



COVID-19: MCA , DOLS & COP update



Mental Capacity Act 2005

Agenda

1. Welcome from the Chair - Ellen Smith
2. DOLS update - Nick Clifton
3. MCA update - Cate Short
4. Swabbing for Covid-19 - Kristy Atkinson
5. Good practice - Providers
6. Advocacy Focus - Leanne Hignett
7. Q & A Panel – Presenters + Stuart Williams, Lorna Warriner, Anita Hudson & Julie Harrington

Deprivation of Liberty Safeguards during COVID-19

Key Messages

The Mental Capacity Act (2005) (MCA) and Deprivation of Liberty Safeguards (DoLS) During the Coronavirus (COVID-19) Pandemic

Key Messages

- No statutory easements to MCA and DoLS
- Deprivation of liberty will always require strong and well-reasoned justification. This has not diminished in any way in the present circumstances.
- Any decisions must be taken specifically for each person and not for groups of people
- non-statutory guidance

- Sct 17. 'Most changes to arrangements around a person's care or treatment linked to the pandemic ... will not constitute a deprivation of liberty and a best interest decision would be the reasonable course of action....'
- *Sct 21* "The Department recognised the additional pressure the pandemic will put in 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."

DEPRIVATION OF LIBERTY?

- Sct 9 '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.
- 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.
- Sct 11. 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” should be considered.

Changes in care and treatment arrangements

Acid Test

- Continuous (or complete) supervision and control AND
 - Not free to leave
-
- Sct 15. 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:

Sct 15 Continued

(a) Does the person already have an authorisation?

- 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.

(b) Are the proposed arrangements more restrictive than the current authorisation? If so, a review should be carried out.

(c) 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.

- There is a shortened Urgent Authorisation form at Annex B of the DHSC guidance which can be used during this emergency period.

Supervisory Body

- Sct 25. The Department recognises that supervisory body staff may need to be deployed elsewhere during the pandemic. Supervisory bodies are well practised in prioritising DoLS applications and will need to take a proportionate approach to all DoLS applications.
- Sct 26. DoLS assessors should not visit hospitals or care homes unless essential – remote techniques should be used
- Sct 27 Previous assessments can be used to inform the new assessment

Further Resources

The Mental Capacity Act (2005) (MCA) and Deprivation of Liberty Safeguards (DoLS) During the Coronavirus (COVID-19) Pandemic

<https://www.gov.uk/government/publications/coronavirus-covid-19-looking-after-people-who-lack-mental-capacity>

National Mental Capacity Forum webinar 28th April

<https://autonomy.essex.ac.uk/covid-19/>

39 Essex Street Chambers Webinars

<https://www.39essex.com/covid-19-issues-for-care-homes-care-providers/>

<https://www.39essex.com/holding-onto-principles-the-mca-and-covid-19/>



MCA , DOLS & COP considerations during COVID- 19

Key Messages



- How should mental capacity be considered, and the MCA applied in the current situation due to COVID-19?
- The COVID-19 situation is one which is rapidly evolving and guidance may change over coming days / weeks.

Mental Capacity Act (MCA) during COVID-19 guidance

- Please see [Coronavirus \(COVID-19\) information for care providers](#)

Safeguarding, DOLS, MCA,
best interest and dementia
advice for providers

Local guidance and support services

- Please share any guidance you have found useful

MCA Local guidance

1. [MCA, DOLS and COP Guidance for Providers during the COVID-19 Crisis \(PDF 983 KB\)](#)
2. [Guidance on social distancing measures and non-compliance](#)

SOCIAL CARE PROVIDER SERVICES

MCA, DOLS AND COP GUIDANCE DURING COVID-19

CRISIS V2

- **General guidance** with relevant links to national guidance documents and additional information available at the time of writing.
- **Does not constitute legal advice** but is general guidance on best practice.
- **Providers / registered managers** should **seek their own legal advice** where necessary

The Key Message!

MCA & DoLS continue to apply

[The Coronavirus Act 2020](#) No easement in the Act

[DHSC Guidance: MCA & DoLS During the Coronavirus \(COVID-19\): Guidance for Hospitals, Care Homes and Supervisory Bodies \[v0.1\]](#) During the pandemic, the principles of the MCA & DoLS still apply

What does this mean in practice?

