

Mental Capacity, Deprivation of Liberty Safeguards and Public Health Legislation.

28th April 2020

The Department of Health and Social Care recently released guidance for using the Mental Capacity Act and Deprivation of Liberty Safeguards (MCA DoLS) during the current COVID-19 pandemic.

The regulations and statutory responsibilities have not changed, if a person still meets the requirements for a DoLS referral, and their restrictions are above that of the general public - that is:

- They are unable to consent to their residence or care as a result of a mental disorder;
- They are subject to continuous supervision and control and;
- they are not free to leave

then a referral must still be made to the relevant supervisory body.

It is acknowledged that the responsibilities under MCA DoLS may interact with the responsibilities under the Coronavirus Act, particularly when considering the need to isolate individuals.

If it is suspected or confirmed that a person who lacks the relevant mental capacity has become infected with COVID-19, it may be necessary to restrict their movements. In the first instance, those caring for the person should explore the use of the MCA as far as possible if they suspect a person has contracted COVID-19.

The following principles provide a guide for which legislation is likely to be most appropriate:

- (a) The person's past and present wishes and feelings, and the views of family and those involved in the person's care should always be considered.
- (b) If the measures are in the person's best interests then a best interest decision should be made under the MCA.
- (c) If the person has a DoLS authorisation in place, then the authorisation may provide the legal basis for any restrictive arrangements in place around the measures taken. Testing and treatment should then be delivered following a best interest decision. Please consult the DoLS Team if you are unsure.
- (d) If the reasons for the isolation are purely to prevent harm to others or the maintenance of Public Health, then Public Health Officer (PHO) powers may need to be used. Please contact your PHO for more information.
- (e) If the person's relevant capacity fluctuates, the PHO powers may be more appropriate.

Any use of Public Health powers should be a last resort. If after exhausting all other options, the Public Health powers are more appropriate, then decision makers should contact their local health protection teams: <https://www.gov.uk/health-protection-team>

Please see the full guidance Government guidance here:

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

Please also see 39 Essex Chambers guidance which the information has been largely based on:

<https://www.39essex.com/the-covid-19-pandemic-the-coronavirus-bill-and-the-mental-capacity-act-2005/https://www.39essex.com/rapid-response-guidance-note-covid-19-social-distancing-and-mental-capacity/>

Annex A: NYCC Decision-making flow chart for decision makers in hospitals and care homes

Please note: this tool is for guidance only and does not substitute legal advice.

