

## Key Points

During the pandemic, it may be necessary to change a person's usual care and treatment arrangements to, for example:

- Provide treatment to prevent deterioration when they have or are suspected to have contracted COVID-19
- Move them to a new hospital or care home to better utilise resources, including beds, for those infected or affected by COVID-19, and
- Protect them from becoming infected with COVID-19, including support for them to self-isolate or to be isolated for their own protection.

New arrangements may be more restrictive than they were, for the person, before the pandemic. It is important that any decision made under the MCA is made in relation to that individual; MCA decisions cannot be made in relation to groups of people.

All decision makers are responsible for implementing the emerging government public health advice (<https://www.gov.uk/government/publications/covid-19-stay-at-home-guidance>).

Care and treatment arrangements may need to be adjusted to implement that advice.

The government has also issued specific advice for social care providers during the pandemic:

<https://www.gov.uk/government/publications/covid-19-residential-care-supported-living-and-home-care-guidance>

When making decisions during the pandemic, about the care and treatment of people who lack the relevant mental capacity, staff should seek consent on all aspects of care and treatment to which the person can consent.

## Best Interest

In many cases it will be sufficient to make a best interests decision in order to provide the necessary care and treatment and put in place the necessary arrangements, for a person who lacks the relevant mental capacity to consent to the arrangements during this emergency period.

## Any other Setting

The same framework for determining best interest decisions and depriving a person of their liberty set out in the guidance above should be applied when considering the arrangements for care or treatment for a person who lacks the relevant capacity in other settings such as supported living.

If the arrangements do amount to a deprivation of liberty, then a referral should in most cases be made to the Court of Protection. The Court has issued their own guidance for this emergency period and will continue to update it as needed (<https://www.judiciary.uk/you-and-the-judiciary/going-to-court/family-law/courts/court-of-protection-guidance-covid-19/>).

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. This includes treatment to prevent the deterioration of a person with COVID-19. During the pandemic, it is likely that such life-saving treatment will be delivered in care homes as well as hospitals, and it is therefore reasonable to apply this principle in both care homes and hospitals.

***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.***

This means that, for example, a person who is unconscious, semi-conscious or with acute delirium, and needs life-saving treatment (for COVID-19 infection or anything else) is highly unlikely to be deprived of liberty. They must be treated based on a best interests decision.

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” set out in Cheshire West should be considered.

- **not free to leave the accommodation, and**
- **under continuous supervision and control.**

Subsequently, the Court of Appeal has commented that “not free to leave” means not free to leave that accommodation permanently

If the acid test is not met then the person is not deprived of their liberty and the DoLS will not be necessary.

Decision-makers should always consider less restrictive options for that person. They should avoid depriving someone of their liberty unless it is absolutely necessary and proportionate to prevent serious harm to the person.

In most cases, a best interests decision will be appropriate and the person will not need to be deprived of the liberty.

If the proposed arrangements meet the acid test, then decision makers must determine how to proceed if the restrictions cannot be minimised or ended.

If this is not possible then the key principles to consider are:(a) Does the person already have a DoLS authorisation, or for cases outside of a care home or hospital does the person have a Court Order? If so, then will the current authorisation cover the new arrangements? **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.

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

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.

In many cases, where a person has a DoLS authorisation or Court Order then decision-makers will be able to put in place new arrangements to protect the person within the parameters of the authorisation or Order. Decision-makers should avoid putting more restrictive measure in place for a person unless absolutely necessary to prevent harm to that person. DoLS cannot be used if the arrangements are purely to prevent harm to others.

During the pandemic, only the shortened form is needed to grant an urgent authorisation and request an extension to that urgent authorisation, from the supervisory body. This should be submitted as soon as is practically possible after the deprivation of liberty has been identified and started. This guidance makes no changes to the process for a standard authorisation, which should be followed as usual, when required.

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.

Where the person is receiving end of life care, decision makers should use their professional judgement as to whether DoLS assessments are appropriate and can add any value to the person's care or treatment.

## Other Settings

The same framework for determining best interest decisions and depriving a person of their liberty set out above should be applied when considering the arrangements for care or treatment for a person who lacks the relevant capacity in other settings such as supported living.

If the arrangements do amount to a deprivation of liberty, then a referral should in most cases be made to the Court of Protection. The Court has issued their own guidance for this emergency period and will continue to update it as needed

**The Coronavirus Act 2020** gives Public Health Officers power to impose proportionate requirements (including screening and isolation), on a person suspected or confirmed to be infected with COVID-19.

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.

If the public health powers are more appropriate, then decision makers should contact their local health protection team (<https://www.gov.uk/guidance/contacts-phe-health-protection-teams>).

## Decision-making flow chart for decision makers in Hospitals and Care Homes

