



## A Best Practice Guide for Care Homes

### The impact of Covid 19 on Mental Capacity Assessments, Best Interest Decisions and Deprivation of Liberty Safeguards:

The duties and responsibilities under the Mental Capacity Act are unchanged by the Coronavirus Act 2020.

This practice guide is to assist care providers when completing mental capacity assessments and best interest decisions during the Covid 19 crisis. Local authorities and care providers are legally required to work within the framework of the MCA and have regard to the MCA Code of Practice.

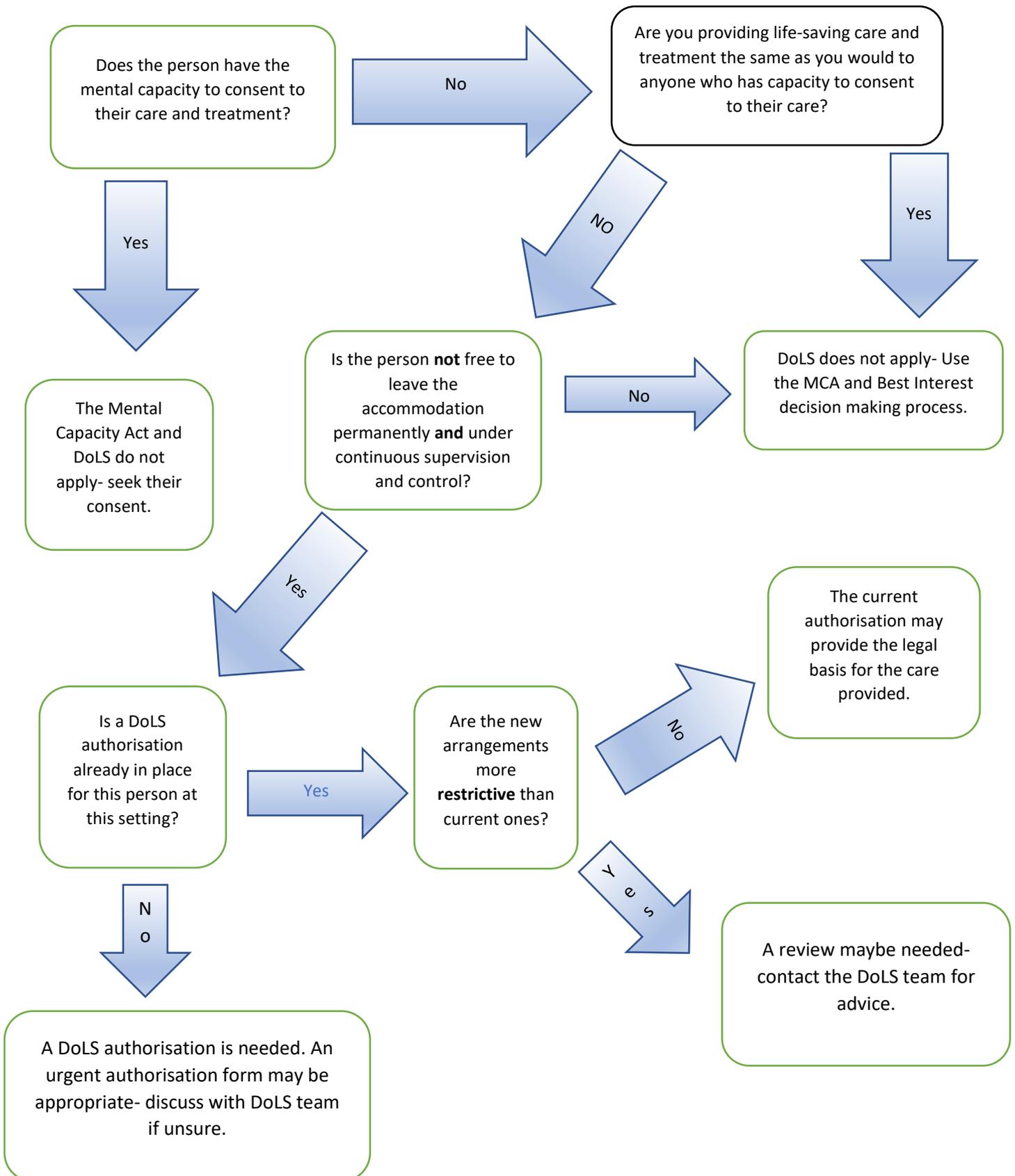
Maintaining clear and accurate records is an essential part of ensuring the Mental Capacity Act is followed. Documenting capacity assessments, best interest decisions and any agreed actions provides a clear record of the decision-making process and any difficult ethical decisions made during the Covid 19 crisis.

The records you keep should be able to demonstrate defensible decision making and evidence the involvement of others.

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Please use this flow chart as a quick reference guide to the further guidance below:

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



### Things to consider:

- Consider what the risks of not making the decision are. What are the key points and how might you communicate them?
- Think about what the person would want?
- Speak to others, share facts and options- be transparent
- Think about communication barriers. Ensure you give the person the best opportunity to understand the options.
- It is ok to seek out support, this demonstrates self-awareness and good practice.
- If a best interest decision needs to be made, have open conversations with others involved with person in a timely manner.
- Make good clear records that can demonstrate the least restrictive options and proportionality.
- Record everything.
- Set review dates.

### Mental Capacity assessments

**1. What are the risks?** -Think about the actual risks- Does the person have symptoms of Covid 19? If so, have they been tested as positive? Do they have health needs which place them in the higher risk group? What are the risks to other people from the person's behaviour? E.g. who are they coming in contact with? Complete a risk assessment to demonstrate you have explored the actual risks for this person and if they require decisive action. This will assist you if you have to make best interest decisions for the person later.

**2. Assess the person's mental capacity as best as you can-** Think about the best time to talk to the person and carry out the assessment. Wear PPE if needed, following government guidance but explain to the person who you are and why you are wearing the PPE.

<https://www.gov.uk/government/publications/wuhan-novel-coronavirus-infection-prevention-and-control/covid-19-personal-protective-equipment-ppe>

Having an easy read guide to PPE may assist with this (see attachments). Think about how you need to communicate with the person- do they have any specific needs such as wearing hearing aids or using Makaton? Consider using social stories to help the person understand what Covid 19 is, what the risks are and what the government are telling us about social distancing (see examples in attachments). You need to establish if the person can understand and comply with the social distancing and self-isolating rules and the consequences of not doing so.

**3. Engage others who are involved with the person-** Think about who you need to involve in the assessment process- whose views do you need to consider? Speak to family/friends and other external professionals involved in supporting the person if possible. It is likely these views will

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need to be sought via telephone or video call to comply with current social distancing rules. Make an accurate record of conversations including, the date and time you spoke to them. You can use previous assessments of the person's capacity to inform your assessment of the person's ability to make complex decisions, ideally these should be less than 1 year old. However, older assessments can be used if they can be relied upon to provide accurate background information.

**4. Have a clear process for making accurate records of the MCA assessment** - Ensure you record the capacity assessment clearly and can demonstrate that you have considered how and when to assess the person. The focus of the assessments should be on the individual person and the risk of harm to them, not to others. The MCA can only be used in relation to the risks posed by the Covid 19 crisis, when the potential harm would be to the person being assessed. It cannot be used when the potential harm is only to 'others.' What that means is, if the risks identified are that the person may only cause harm to others by their actions, then MCA is not applicable and Public Health would need to be consulted. However, if the potential harm is also a risk to the individual, then the MCA can be used to protect the person being assessed.

**5. Decide if person does lack the capacity to make decision** -If the person has been assessed to lack the capacity to make the decision about how to keep themselves safe during Covid 19 crisis, to consent to testing or to any restrictions being placed on them, you need to move on to making a best interest decision. When considering if a person can consent to having a coronavirus test, it is important that the information provided must include the consequences if the test is positive. You could consider using an easy read information sheet about having the Covid 19 test (see attachments).

## Best Interest Decisions

**1. What do you want to achieve** - What is the purpose of the decision you are making? The focus must be on the person whom you are making the decision for and the impact on them. It is important that you consider **what the person would want** if they had the capacity to make the decision for themselves. Would they want to put themselves at risk getting the virus? Would they want to be a responsible person and comply with government rules?

**2. Involving others; a multi-disciplinary approach** - You need to involve family/friends and other external professionals involved in the person's life if possible. Keep language clear and simple and be honest and transparent. It can be difficult to have these conversations, but it is important you explain what options are available and why.

Does the person have a Power of Attorney, or a guardian appointed by the Court of Protection? If so, they must be involved in the decision. They would be the decision maker as they have the legal authority. However, if there was disagreement over the decision, you may need to seek advice from Isle of Wight Council - Adult Social Care.

**3. The least restrictive option** - What are all the available options? Think carefully about what realistic options you have available in the current circumstances. What is the least restrictive way you can safely support the person?

Seek advice and support if you are finding it challenging to make these difficult decisions. Accept that the options available may have a significant impact on a person's life. However, if you can

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demonstrate that the least restrictive options have been considered, you have consulted others and how you came to the decision made, then the MCA requirements will be met.

*'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.'* (Department of Health and Social Care 2020)

**4. Decisions made in context of Covid 19** – It is essential you record the whole process of making a best interest decision in detail. You may need to make a decision that is the 'least worst' option. Do you all agree that the decision made is necessary and proportionate? If you do this, you will have an objective record should your decision later be challenged.

What strengths are there in the person's network or environment which could support them? How can you reduce the impact of the decision made? What resources are available- e.g. handheld computer tablet to make video calls to family or activities to keep the person occupied and stimulated.

**5. Review** – We do not know how long the crisis will last or how long the decisions you make during this period, will need to be in place. However, it is very important that you agree when and how often the best interest decisions made will be reviewed. Some decisions may need to be reviewed very regularly while others may not need to be reviewed until the crisis is over. For example, if you agree a decision to restrict someone from leaving their room whilst they have symptoms of Covid 19 or have tested positive, then a review should be set at the end of the 14 day isolation period or before if the person shows significant distress.

## Deprivation of Liberty Safeguards (DoLS)

### 1. Does the decision that has been made deprive someone of their liberty? -

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.

*If the decision made is about providing life-saving treatment, including for the treatment of COVID-19, then the person will **not be** deprived of their 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.* (Department of Health and Social Care 2020) – see flow chart.

### 2. What decisions are likely to need a review of DoLS or application for a new DoLS authorisation?

If the decision made imposes additional significant restrictions to a person's liberty in order to keep them safe, then if the person already has a DoLS, they may need a review. If they do not already have a DoLS, a new application may be required. For example, preventing someone leaving their bedroom or preventing them from accessing different parts of care home e.g. using barriers to prevent access or using sedation to reduce the likelihood of distress during the restrictions (under guidance and instruction from GP), would then need consultation with the DoLS team to request a review of person's DoLS or to submit a new DoLS application.

### 3. Urgent applications

If a new application is needed, an urgent authorisation can be completed and submitted to the DoLS team. This would mean the authorisation would come into effect immediately and last up to seven days, which can be extended for a further 7 days. This potentially would cover a 14-day isolation period.

### 4. How will DoLS assessments/Review take place?

If you contact the Isle of Wight Council - Adult Social Care DoLS team, they will advise on the process and prioritise urgent applications using the national DoLS prioritisation tool. However, during the crisis, assessments and reviews would be carried out remotely wherever possible.

## Practice Examples of Mental Capacity Assessments and Best Interest decisions

### Example 1:

Mrs Green lives in a care home for older people. She has a diagnosis of dementia and will walk with purpose around the care home, sometimes going into other people's bedrooms. She has previously been assessed as lacking capacity to make some important decisions but can make decisions about day to day things such as what to wear or what she would like to eat. She has a DoLS authorisation in place for this accommodation. Mrs Green has some symptoms of being unwell. The staff have informed Mrs Green that due to the current Covid 19 crisis and government rules, she needs to stay in one area of the home to reduce the potential risks of her spreading the virus to others.

- Think about what the risks are to Mrs Green?
- What realistic options are available at this time that would keep her safe and prevent her from potentially spreading the virus around the home?
- How can you meet her communication needs and what time of day is the best time to talk to her? Think about using a social story to help explain what is happening.
- Involve her family/representative, the staff who support her and external professionals in the discussions.
- Complete an MCA assessment to determine Mrs Green's capacity to understand the decision.
- If she is assessed to lack capacity for this decision, move on to making a Best Interest decision.
- Decide who the decision maker will be - Does anyone have a Power of attorney for health and welfare?
- Out of the available options, which is the least restrictive option? You need to think what would keep Mrs Green safe if she is unable to keep herself isolated from others? Make sure all the options are discussed and everybody's views are recorded.
- Consider if the decision made is above the restrictions currently authorised in her DoLS. Do you need to request a review, so any additional restrictions are covered?
- Is there a Safeguarding risk with the decision made? Discuss with external professionals involved or the safeguarding team.
- Be prepared to regularly explain the restrictions to Mrs Green and provide reassurance.
- Set a review date and bring forward if anything changes or there are concerns.
- Throughout your decision making please refer to and consider the 8 ethical principles set out by the government - see below

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### Example 2:

Mr Brown lives in a care home for people with physical and learning disabilities. His care plan states that he likes to go out shopping and to visit café's every other day and needs staff to go with him to provide support. He can become unsettled when he does not have a routine. Mr Brown does not understand what Covid 19 means or why he cannot go out to shops and cafes anymore. Mr Brown also needs support to make important decisions. He has started self-harming to cope with his frustrations. He has a DoLS authorisation in place.

- What are the risks to Mr Brown? – How can you reduce them – perhaps by introducing new indoor activities?
- Consider using a social story to explain what is happening and why his routine has changed.
- What is the decision that needs to be made? Do you need to consult his GP about support?
- Complete an MCA assessment. If Mr Brown lacks capacity to understand and make decisions to keep himself safe move onto a Best Interest decision.
- Consult with others that are involved in Mr Brown's life, including family and external professionals such as social workers or learning disability nurses. Seek their views to how to support Mr Brown and reduce the risks.
- Decide who the decision maker is. Does he have a Power of attorney?
- Record the available options and always prioritise the least restrictive one.
- