



Department
of Health &
Social Care

The Mental Capacity Act (2005) (MCA) and Deprivation of Liberty Safeguards (DoLS) During the Coronavirus (COVID-19) Pandemic

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**Guidance for Hospitals, Care Homes and Supervisory
Bodies [v0.1]**

Summary of key points:

- This guidance is only valid during the COVID-19 pandemic and applies to those caring for adults who lack the relevant mental capacity to consent to their care and treatment. The guidance applies until withdrawn by the Department. During the pandemic, the principles of the MCA and the safeguards provided by DoLS still apply.
- Decision makers in hospitals and care homes, and those acting for supervisory bodies will need to take a proportionate approach to all applications, including those made before and during the pandemic. Any decisions must be taken specifically for each person and not for groups of people.
- Where life-saving treatment is being provided, including for the treatment of COVID-19, then the person will not be deprived of liberty as long as the treatment is the same as would normally be given to any person without a mental disorder. The DoLS will therefore not apply.
- It may be necessary, for a number of reasons, to change the usual care and treatment arrangements of somebody who lacks the relevant mental capacity to consent to such changes.
- In most cases, changes to a person's care or treatment in these scenarios will not constitute a new deprivation of liberty, and a DoLS authorisation will not be required. Care and treatment should continue to be provided in the person's best interests.
- In many scenarios created or affected by the pandemic, decision makers in hospitals and care homes will need to decide:
 - (a) If new arrangements constitute a 'deprivation of liberty' (most will not).
 - (b) If the new measures do amount to a deprivation of liberty, whether a new DoLS authorisation may be required (in many cases it will not be).
- This guidance, particularly the flow chart at Annex A, will help decision makers to make these decisions quickly and safely, whilst keeping the person at the centre of the process.
- If a new authorisation is required, decision makers should follow their usual DoLS processes, including those for urgent authorisations. There is a shortened Urgent Authorisation form at Annex B which can be used during this emergency period.

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- Supervisory bodies who consider DoLS applications and arrange assessments should continue to prioritise DoLS cases using standard prioritisation processes first.
- DoLS assessors should not visit care homes or hospitals unless a face-to-face visit is essential. Previous assessments can also be considered as relevant evidence to help inform the new assessments.

Use of the MCA and DoLS due to COVID-19

1. During the pandemic, the principles of the MCA and the safeguards provided by DoLS still apply. This emergency guidance is for all decision-makers in England and Wales who are caring for, or treating, a person who lacks the relevant mental capacity. It applies to all cases during the pandemic. It applies until withdrawn by the Department for Health and Social Care ('the Department'). The content of this guidance should not become the new norm beyond the pandemic.
2. 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.
3. 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.
4. 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>).
5. 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 Decisions

6. If the person lacks capacity to provide consent, the decision maker should where necessary make a **best interests** decision under the MCA regarding the care or

treatment that needs to be provided. When doing so, they should consider all relevant circumstances, and in particular:

- whether it is likely that the person could regain capacity and if so whether the decision can wait,
- ensuring participation if reasonably practicable,
- the person's past and present wishes and feelings, and beliefs and values that would be likely to influence their decision,
- the views of the person's family members and those interested in the person's welfare, if it is practicable and appropriate to do so.

7. 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.

8. Decision makers should consider whether a person has made a valid and applicable advance decision to refuse the specific treatment in question. If they have made such a decision, then relevant treatment, including for COVID-19 cannot be provided. Likewise, if the person has a donee appointed under a personal welfare lasting power of attorney or a court appointed deputy with a specific authority in relation to the proposed treatment, who is refusing consent to that treatment, then that treatment cannot be provided. Anyone with such authority must act in the person's best interests when making decisions about such treatment. If staff are not in agreement with the attorney's or deputy's determination of the person's best interests, then unless the dispute cannot be resolved through other means, consideration should be given to an application to the Court of Protection.

Delivering life-saving treatment - application of the Ferreira judgment

9. 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.**

10. 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. (The exception to this is people described at para 8.)
11. 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 (set out below) should be considered. If the acid test is not met then the person is not deprived of their liberty and the DoLS will not be necessary.

