

Mental capacity during COVID-19: advice for social care

Best interests decisions: A COVID-19 quick guide

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The [Mental Capacity Act \(MCA\)](#) ^{link 1} is at the heart of good, empowering practice in health and social care. This quick guide aims to help people across social care and health settings to apply its provisions about making best interests decisions for or on behalf of people who [lack the relevant capacity](#) ^{link 2} in the context of the COVID-19 pandemic.

The MCA remains unaltered by the [Coronavirus Act 2020](#) ^{link 3}. But while the law stays the same, applying the MCA in practice clearly has to take on board the new and challenging implications of COVID-19 and the measures, such as social distancing and testing, in place to combat it.

Best interests decisions

Section 1(5) of the MCA set outs the best interests principle that 'any act done, or decision made, under the Act for or on behalf of a person who lacks capacity must be done, or made in his [or her] best interest'. There is no definition of what constitutes best interests, because it is too individualised and case-specific a concept. What the MCA gives us instead is a checklist – set out in section 4 of the Act, and explained in chapter 5 of the [MCA Code of Practice](#) ^{link 4} – of what needs to be, or should not be, considered whenever a best interests decision needs to be made for or on behalf of someone. If the person has a valid and applicable [Lasting Power of Attorney](#) ^{link 5} or a [Court-Appointed Deputy](#) ^{link 6} with the authority to make a particular decision, then that attorney or deputy can make the best interests decision.

There is no hierarchy to the checklist: all relevant parts should be considered, and weighed up according to the circumstances of the case. It is important to be clear who ultimately is responsible for making any decision, and to record the decision-making process, along with the reason why one option was chosen, and others rejected clearly laid out.

It is important also to note that best interests decisions can only be made in respect of decisions that a person with the relevant capacity could make for themselves. Decisions, therefore, can only be made between actually available options. This is sometimes known as the 'concrete situation'.

Whenever making a best interests decision, a person's emotional wellbeing, and rights to a private and family life under Article 8 of the European Convention on Human Rights, should be central to your thinking about that decision. For example, you should always consider ensuring that the person can maintain a fulfilling and active life, and make their own choices as far as possible.

Best interests decisions during the pandemic

The checklist for making best interests decisions remains valid and applicable during the pandemic, and should be your guide whenever you need to make decisions on behalf of someone who lacks the capacity to do so. And efforts to involve the person in the decision-making process – especially when the decision is a significant one – should be maintained as much as possible, even where it is established that they lack the relevant capacity.

As we adjust to the impacts of the COVID-19 pandemic, the options available to people are likely to be reduced. You will also have to consider government rules and guidance relating to COVID-19. It is highly unlikely to be in the best interests of a person to do something that is prohibited under the government guidance which applies at the time – whatever the benefits to that person.

Best interests decisions are individual in that they must be based on what is in the best interests of that person, not on what is right for other people. So, for example, the desire of other family members to see the person would be unlikely to be the primary basis for a best interests decision to be made about a family gathering involving the person you support. The judgement has to be whether it is right for them.

When to review a best interests decision

As situations change, previous best interests decisions may need to be reviewed, and new decisions made. Whether and how to review a best interests decision because of COVID-19 will need to be judged based on an individual's circumstances. The following considerations may, however, be useful to bear in mind:

- Individual risk factors – coronavirus affects people differently, and some of the [additional risk factors](#) ^{link 7} are by now well-known. The priority given to reviewing best interests decisions should be shaped by people's individual



susceptibility to COVID-19.

- Proportionality – it may not be possible to review every decision, so a plan may need to be made within your organisation for what is realistically achievable. This is in no way to downplay people’s rights to a proper review of their care arrangements; it is about proper planning to focus on the most important tasks in a difficult situation.
- Changes to lockdown rules – what people are allowed to do changes frequently, and gradually. Bear in mind, therefore, a best interests decision may need to be reviewed as the governmental guidance changes, and other possible options become more or less viable.
- Prioritisation - the implications of the pandemic will be different for different decisions. Some, such as whether someone should move from a care setting where infections are more common (assuming there is another viable option), are major ones which will call for more pressing consideration.
- Alternatives – COVID-19 may have changed someone’s current situation, but some alternative options may no longer be present, in which case a review of the current decisions may not be worthwhile.

Common COVID-related decisions

We now look at how the checklist, and other best interests considerations, might apply in various COVID-related decision-making processes. Because best interest decisions are highly personalised to the individual in question, it is not possible to address every situation in a guide such as this, but we hope this offers some useful thoughts about what to take into account in different situations.

