

Mental Capacity Act Compliance and COVID 19 testing

21st July 2020

Testing is seen as a key part of the Government's strategy to bring COVID-19 under control. There are a number of contexts in which testing may be relevant:

- A. For clinical purposes, to determine whether a patient has or does not have COVID-19, for purposes of deciding how to address their symptoms;
- B. In the community, to determine whether a person has COVID-19 and hence whether they may be required to self-isolate, either within (for instance) a supported living placement, or within their own home;
- C. Prior to entry to an institution.
- D. Part of a national surveillance programme.

As testing for COVID-19 becomes a central part of the efforts to combat the disease, and as a [policy of seeking to test everyone in care homes is rolled out](#), it is becoming increasingly common that people who lack capacity to consent to the procedure are needing to be tested.

If the person cannot consent, then, unless there is a health and welfare attorney or deputy who can consent on their behalf, the relevant professionals will have to decide whether they reasonably believe that to test the person is in their **best interests**.

There can never be a blanket decision that it is in the best interests of everyone in, for example, a care home to be tested.

In completing a capacity assessment, the decision maker (the care home manager where the test is undertaken in a care home) must ensure that they have provided the relevant information to aid the person to make the decision themselves.

Examples of proposed decision makers for the purpose of undertaking swabs:

- Extra Care settings: Manager of the home care agency
- Supporting Living: Manager of the care team
- Own home: GP or District Nurse, where they are undertaking the swab.
- Mobile testing unit (for people in their own home): If an individual who lacks capacity is supported to have a swab taken through a mobile testing unit – the accompanying person should bring with them, information that confirms the person does not have capacity to consent and be prepared to provide that information (even if verbal). The person undertaking the swab (usually a self-swab but may need to be supported by someone) would be making a best interests decision to undertake the swab.

If the person's capacity fluctuates, it is advisable to either wait until a time where the person may be better able to consent to the test, or work with them when they have capacity to complete a statement regarding their consent to undertake a swab during a time when they may lose capacity.

In completing a best interests decision (this can be completed over the telephone), the decision maker must consult with anyone relevant in that person's care (but not an exhaustive list). This may include an IMCA if there is no one suitable to consult.

In completing a best interests decision, the decision maker must demonstrate that they have explored the least restrictive option, providing evidence of alternative ways in which the test could be administered that may be available, and other options available such as not testing.

The Mental Capacity Act allows restraint and restrictions to be used – but only if they are in a person's best interests. Extra safeguards are needed if the restrictions and restraint used will deprive a person of their liberty.

If a person is likely to resist the swab and significant restraint is required, and the justification to undertake the test is only to protect others (and therefore not in the best interests of the individual) it would be advised to consider whether the test is needed and what alternative options there are. For example, the person may be treated as COVID positive and may then need to follow the appropriate guidance for self-isolation for up to 14 days.

Any restrictions put in place without a confirmed diagnosis of COVID 19 could amount to a deprivation of liberty and would require the necessary authorisation. Please refer to the 'COVID 19 MCA decision making tool' for further information.

If, after exhausting all other options, the need to undertake the swab is still considered necessary and is unable to be administered without resistance, as a last resort, please contact your local public health officer: <https://www.gov.uk/health-protection-team#>

Please see further information from 39 Essex Chambers, which this information has been drawn from: <https://www.39essex.com/rapid-response-guidance-note-testing-for-covid-19-and-mental-capacity/>

There is also further information on best interests decision making during the pandemic on the SCIE website: <https://www.scie.org.uk/care-providers/coronavirus-covid-19/mca/best-interests-decisions>

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

