

## Swabbing for Covid-19



This guidance can apply in any setting – including the inpatient psychiatric setting where the person is detained under the MHA 1983.

There are **NO** statutory easements to the Mental Capacity Act (MCA) and DoLS.

MCA or any restrictive practice cannot be used to prevent harm to others. When the primary reason for testing is for the protection of others (which would be extremely rare), legal advice should be sought wherever the negotiating skills of the professionals involved (including, where relevant, any Public Health Officers<sup>1</sup>) are not able to bring about an agreement to undergo the test. There are, at this point, two potential routes to consider:

- a. An application could be made to the magistrates' court under s.45G Public Health (Control of Diseases) Act 1984 for an order that the person "submit to medical examination." Breach of that order is an offence. There is, however, no ability for the magistrates to empower a person to enforce that order by force, so this would not necessarily add much save for the added weight of a court order;
- b. An application could be made to the High Court for an order under its inherent jurisdiction (used when there is no statutory provision governing a situation) specifically to bring about the use of force to test the individual. The court has the powers to grant an order which could be made even in respect of both an adult lacking mental capacity and a capacitous adult refusing to undergo a test. It is very likely that the measures taken to enforce the test would amount to a deprivation of liberty, but such could be justified by reference to Article 5(1)(e) ECHR<sup>2</sup> which enables detention for the prevention of the spreading of infectious diseases.

**A Mental Capacity assessment should be completed** for any person where capacity is questionable specifically around the decision to consent to a Covid Swab test. Where capacity is assumed, it should be documented as such on the person's record.

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<sup>1</sup> [Essex Chambers](#) suggest that it is likely to be unlawful to use force to bring about testing in most situations absent recourse to court. The Coronavirus Act 2020 specifically envisages the use of reasonable force in relation to the operation of powers under Schedule 21, but only by a constable or immigration officer in the exercise of a power conferred by the Schedule and a constable or immigration officer cannot carry out testing or obtain a biological sample. Whilst a constable or immigration officer could be present at or outside the testing room to ensure the individual does not abscond from the room, it is difficult to see how they could themselves lawfully deploy reasonable force to bring about the testing itself.

<sup>2</sup> [European Convention of Human Rights](#)

For those who lack capacity or likely to be none compliant with the process, the best interest assessment and care plan should list the available options, any restrictions being proposed, and why less restrictive options cannot be utilised. Most importantly, 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. Best practice that sits alongside Best Interests is the consultation with others, family, LPA or advocacy – this does not need to be a formal meeting. You should consult with you infection prevention and control leads to ensure the criteria for testing is being followed as recommended, and what the consequences would be for the individual and for the people around them ( care staff/ other residents

The first consideration should be whether the resident has capacity to consent to a swab!

- Do they understand the information pertaining to the test? Salient details the person needs to understand cannot be prescriptive as each person is individual. The test is very invasive, far reaching in the back of the throat and the top of the nasal cavity. You should consider [easy reads](#) and [pictorial aids](#).



- Can the person 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

The person's previous wishes and feelings must be reflected in any best interest's decision making. Consider their perception to civic duties and risk of putting others at risk. Would the person want others to know their diagnosis to enable protection of others?

If there is any reason to consider that the process of carrying out the test (for instance to overcome any resistance on the part of the person) would be likely to "involve serious consequences for the person (including serious distress or other harm)" or "there is a fine balance between its benefits to the patient and the burdens and risks it is likely to entail", then it may be that an IMCA should be instructed. In such cases, and if there is no other way of securing testing in an acceptable fashion, it is strongly advised legal advice is sought. **This is a situation in which at a minimum an approach to the Court of Protection is required**

Any interventions being considered need to consider the Person's Best Interests using a balance chart to evidence the proposed benefits and risks. The balance chart should consider (but isn't exclusive to):

- Any welfare attorney who can consent on their behalf
- 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. These may include environmental (confined to certain areas), mechanical (bed rails or other equipment that restrict movements), physical (restraint in the form of redirection), pharmaceutical (use of medication)<sup>3</sup>

**NB: 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.**

## **Acknowledgements**

Lancashire and South Cumbria Safeguarding Network

Essex Chambers

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<sup>3</sup> Although the test may be uncomfortable and invasive, in many cases it will be possible to carry out the test in such a way that it cannot sensibly be said that any restraint of the individual will be required. If restraint – which would not necessarily need to involve physical force – is required, then consideration will have to be given as to whether the conditions in [s.6 MCA 2005](#) are met. We note that the conditions include a specific focus upon whether the act in question is necessary to prevent harm to the person (as opposed to others)