

## **Guidance re: Testing for Covid-19 for individuals who lack capacity**

**Dan Anderson, POhWER Advocacy**

It is our understanding that there has been no concrete guidance released by the government to specify how mass testing of clients with capacity issues in Care Homes and Mental Health Units should be addressed. It appears that the already existing frameworks established by the Mental Capacity Act 2005, and the Coronavirus Act 2020 are expected to inform these processes, however it is our opinion that there may be gaps within these legislative frameworks which could lead to confusion in how to undertake testing. In the below guidance we have attempted to present the relevant information that would shape any approach, and highlight the areas where the current legislation may lead to confusion.

This guidance applies only to people aged 18 and above. Covid-19 testing will be relevant in the following circumstances:

- a) For clinical purposes i.e. if individual presents with symptoms so best treatment option can be ascertained
  - b) If an individual is in the community and may potentially require isolation in order to reduce risk of infecting others
  - c) Before admission to any institution (hospital/care home/ prison etc) to ascertain whether isolation within setting will be necessary.
  - d) For all residents/patients already placed in Care Homes/Hospitals to ascertain if isolation is necessary
- Government advice is now to test all residents in care homes prior to admission. All patients being discharged from hospital to Care Home will be tested by the NHS prior to discharge and individual will be isolated until negative test result is returned
  - Guidance recommends that all residents in institutions be tested, particularly in cases where there have been confirmed cases and there are residents presenting with symptoms.

If residents/patients are deemed to have capacity, then consent must be sought to test the individual (in accordance with the Mental Capacity Act 2005). The purpose of test (including potential consequences if test is positive) must be explained to individual. These consequences could include a period of isolation if test result is positive and/or possibly even temporary relocation if isolation is not possible in current placement. In line with the Mental Capacity Act every effort must be made to explain information to the individual in a manner which best suits their communication abilities, and capacity must be formally assessed in order to be demonstrated as absent.

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## Individuals who lack capacity

- For those who are assessed to lack capacity with regards to consent to testing then any deputy with power of attorney over health and welfare decisions should be consulted to consent or refuse on the individual's behalf.
- If no deputy is appointed/available, then relevant professionals will be required to make a best interest decision on behalf of individual. The best interest decision must be specific to the individual and blanket decisions around testing groups of people are not permitted.
- When making a decision on behalf of an individual, decision makers are expected to discuss what views the individual might express where they in a position to do so. This may include the possible impact on others around them if they are not tested and whether the individual would consider themselves a responsible citizen (i.e. they would want to be tested to prevent risk of harm to other residents and staff). It is our belief however that applying moral standards to best interest decisions may be problematic due to the possibility of different interpretations of morality and moral behaviour
- Unlike most best interest decisions which focus on possible medical outcomes, the decision makers (those responsible for the testing) will likely be care home staff/mental health support staff, and not specifically medically trained clinicians. This creates a gap in law when considering a referral for an Independent Mental Capacity Advocate (IMCA) as Serious Medical Treatment (SMT) decisions require a referral specifically from a clinician and cannot be made by Care Home staff or non-clinical NHS or private healthcare professionals. This potentially leads to a gap where professionals who are not trained to make medical best interest decisions will be expected to do so without the required independent support of an IMCA that would usually be enshrined in law.
- If it is clear that the individual who lacks capacity would not wish to be tested (this may be indicated by behaviour or previous views expressed when the person was capacitous) staff may take other factors into account, such as the potential risk to others and public health risks when making the decision. While it is understandable that public health is a major factor of consideration, it can therefore be seen that there is a very wide scope to ignore the individuals wishes or previously expressed views, therefore potentially making the best interest process moot, with testing being the only possible outcome of any decision making process. It is therefore our perspective that if the government's perspective is that testing should be administered regardless of the wishes and feelings of the individual then this should be stated more explicitly in guidance to Care Home and Health (both private and NHS) professionals.

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- The test has the potential to be uncomfortable and invasive and in some cases restraint may be required. If this is the case then the conditions in section 6 of the MCA must be satisfied as stated below in the MCA 2005:

*(1) If D does an act that is intended to restrain P, it is not an act to which section 5 applies unless two further conditions are satisfied.*

*(2) The first condition is that D reasonably believes that it is necessary to do the act in order to prevent harm to P.*

*(3) The second is that the act is a proportionate response to—*

*(a) the likelihood of P's suffering harm, and*

*(b) the seriousness of that harm.*

This means that the justification for restraint must be the risk of harm to the individual and not specifically the risk of harm to others. If the only reason for considering restraint is the risk to others then decision makers must either a) invoke public health powers to justify restraint, or b) make an application to the court of protection.