COVID-19 testing

As testing for COVID-19 becomes a central part of the efforts to combat the disease, it is becoming increasingly common that people who lack capacity to consent to the procedure are needing to be tested. The procedure for testing – having one’s nose and throat swabbed – can be moderately uncomfortable, and may be distressing for people who do not understand what is happening. But knowing whether someone has COVID-19, or not, is important for their proper care and treatment.

With the caveat that each decision needs to be made on an individual basis, things to consider when making a best interests decision about testing for COVID-19 are likely to include:

- 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. It may be policy to roll-out access to testing for all care homes, but whether it is in the best interests of each person to be tested can only be a decision made on an individual basis.
- Best interests decisions should focus on the individual’s best interests. The testing of someone who lacks the capacity to consent cannot be justified solely, under a best interests decision, by saying ‘it protects other people from a possible infection’, although the risk to others can be factored in.
- The checklist requires us to take into account all relevant circumstances – including here the presence of a deadly pandemic – and the person’s past and present wishes and feelings, and their beliefs and values. There may be a small number of cases where it may be in the person’s best interests not to be tested. An example could be where the person is likely to be extremely distressed by the process. However, in most cases it is likely (although not certain) that the person, if they had the relevant capacity, would have consented, because they would want to know if they had COVID-19 so it could be treated. In many cases this may be a decisive consideration.
- Whether or not the person has symptoms of the coronavirus should be factored in. If someone is displaying symptoms – a persistent dry cough, a high temperature, and/or a loss of taste and smell - which indicate that COVID-19 is likely, it is probable (although, again, not certain) that it would be in their best interests to know whether or not they definitely have the coronavirus.
- It is also worth noting that if someone does not have a test, then the options available to them in terms of accommodation, care, and support are probably going to be reduced. As a general rule, this would tend to add to the view that it is likely that a test would be in a person’s best interests.
- In some cases, the best interests of the person may be disputed or not clear cut. For example, if a person becomes significantly distressed at the prospect of a test, despite best efforts to support and comfort them through it, then the distress will need to be balanced against the long- term benefits to the person. In some cases, for example if testing is opposed by the family and the person, consideration may need to be given to an application to the [Court of Protection](#) [link 8](#) .
- As a test is unlikely to be viewed as serious medical treatment, the person may not have a formal right to an [IMCA](#) [link 9](#) if they are without family or friends to support them. But, if it would give the person additional support. bringing in an advocate may still be a good idea.
- It is unlikely that the person has a valid advance decision to refuse treatment (ADRT) that explicitly rules out the test, as the test is not in itself treatment. But, if an ADRT, or an advance statement of wishes, suggests that the person objects to the test procedure, this gives a powerful indicator of the person’s past wishes and feelings, and would need to be factored into the best interests decision-making process.
- A public health intervention that overrides a best interests judgement – such as forced testing under the Coronavirus Act – is very unlikely to apply. If you have any concerns, the Department of Health and Social Care provide more information on [their website](#) [link 10](#) .

Social distancing

The precise details are changing, but it is reasonable to assume that social distancing – constraints on people’s rights to move and associate freely will continue as we go through the winter months.



Factors to consider when making best interests decisions that relate to social distancing include:

- Some people who may lack the relevant mental capacity will also be those who are at heightened risk from COVID-19. Some will be categorised as extremely vulnerable, and be subject to tighter [social distancing rules](#) [link 11](#) . It seems unlikely that there would be a defensible best interests decision that involved stepping outside those rules for people to whom they are applicable.
- The risk of infection with COVID-19 will be heightened by contact with others, even where that risk is low enough for the contact to be permitted by government rules. And so that risk would need to be weighed up in a best interests decision-making process about, for example, whether someone should see friends for a socially distanced picnic when guidance allows.
- There are, possibly, going to be available alternatives to face-to-face contact with loved ones, such as video calls, or conversations through closed windows. While, for many people, these are not an exact substitute for actual contact, the fact that they offer a connection with family and friends with reduced risk in relation to contracting COVID-19 is a factor that should be considered and given appropriate weight.
- Remember also in this context that in weighing up what is in someone's best interests, you have to consider all relevant factors, and so people's emotional and mental wellbeing will need to be considered alongside their physical wellbeing. An outing with friends or family (when guidance allows), albeit with some additional infection risk, may have significant psychological benefits. Each decision must be made on the basis of the individual circumstances of the person you support, using the checklist.

