the pandemic. Supervisory bodies are well practised in prioritising DoLS applications and have been using prioritisation methods to do so since 2014. During the pandemic, supervisory bodies will need to take a proportionate approach to all DoLS applications including existing applications and new applications including those generated because of the pandemic.

To carry out DoLS assessments and reviews, 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.

Face-to-face visits by professionals are an important part of the DoLS legal framework.

When deciding whether or not to visit in person, professionals should consider the local COVID alert level of the place they are considering visiting.

In areas where the local COVID alert level is high or very high, professional face-to-face visits should only occur in exceptional circumstances – for example, if the visit is the only way to meet the person's specific communication needs, in urgent cases or if a meeting is needed to avoid a breach of the person's human rights. Wherever possible, professionals should use remote techniques to remain in contact with the person.

If the local COVID alert level is medium, DoLS best interests assessors and mental health assessors 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 to settings in all local COVID alert level areas must follow important local infection control policies in the setting that they visit, which are based on national government guidance.

DoLS best interests assessors and mental health assessors should work collaboratively with hospital and care home staff. They should be mindful of their distinct, legal duties under DoLS.

Where appropriate and relevant, current assessments can be made by taking into account evidence taken from previous assessments of the person. The assessor undertaking the current assessment must make a judgement on whether the evidence from the prior assessment is still relevant and valid to inform their current assessment. If this information is used to support the current assessment or review, this should be noted and referenced. Alternatively, if the assessment was carried out within the last 12 months, this can be relied upon without the need for a further assessment.

Where the person is receiving end-of-life care, supervisory bodies should use their professional judgement as to whether an authorisation is necessary and can add any value to the person's care.

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 gives public health officers 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 sensible public health advice. These powers are broadly replicated in Wales.

New regulations and guidance for self-isolation 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.

In all cases, when a person who may lack the relevant capacity is being asked to make a decision about 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 lacks capacity to make decisions relating to public health rules or instructions, 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.

These points are explained it more detail under ‘Emergency Coronavirus health powers’ in The Mental Capacity Act (2005) (MCA) and deprivation of liberty safeguards (DoLS) during the coronavirus (COVID-19) pandemic: additional guidance.