Depriving a person of their liberty

12. In cases where the Ferreira judgment does not apply decision-makers must determine if someone is, or will be, ‘deprived of their liberty’ as a result of the arrangements for their care and treatment. If this is the case, then legal authorisation is required. For adults residing in a care home or hospital this would usually be provided by the DoLS. If the person is residing in any other settings, then an application to the Court of Protection should be considered.
13. 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.
14. **The Cheshire West ruling stated that a person who lacks the relevant mental capacity to make decisions about their care or treatment is deprived of their liberty if, as a result of additional restrictions placed upon them because of their mental disorder, they are:**
 - **not free to leave the accommodation, and**
 - **under continuous supervision and control.**

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This is known as the acid test. Subsequently, the Court of Appeal has commented that “not free to leave” means not free to leave that accommodation permanently (<https://www.familylawweek.co.uk/site.aspx?i=ed182592>).

15. If the proposed arrangements meet the acid test, then decision makers must determine how to proceed. The starting point should always be to consider whether the restrictions can be minimised or ended, so that the person will not be deprived of liberty. 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? If so, **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.
 - (b) Are the proposed arrangements more restrictive than the current authorisation? If so, a review should be carried out.
 - (c) 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.
16. 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.

Hospitals and care homes

17. As stated above, most changes to arrangements around a person’s care or treatment linked to the pandemic (examples at para 2), will not constitute a deprivation of liberty and a best interest decision would be the reasonable course of action.
18. In some cases, a new authorisation may be needed. In such cases, an urgent authorisation can come into effect **instantly** when the application is completed

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and lasts for up to a maximum of seven days, which can be extended for a further seven days if required.

19. During the pandemic, only the shortened form at Annex B 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.
20. Any authorisation in force (urgent or standard) is still applicable if the person moves within the same setting e.g. a change of ward. If the person moves to a totally different setting a new authorisation may be needed.
21. 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.
22. 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.

Any other setting

23. 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.
24. 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/>).

Supervisory bodies (local authorities in England and local health boards in Wales)

25. The Department recognises that supervisory body staff may need to be deployed elsewhere to deal with other urgent front-line adult social care matters during the pandemic. Supervisory bodies are well practised in prioritising DoLS applications and have been using prioritisation methods to do so since 2014. During the pandemic, supervisory bodies will need to take a proportionate approach to all DoLS applications including existing applications and new applications including those generated because of the pandemic.
26. To carry out a DoLS assessments and reviews, remote techniques should be used as far as possible, such as telephone or videocalls where appropriate to do so, the person's communication needs should be taken into consideration. Views should also be sought from those who are concerned for the person's welfare.
27. Where appropriate and relevant, current assessments can be made by taking into account evidence taken from previous assessments of the person. The assessor undertaking the current assessment must make a judgement on whether the evidence from the prior assessment is still relevant and valid to inform their current assessment. If this information is used to support the current assessment or review this should be noted and referenced. Alternatively, if the assessment was carried out within the last 12 months, this can be relied upon without the need for a further assessment.
28. Where the person is receiving end of life care, supervisory bodies should use their professional judgement as to whether an authorisation is necessary and can add any value to the person's care.

Emergency Public Health Powers

29. 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.
30. 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. The following principles provide a guide for which legislation is likely to be most appropriate:

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(a) The person's past and present wishes and feelings, and the views of family and those involved in the person's care should always be considered.

(b) If the measures are in the person's best interests then a best interest decision should be made under the MCA.

(c) If the person has a DoLS authorisation in place, then the authorisation may provide the legal basis for any restrictive arrangements in place around the measures taken. Testing and treatment should then be delivered following a best interest decision.

(d) If the reasons for the isolation are purely to prevent harm to others or the maintenance of public health, then PHO powers should be used.

(e) If the person's relevant capacity fluctuates, the PHO powers may be more appropriate.