A different challenge presents itself when someone who lacks the relevant capacity does not adhere to social distancing rules. Someone with impaired cognition may simply not understand that they need to do so, or to adhere to distancing measures when restrictions do permit them to be out and about, as an example. If this is the case with someone you support, you will need to use a combination of kindness, vigilance, and what you know of the individual to address each situation as it arises. Ongoing efforts to help the person understand the rules should be maintained, and there are resources to assist with this from a range of organisations, including [Mencap](#) [link 12](#) , and [Books Beyond Words](#) [link 13](#) .

In certain circumstances, the person may be subject to a legal authorisation such as the [Deprivation of Liberty Safeguards \(DoLS\)](#) [link 14](#) or by the Court of Protection, which authorises the person's deprivation of liberty. In some cases these authorisations may already cover limitations on a person's movement. If these existing limitations do, in effect, address concerns about people not social distancing, then the issue may be addressed. If someone subject to DoLS requires additional restrictions to manage a lack of social distancing, then a review of the DoLS authorisation may be required, but it is likely that in most cases the existing DoLS authorisations will be sufficient. Please see government guidance on [applying DoLS during the pandemic](#) [link 15](#) .

While public health officers do have powers to enforce social distancing, it seems improbable that they would be used with a person who lacks the relevant capacity, even where the person has symptoms of COVID-19. It is likely to be better for everyone to manage the situation through the skilled support of staff and others.

Self-isolating

Some similar considerations apply when dealing with best interests decisions about people who need to self-isolate, either because they are medically more vulnerable; have COVID-19 symptoms; or, under the test and trace rules, they have been in contact with someone who has COVID-19 symptoms. Again, it is highly unlikely that a decision would be reached that it was in a person's best interests to ignore the need to self-isolate. In addition to the clear medical interests, the desire most people have to act as responsible citizens might be a factor here when weighing up people's wishes and values.

So again, the challenge may be that someone does not understand the need to self-isolate, and therefore does not stick to the restrictions. The advice above – to carry on trying to explain the need to abide by the rules; to use whatever resources and communication aids might work for the person; and to support them with vigilant kindness – would apply here, too. In many cases, existing DoLS authorisations may support a person's self-isolation, but if additional restrictions were necessary, the authorisation may need to be [reviewed](#) [link 16](#) .

Moving home

Residents of care homes and other group care settings have been disproportionately affected by the pandemic. This has focused attention on the risks of group living, and how these should be weighed against the risks that a person may have faced living elsewhere, prior to their move into a care home.

Where a person has the capacity to decide where to live, it may be that the risks of coronavirus means that they now wish to move, and may decide to look into their options. But here we are dealing with people who lack the relevant capacity, and therefore with the question of whether and how to review a best interests decision about where the person should live, in the light of the COVID-19 pandemic.

It is likely that a person in a care home who lacks the capacity to make significant decisions will be living there under a DoLS authorisation, or an authorisation from the Court of Protection, if they are in a non-registered setting such as supported living. And so any decision about moving might need to be done in the context of those processes. Here, we look simply at things to factor in when making new best interests decisions, or reviewing existing ones. This thinking can also be applied to best interests decisions that relate to people who may be moving into a care home from their current home or via a discharge from hospital. Each decision will need to be made on an individual basis, factoring in the circumstances and personalities involved. This is simply a guide.



- What are the actual viable alternatives? People typically move into care homes when there are challenges to living in their own homes which cannot be overcome. A move into a care setting usually takes place after consideration of more minor changes, such as receiving care and support at home. It would be unlikely, in most cases, that whatever challenges prompted the move into a care setting have gone away, so the practicalities of a move back home would need to be considered and weighed up against concerns people may have about the risks of group care at the present time. It may be the case that the person's house has been sold or rented, and so that option is not available.
- One option a number of people are considering is moving in with family members or others close to the person. Various issues would need to be considered by the best interests decision-maker, depending on the circumstances of the case:
 - The suitability of the accommodation, and the care that they would receive: would the person have their own room? Would the new home be safe, in terms of preventing falls or accidents?
 - Have family members had COVID-19, or have they been tested recently? Have they been self-isolating?
 - Might there be safeguarding concerns? Might the pressures of house-sharing, and of caring, negatively affect either the person, or the people into whose home they would move?
 - Repeated changes of accommodation can in themselves be harmful, especially to older people with dementia. Is a permanent move with family members anticipated, or is the move intended to be short-term?
 - If it is short-term, is the care setting willing or able to hold a place open for the person? The risk of an inadvertent permanent move would need to be weighed up in any decision-making process.
- Many care settings have no current COVID-19 infections. It is easy to lose sight of the fact, amid a flurry of negative media headlines, that the coronavirus is not present in most care settings, and the risks from it need to be weighed accordingly.