- **Any decision** made for or on behalf of an individual where it is **reasonably believed they lack capacity**, still needs to **uphold the MCA 2005 principles** and to **be defensible**.
- Thought as to **how this is recorded**, captured succinctly and **as practicably as possible** is required.
- **Reasonable and practicable steps** need to be taken to demonstrate application of the MCA.
- It is **necessary to be able to justify** what has been put in place.

What does practicable mean?

- The [MCA Code of Practice](#) uses 'practicable' throughout. What was practicable up until recently is no longer practicable during the COVID-19 crisis.
- Examples of urgent situations are reflected in the MCA Code of Practice. Please refer to the Code for additional guidance as required.



Examples from the Code

MCA Code Section 2.9

'In some situations treatment cannot be delayed while a person gets support to make a decision. This can happen in emergency situations or when an urgent decision is required (for example, immediate medical treatment). In these situations, the only practical and appropriate steps might be to keep a person informed of what is happening and why.'



Examples from the Code

MCA Code Section 3.6

'...However, even in emergency situations, healthcare staff should try to communicate with the person and keep them informed of what is happening.'

MCA Code Section 5.13

'.... If the decision is urgent, there may not be time to examine all possible factors, but the decision must still be made in the best interests of the person who lacks capacity.....'



MCA Code Chapter 6 page 93

'... If restraint is being considered, is it necessary to prevent harm to the person who lacks capacity, and is it a proportionate response to the likelihood of the person suffering harm – and to the seriousness of that harm?'

(Please also see 6.40-6.48 regarding restraint.)

What is Good Care during Coronavirus crisis?

Think about **how to apply the MCA**, to limit interference with **HR [Article 8: Right to respect for Private & Family Life](#)**

- Treating a care home or supported tenancy as a household and following the same national guidelines in terms of managing COVID-19.
- Restricting service users from having face to face contact with their family and friends
- Cohorting residents / tenants showing COVID -19 symptoms to specific area, or isolating them in their room to prevent the spread of the virus
- Preventing someone from breaking social distancing rules

Good Practice: Please send us examples!

- **Support people to maintain contact with family & friends** e.g. using tech as appropriate to the individual
- **Provide accessible information** on COVID-19 measures, tailored to the person
- **Support people** deprived of liberty **to access at least 1 hour's fresh air daily/ exercise**
- **Support people who are socially distancing** to have **outdoor exercise** every day
- **Consider whether** care home residents/ people being discharged from hospital **can return to own/ family home during the pandemic**

Good Practice

- **Respect, dignity and Human Rights** remain pivotal
 - [Council of Europe's Statement of principles](#).
 - [Ethical Consideration guidance](#) sets out 8 key ethical considerations.
 - [Hospital Discharge & Covid -19](#) provides considerations for discharge processes.
- **DOLS applications and COPDOL** referrals should still be made, and LCC alerted to high priority cases.

Good practice: less restrictive solutions

- **Segregation / Isolation / Physical Restraints:**

Record what less restrictive measures you have considered and why these are not appropriate before segregating or isolating a person.

- **Chemical Restraints**

Record what less restrictive measures you have considered to try to manage agitation, wandering, anxiety, distress, being unable to go out etc, which stop short of chemical restraint. Record why these are not appropriate before considering use of medication

CAUTIONARY NOTES

Some **Do Nots!** Do not ...

- **Increase medication without** prior **consultation** with appropriate medical practitioner.
- **Impose restrictions** under this guidance which are **not related to the COVID-19** pandemic
- **Impose restrictions** which **exceed what is reasonable and proportionate** for the person involved.
- **Disregard national guidance**
- **Disregard importance of consultation** with others interested in the persons' welfare

Good practice: less restrictive solutions

- **Compliance with self-isolation and social distancing**

If a person in your care has a specific health condition that requires them to leave the home to maintain their health they can do so.

This could include where individuals with a learning disabilities or autism require exercise in an open space 2 or 3 times each day, or where individuals need support from more than one carer - ideally in line with a care plan agreed with a medical professional.