31. If the public health powers are more appropriate, then decision makers should contact their local health protection teams

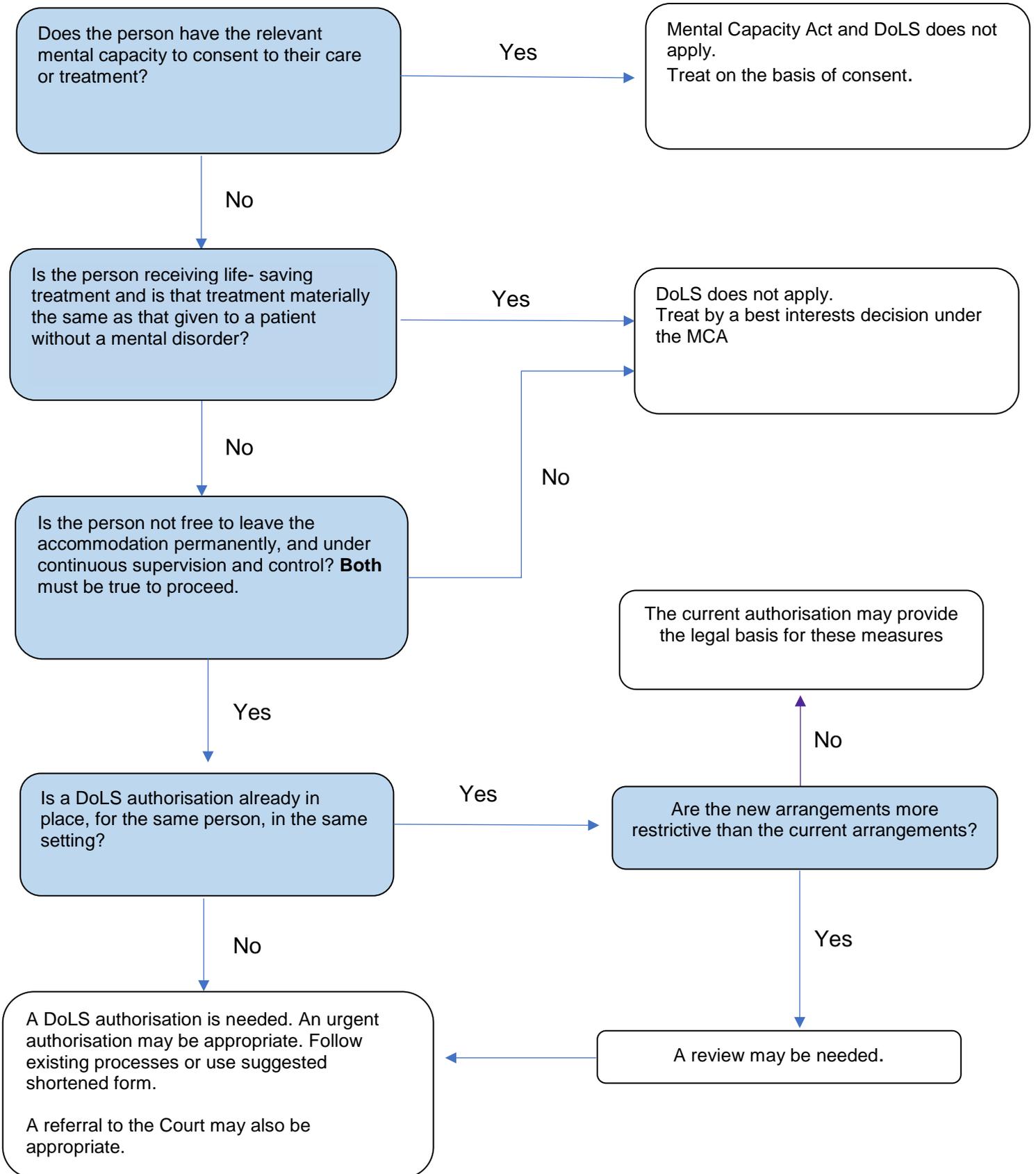
(<https://www.gov.uk/guidance/contacts-phe-health-protection-teams>).

Next steps:

32. The Department will monitor responses to this guidance and update it if needed.

To offer feedback for potential updates to the guidance, please email ips.cop@dhsc.gov.uk. We are considering the publication of this guidance in other formats.

Annex A: Decision-making flow chart for decision makers in hospitals and care home



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