social care institute for excellence

Mental capacity during COVID-19: advice for social care

Mental Capacity Act (MCA) and the COVID-19 crisis

Updated: 7 January 2021

The coronavirus pandemic has the potential to cause harm to, and even the death of, a wide range of people. We also know that those most at risk from COVID-19 – older people, and people with existing long-term health conditions – are likely to be over-represented in the group of people whose rights and freedoms are protected by the Mental Capacity Act (MCA) 2005. The people who the MCA is there to support are those, in the language of the Act, who may have a permanent or temporary impairment in their cognitive functioning which may make it hard for them to make a particular decision at a particular time.

What this means is that people with conditions such as dementia, learning disability or significant mental health problems (or shorter-term issues like drunkenness or concussion) may, in some situations, lack the mental capacity to make a particular decision. And so, when people are having their lives affected on a grand scale by the coronavirus, it is important to know what protections the MCA gives them, both during the crisis and in more typical times.

What are the legal changes?

Unlike the Care Act, the **MCA** link 1 – and the related **Deprivation of Liberty Safeguards (DoLS)** link 2 – has not been altered by the emergency Coronavirus Act which went through Parliament in the week beginning 23 March 2020. However, the Government has released **guidance** link 3 on applying the MCA and DoLS during the pandemic.

So the MCA still applies, and the five principles on which it is based are as important as ever:

1. Everyone is presumed to have mental capacity until it is established that they do not.
2. No-one is to be judged to lack capacity until all reasonable steps have been taken to support that person to make a decision, and these have been unsuccessful.
3. A person cannot be judged to be unable to make a decision simply because that decision appears unwise.
4. If a person cannot make a decision, then any decision made on her/his behalf must be made in her/his best interests.
5. When making a best interests decision, the least restrictive option – the choice that interferes the least with a person's freedoms – is the one which must be chosen.

Alongside the five principles, we do have, as a guide to practice in this unusual period, a very helpful **ethical framework from the DHSC** link 4, which makes it clear that the core tenets of the MCA still apply. Similarly, **NHS guidance** link 5 on hospital discharges reaffirms the need to use the MCA appropriately during the coronavirus outbreak.

What are the implications of COVID-19 for the MCA?

While the basic law remains the same, there are implications for the use of the MCA during the coronavirus outbreak.

- A lot of new, or recently retired, staff and volunteers are pouring into the health, social care, and community sectors, and people need to understand the MCA, and its importance in protecting the rights of people with cognitive impairments.
- The challenges of **assessing whether a person has capacity** link 6 are magnified if being done remotely by telephone or video link. Accessing good support – from your colleagues, managers, or information sites – is very important.
- All aspects of health and social care – including seeking this support – are made more complex by the combination of mass home-working, higher sickness rates, and demands of responding to a nationwide crisis. So the challenges of applying the MCA well should not be underestimated.
- Remember that any best interests decision can only be made between the available options. Being subject to a best interests decision is not a passport to services or choices that are not otherwise available to people. And so, at the moment, when everyone's choices are still somewhat curtailed, this needs to be borne in mind. For instance, a best interests decision that someone travel to a family gathering will not be valid right now, because it runs counter to Government requirements on social distancing.
- The current national lockdown means that family members are only able to visit each other in care homes with arrangements such as substantial screens, visiting pods or behind windows.
- The COVID-19 outbreak is likely to have **safeguarding implications** link 7, and practitioners need to understand the application of the MCA in safeguarding situations – in brief, that the MCA applies in safeguarding cases, and so if someone is making a capacitated yet seemingly unwise decision about a safeguarding situation, they have the right to do so, provided other people are not put at risk.

- Advance Decisions to Refuse Treatment – by which people can set out what medical care they would not want to have in given situations where they may lack the future capacity to make a choice – are an important part of the MCA. At a time when a lot of people will be thinking through the implications of falling ill to COVID-19, it may be useful to support people to consider what interventions they would not desire to have, should they lose decision-making capacity.
- It is evident that COVID-19 is a particular threat in care homes, where older people and people with complex health conditions, living in close proximity, are at additional risk. If a person lacks the capacity to decide on their own living arrangements, and best-interests decision needs to be made, the current risks of care home living, among all the other factors that would be considered, needs to be thought about. At the time of writing, many care homes in this country do not have cases of coronavirus confirmed, so there should never be a blanket rejection of them. But a good best interests decision should weigh up evidence-informed risks.

What are the implications of COVID-19 for DoLS?

DoLS can undeniably be complicated, but the **SCIE briefing** link 8 is a good place to start. And as mentioned above, the DHSC has produced guidance on applying DoLS during the crisis. Some key points from it include:

- There is a new, shorter application form which can be used for urgent DoLS authorisations.
- Unless care regimes are more restrictive as a result of the pandemic, it is likely that any existing DoLS authorisations will be sufficient for care given during the crisis.
- A reminder that life-saving treatment in a care home or hospital does not require a DoLS authorisation, providing the same treatment would be given to a person without a mental disorder. This applies to COVID-19 as it does to any other condition.

For what this looks like in practice, we are here borrowing from Lorraine Currie, a national expert on the MCA and DoLS who leads on these issues for Shropshire Council. She has set out very useful practical guidance on DoLS assessments during the outbreak, which she has shared more fully on the website of **39 Essex Chambers** link 9 , a leading mental capacity law firm:

For urgent new applications for Standard or Urgent Authorisations

- Consider whether the s12 doctor could visit to complete the mental health and the mental capacity assessments, to limit the number of professionals visiting. A Best Interests Assessor (BIA) could then complete the rest of the assessments by phone interviews.
- Where significant restrictions are needed, or the person is strongly objecting, the BIA may need to actually visit to assess the person. Here, perhaps shorter authorisation periods with a reassessment planned later would be appropriate, or a longer authorisation period with a short-to-mid-term review planned, within two to three months.

If visits are absolutely impossible:

- Can the mental health assessment be completed from existing notes?
- Is there a capacity assessment for the same or similar decision with adequate evidence, on which the BIA could rely?
- Is the person nonverbal, such that capacity is likely lacking on this basis alone?
- Is there evidence from other sources and previous assessments rendering it likely that capacity is lacking for most decisions other than day to day?
- If a capacity assessment can be completed by any of the above methods, then the remaining assessments could be completed by telephone.
- Ensure that the restrictions on visiting the person are noted in the assessments.

Identify how the information was obtained and assessments completed. The following wording is suggested:

For the BIA report:

> “This assessment occurred at a time when public health measures had been put in place by HM Government to contain the spread of the COVID-19 virus. Professionals were being advised only to carry out essential visits to care homes.
>
> When completing this assessment, I had to balance the need to protect X’s Article 5 rights against the need to protect them from transmission of the virus. COVID-19 infection would have posed a grave risk to X in view of their underlying health conditions.
>
> In view of these concerns, I therefore decided to base my assessment on existing documents and on the views of X’s carers and family/friends rather than visiting them in person.”

For the Authorisation document:

> “I note that the BIA decided not to assess X face to face in view of the risk of COVID-19 transmission. I agree that this is the best way of promoting X’s Article 5 rights whilst protecting them from serious illness. This authorisation will be reviewed when public health restrictions are lifted.”

For applications to renew a Standard Authorisation

- If renewals of Authorisations fall during the COVID-19 outbreak, recently expired capacity assessments could reasonably be used for the renewal process, if the BIA can confirm with the care home and the Relevant Person's Representative that there is no change in the person's circumstances. It would be important to note that a call had been made to establish this when completing the relevant paperwork.
- If there have been significant changes (such as an increase in dependency or restrictions) the BIAs could still complete renewal assessments by telephone, recording any significant new information in a Form 3 (Combined Best Interests Assessment) and identifying a visit was impossible.
- If the person is now objecting, or objecting more strongly, to their placement, then BIAs should highlight the strength of objection and consider advising on an application to the Court of Protection at the earliest opportunity.

Applying to the Court of Protection

The practicalities of accessing the Court of Protection are also affected during the outbreak. Again, with thanks to 39 Essex Chambers, we set out here the main points made by Justice Hayden, the Vice-President of the Court of Protection:

- Judicial visits to the person should be only made where 'absolutely necessary', and 'strongly discouraged' in the case of visits to care homes. Alternative arrangements such as telephone and video conferencing should be used instead.
- Practitioners and judges need to bear in mind 'creative options' to enable the person's views to be heard during court proceedings.
- The Court still needs to be satisfied about the validity of the judgements it is making. And so, 'if applicants are entirely prevented by the pandemic from obtaining any evidence of P's lack of capacity but still seek an order, then they need to explain to the Court exactly why the evidence cannot be obtained and exactly what it is that the Court is asked to do on an interim basis'.
- As of 24 March 2020, following the Prime Minister's broadcast on Monday 23 March, 'no hearings which require people to attend are to take place unless there is a genuine urgency and it is not possible to conduct a remote hearing. The existing procedures for assessing cases and allocating judges are intended to ensure identification of "genuinely urgent" cases'.
- Hearings with time estimates of two hours or less will be conducted by telephone and it is the applicant's role to make the necessary arrangements.
- When attending court for any 'genuinely urgent' hearings that require in-person attendance, it is essential that there is a 2 metre separation at all times.

Find out more about the Mental Capacity Act

- **Government guidance: Coronavirus (COVID-19) looking after people who lack mental capacity** link 10
  Guidance for health and social care staff who are caring for, or treating, a person who lacks the relevant mental capacity.
- **SCIE Mental Capacity Act support** link 11
- **SCIE MCA training** link 12
- **SCIE MCA e-learning** link 13
- **MCA Directory** link 14
- **National Mental Capacity Forum** link 15

SCIE support

SCIE's COVID-19 hub link 16 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/mental-capacity-act-2005-at-a-glance
link 2 | https://www.scie.org.uk/mca/dols/at-a-glance
link 3 | https://www.gov.uk/government/publications/coronavirus-covid-19-looking-after-people-who-lack-mental-capacity
link 4 | https://www.gov.uk/government/publications/covid-19-ethical-framework-for-adult-social-care
link 5 | https://www.england.nhs.uk/coronavirus/wp-content/uploads/sites/52/2020/03/covid-19-discharge-guidance-hmg-format-v4-18.pdf
link 6 | https://www.scie.org.uk/mca/practice/assessing-capacity
link 7 | https://www.scie.org.uk/care-providers/coronavirus-covid-19/safeguarding-adults
link 8 | https://www.scie.org.uk/mca/dols/at-a-glance

link 9 | https://www.39essex.com/the-covid-19-pandemic-the-coronavirus-bill-and-the-mental-capacity-act-2005/

link 10 | http://www.gov.uk/government/publications/coronavirus-covid-19-looking-after-people-who-lack-mental-capacity

link 11 | https://www.scie.org.uk/mca

link 12 | https://www.scie.org.uk/training/mentalcapacityact/

link 13 | https://www.scie.org.uk/e-learning/mca

link 14 | https://www.scie.org.uk/mca/directory

link 15 | https://www.scie.org.uk/mca/directory/forum

link 16 | https://www.scie.org.uk/care-providers/coronavirus-covid-19

link 17 | https://www.scie.org.uk/myscie/register

link 18 | https://www.scie.org.uk/myscie/login