Discharge from hospital

The point at which a person is medically fit for discharge from hospital, and ongoing plans need to be made for their health and social care, is often a pressurised context in which to make best interests decisions. That is certainly the case during the pandemic, where the need for hospital beds has been acute.

The principles and processes of the MCA apply here as they always have, however, and so any best interests decision must focus on the needs of the individual, rather than on any organisational priorities. Where a person is discharged from hospital, if they lack the capacity to make decisions about their ongoing care, it will be a matter for the decision maker in consultation with the person, professionals, family and others to decide what care and residence arrangements are in their best interests. They should also factor in COVID-19 as well as other relevant circumstances. Additionally, it is important that decision makers give due regard to the nature of discharge, considering people's long-term welfare and independence.

As with all best interests decisions, they will need to choose from the viable options available. In some cases, these options may be restricted because of the impacts of the pandemic.

Usual activities

As we move between tighter restrictions and a tiered approach, the range of usual activities a person can do will continue to fluctuate. Any activities that are permitted under the current restrictions are unlikely to be entirely free from risk of a COVID-19 infection, but few, if any, activities are free from risk. Even staying at home and focusing on avoiding infection carries risks, sometimes significant ones, to a person's mental and physical health. The ethos of the MCA is generally to enhance, not restrict, people's lives, and we need to guard against the pandemic becoming a reason to be unduly protective of people where that is not warranted by the risks.

And so, when more options for activities become available, taking part in them will need careful weighing up to determine whether doing so is in the person's best interests. This will involve using the checklist; your skills, experience and judgement; and what you and others know of the person to guide you through the decision-making process. COVID-19 will now be a factor to be weighed up, but the tools and techniques for factoring it into the best interests decision-making process have not changed.

Support from SCIE

SCIE's COVID-19 hub [link 17](#) contains more relevant information including safeguarding, supporting people who are isolated and vulnerable, and infection control. It can be used when supporting and safeguarding adults and children during COVID-19, and can also be shared with community groups.

link 1 | <https://www.scie.org.uk/mca/introduction>

link 2 | <https://www.scie.org.uk/mca/practice/assessing-capacity>

link 3 | <https://www.scie.org.uk/care-providers/coronavirus-COVID-19/commissioning/legal-policy-context#mental-capacity>

link 4 | <https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>

link 5 | <https://www.scie.org.uk/mca/practice/representing-the-person/lasting-power-of-attorney>

link 6 | <https://www.scie.org.uk/mca/practice/representing-the-person/court-appointed-deputies>

link 7 | <https://www.nhs.uk/conditions/coronavirus-covid-19/people-at-higher-risk/whos-at-higher-risk-from-coronavirus/>



link 8 | <https://www.gov.uk/courts-tribunals/court-of-protection>

link 9 | <https://www.scie.org.uk/mca/imca>

link 10 | <https://www.gov.uk/government/publications/coronavirus-covid-19-looking-after-people-who-lack-mental-capacity/the-mental-capacity-act-2005-mca-and-deprivation-of-liberty-safeguards-dols-during-the-coronavirus-covid-19-pandemic-additional-guidancea#emergency-public-health-powers>

link 11 | <https://www.gov.uk/government/publications/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19>

link 12 | <https://www.mencap.org.uk/advice-and-support/coronavirus-covid-19/coronavirus-guidance-help-you-stay-safe-and-well>

link 13 | <https://booksbeyondwords.co.uk/coping-with-coronavirus>

link 14 | <https://www.scie.org.uk/mca/dols>

link 15 | <https://www.gov.uk/government/publications/coronavirus-covid-19-looking-after-people-who-lack-mental-capacity/the-mental-capacity-act-2005-mca-and-deprivation-of-liberty-safeguards-dols-during-the-coronavirus-covid-19-pandemic-additional-guidancea#depriving-a-person-of-their-liberty>

link 16 | <https://www.gov.uk/government/publications/coronavirus-covid-19-looking-after-people-who-lack-mental-capacity/the-mental-capacity-act-2005-mca-and-deprivation-of-liberty-safeguards-dols-during-the-coronavirus-covid-19-pandemic>

link 17 | <https://www.scie.org.uk/care-providers/coronavirus-covid-19>

link 18 | <https://www.scie.org.uk/myscie/register>

link 19 | <https://www.scie.org.uk/myscie/login>