- It should also be the case that if there is believed to be no way of administering the test **without causing the individual significant distress** then an application to the court of protection is **required**.
- Ordinarily if a medical intervention is likely to cause significant distress to an individual who lacks capacity, there is a requirement for the medical professional responsible for the decision to consult with the individual's family or friends, and if no such people are available then a referral for an Independent Mental Capacity Advocate (IMCA) would be required. This IMCA referral would be described as a 'Serious Medical Treatment' referral (SMT). We would argue that if a medical test requires restraint and distress for the individual then this would satisfy the criteria for an SMT referral. However there is a degree of issue here in that referrals can only be made for SMT by clinicians, and the decision about whether to test or not in these situations will likely be made by care home staff or mental health professionals. In these cases we would recommend that decision makers involve the individual's GP who can make a referral for an IMCA, and also observe the requirement to make an application to the Court of Protection to confirm that the testing is necessary, proportional, and in the best interest of the individual.

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- In some cases restraint or sedation for testing, and also isolation as a result of positive result from testing can constitute a deprivation of liberty. If this is the case then an application for a DoLS authorisation is required. If it is felt however that any restrictions to liberty are being enacted to prevent harm to others as opposed to the individual themselves then DoLS will not be appropriate and the powers of the Public Health Officers should be used instead (this in accordance with government guidance on DoLS during the pandemic, a link to which can be found below)

### Individuals who have capacity but refuse tests

- There is currently no government guidance available to the public that specifies whether an individual with capacity can be forced to undergo a test against their will
- Some officials have the power to enforce public health restrictions, but these powers would not extend to Care Home staff. If there is a requirement to enforce testing upon a capacious individual an application to magistrates court or the high court may be necessary.

### Is the current legislation sufficient?

- Some of the issues described above are likely to lead to a degree of confusion for those tasked with administering tests, specifically the following questions:
  - o *When does testing constitute a serious medical decision?*
  - o *When is it appropriate and necessary to use restraint or sedation to administer a test?*
  - o *How can public health powers be applied to test an individual with capacity who refuses testing?*
  - o *How will it be recorded and checked that capacity has been assessed and the consequences of testing have been properly explained to individuals?*
  - o *What definition is there of a responsible citizen, and what is the expectation of how this should be applied in a best interest process?*
- It is our view that in order to enact the mass testing in care homes and mental health settings that is currently necessary and may continue to be necessary for some time, it would be a requirement that the government produce firm guidelines enshrined in legislation that can govern these processes. The current situation caused by the pandemic is unique and we believe that the existing legislation is unable to provide sufficient clarity to support the individuals required to make decisions about testing to do so in a uniform and fair manner.

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## Publicly available resources around testing and Mental Capacity Legislation

Link to the guidance around testing published by 39 Essex Street:

<https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2020/05/Mental-Capacity-Guidance-Note-COVID-19-testing-and-capacity-4-May.pdf>

Government Guidance for looking after people who lack mental capacity

<https://www.gov.uk/government/publications/coronavirus-covid-19-looking-after-people-who-lack-mental-capacity>

NHS guidance for supporting patients who are unwell with Covid-19 in Mental Health and Learning Disability settings

[https://www.england.nhs.uk/coronavirus/wp-content/uploads/sites/52/2020/04/C0290\\_Supporting-patients-who-are-unwell-with-COVID-19-in-MHLDA-settings.pdf](https://www.england.nhs.uk/coronavirus/wp-content/uploads/sites/52/2020/04/C0290_Supporting-patients-who-are-unwell-with-COVID-19-in-MHLDA-settings.pdf)

Link to the Mental Capacity Act Code of Practice

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

Link to the Mental Health Act Code of Practice

<https://www.gov.uk/government/publications/code-of-practice-mental-health-act-1983>

Link to the Coronavirus Act 2020

[http://www.legislation.gov.uk/ukpga/2020/7/pdfs/ukpga\\_20200007\\_en.pdf](http://www.legislation.gov.uk/ukpga/2020/7/pdfs/ukpga_20200007_en.pdf)

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