

Dear Colleague,

26 March 2020

This letter is to provide some support and guidance for managers and staff in Managing Authorities regarding implementing the Mental Capacity Act 2005 (MCA) including the Deprivation of Liberty Safeguards (DoLS) during the global pandemic. Matters are changing rapidly; last night, new legislation came into force called the Coronavirus Act 2020 which among other things provides in Schedule 21, the powers of public health officers, the police and immigration officers to restrict people for the purposes of assessing and containing the spread of the coronavirus for the good of the person, other people and public health. Although there are changes made to the Care Act, the MCA is not affected by this new legislation.

However as you have seen, Best Interests Assessors (BIAs) will not be routinely knocking on the doors of care homes and hospital wards to undertake DoLS assessments. We are mindful of the need to stay away to minimise the spread of infection and we remain very respectful of the work you are all doing to keep us all safe and well. We are still awaiting some formal guidance from the Department of Health and Social Care regarding the DoLS during this crisis. That may come at any time, and I have held off writing to you hoping it would come. However I didn't want to leave it any longer, so I hope the following will be of some use until we have something more formal from the government.

As stated, the MCA is unchanged, which means that consent must still be sought for all decisions. You may be wondering how you stand if a person is showing symptoms of - or may have been exposed to a person showing symptoms of - the coronavirus, and if the isolation amounts to deprivation of liberty? Jack Skinner (DoLS Manager, BMDC) and I will be happy to talk about specific cases with you, as each is unique to the person and their circumstances. Of course, we cannot provide legal advice and nothing in this letter should be taken as legal advice but we are confident we can support you in finding solutions and supporting your practice to be compliant with the law.

In terms of what can practicably be achieved then, the following might be helpful.

- People must still give valid consent for every intervention and if you think the person may lack capacity to consent then mental capacity (and if lacking capacity, best interests) assessments will be necessary. Staff should continue to seek valid consent from the person (or a person authorised to give consent) and if that cannot be provided because of a mental impairment, i.e. the staff member's opinion is that the person does not have the mental capacity to make the decision, then a best interests decision will need to be made for that person (please see section 4 of the Mental Capacity Act 2005). Such decisions will still need to be evidenced; a care worker in a care home for example, might not write up a capacity assessment for every single interaction with every person, but if asked to give account for his or her behaviour (e.g. to a line manager) they would still need to be able to do so.
- If the restrictions are for a non-negligible amount of time and the person is not free to leave and is under continuous supervision and control – and cannot consent to these restrictions because of a mental impairment – it is probable they are deprived of their liberty. If the person is deprived of their liberty in the opinion of the Managing Authority, please send the Form 1 to the DoLS admin team in the usual way, email [dolsadmin@bradford.gov.uk](mailto:dolsadmin@bradford.gov.uk) It will be screened by the DoLS team in Bradford council, and then prioritised. Crucially, if you feel authorisation is needed, please make the referral including an Urgent authorisation.

- Please highlight in an email to the MCA team [MCA-Service@bradford.gov.uk](mailto:MCA-Service@bradford.gov.uk) any situations which you feel require our urgent attention. Such might include, for example, the person strongly objecting to being in the care home or to newly imposed restrictions because of the coronavirus, or a relative of the person strongly objecting, or if the restrictions in place are extensive (e.g lots of close monitoring of the person's movements) etc. It may be that a team member will have a chat with you and be able to help with suggestions, but such will also help team members to screen and prioritise the referral. Please do not email team members directly as they may not see your email (e.g if the team member is on sick leave).
- BIAs are instructed not to go into care homes and wards to minimise the risk of spreading infection among those who appear most vulnerable to the coronavirus, unless absolutely necessary. The guidance from the Vice President of the Court of Protection is that visits to care homes should be "strongly discouraged." This applies equally to the Relevant Person's Representative (RPR).
- If a BIA is allocated to assess mental capacity and best interests in such a situation, we will all have to be creative in our thinking. For instance, a BIA might attempt to assess mental capacity by talking to the person through their window from the garden? Of course, this would not be very private and may not work, but in these challenging times we need to try whatever we can which is reasonable and practicable. If it is the case that a face-to-face meeting cannot be avoided, we would almost certainly seek to have the mental health assessor undertake the capacity assessment as well as the mental health assessment for DoLS, leaving the BIA to undertake the rest of the assessments over the phone. It may be that a short authorisation is recommended but that would need to be balanced against the need for another visit in a few months time. BIAs will also consider whether equivalent assessments might be used, whether they can determine mental incapacity using other methods etc. Of course, the BIA will document on the Form 3 these exceptional circumstances as necessitating such an approach. In short, we will do what we can without increasing the risk of spreading infection, which is priority for us all at this time.
- Managers and staff should continue to seek the least restrictive ways in which care can be provided and this will include contact with their family and friends. Using technology, such as WhatsApp or Zoom or just a phone call to facilitate contact may be helpful for some (and for others it may not or may be confusing or upsetting but should be tried). Similarly, efforts will be made to explain the need for the restrictions to the person and their relatives.
- The MCA team and Safeguarding team in Bradford hope to establish in the coming days an online meeting; managers will be sent a link to join the meeting using a laptop or phone. It is hoped we will be able to take questions and provide some support. We will be in touch soon about that. And as soon as formal guidance from DHSC is provided, I will forward it to you. Meanwhile please note you can contact the MCA team on the email address above and someone will give you a call back.

Stay safe and well,



Ian Burgess  
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Bradford MDC