Guidance on social distancing measures and non-compliance

- Strongly encourage everyone to follow Social Distancing Regulations
- Recognise providers expert in caring for people they support - best placed to know how to support individuals to comply
- Urge support provided is person centred, empathetic - now more than ever
- Encourage risk mitigation and creativity around home based activities, distraction techniques and time of the day for permitted exercise

Social distancing ... If all else fails

- Police can enforce stay at home guidance
- Where all attempts to persuade a person to comply have failed, Lancashire Constabulary can advise. They will :
 1. **Engage** – encourage voluntary compliance.
 2. **Explain** – will stress the risks to public health and to the NHS
 3. **Encourage** – officers will encourage compliance and emphasise the benefits to the NHS by staying at home, how this can save lives and reduce risk for more vulnerable people in society.
 4. **Enforce** –, if necessary and proportionate: direct those without a reasonable excuse to go home, using reasonable force if needed; and/or issue a £60 penalty notice

Lack of capacity & Social distancing

- MCA & DOLS Guidance issued by the DHSC does not fully address this issue
- Where DOLS or COPDOL authorisation does not cover restrictions Essex Chambers suggest a pragmatic approach (NB this is not legal advice)
 - families and carers to prevent P from going out;
 - steps to be taken to seek to explain to P why not going out is of importance, and to support her decision-making capacity in this context;
 - steps to be taken within the framework of the MCA 2005 to maximise P's autonomy within the constraints applied to her.

Resources & Webinars

- **National MCA Forum** – Chair Baroness Finlay
[Coronavirus \(COVID-19\) webinars](#)
 - Covid-19, DoLS, and Best Interests
 - Sharing voices in response to COVID-19
- **Essex Chambers**
 - [COVID-19: ISSUES FOR CARE HOMES/CARE PROVIDERS](#)
 - [HOLDING ONTO PRINCIPLES – THE MCA AND COVID-19](#)
- **SCIE** [Coronavirus \(COVID-19\) advice for social care](#)



Mr Justice Hayden Vice President of the Protection

Letter to all Directors of Social Services

‘The protection afforded to this group of people by the Mental Capacity Act 2005 is constructed in a way which promotes autonomy, guards liberty and seeks to identify best interests. It requires to be said, in terms which permit of no ambiguity, that these principles have, if anything, enhanced importance in times of national emergency.’

Swabbing for Covid-19

Kristy Atkinson

Deputy Designated Professional for Safeguarding Adults and MCA

GP, C&SR and WL CCG

Mental Capacity Act (MCA)

- There are **NO** statutory easements to the MCA
- MCA or any restrictive practice **cannot** be used to prevent harm to others
- A decision specific Mental Capacity assessment should be completed for any person where capacity is questioned.
- Where capacity is assumed, it should be documented as such on the person's record.

MCA Assessment

- Do they understand the information pertaining to the test?
Salient details!!!!
- consider easy reads and pictorial aids
- Retain the information for the period of time required to consent to the interventions being proposed?
- Can the person use and weigh the information up to know the interventions are to ensure they are cared for safely, and receive appropriate treatment
- Can the person communicate their consent to the decision?
(Not always verbal means)

Best Interests

- Lasting Power of Attorney?
- Use the checklist - available options, any restrictions being proposed, and why less restrictive options cannot be utilised.
- A balance chart should be evidencing why the test is in the **person's** best interests, how effective it will be (based on symptoms and timescale of presenting symptoms) and any outcomes that will be of benefit to the person
- Consultation with others

What should we be balancing?

- The benefits of having a swab including known clinical advantages based on timescales and symptoms of the person's individual presentations and circumstances.
- The consequences of a positive diagnosis, including the 14 day self-isolation period.
- The residency and care options available both if tested or not tested
- The impact of intervention considering any behaviour the person is known to present with, any positive behavioural support that can be provided (Times of day when person is more compliant or engaging with support), the impact of the tester wearing PPE and the close proximity required to perform the intervention.
- The impact of the invasiveness of the procedure
- Any restrictions being proposed or would be required and the timescale needed to implement them to enable completion of the procedure.

Restrictive practice

- Any restrictive intervention needs to be proportionate to the benefit of being swabbed.
- Consideration needs to be given to the proportionality and necessity of swabbing resulting in increased temporary restrictions and evidenced in the best interest analysis.

Over to you !

- Please share examples of best practice, and stories of how you have used creative ways of engaging with service users and families
- Please share any user - friendly information that you have come across or have developed
- What are your burning issues?

Keep well and safe everyone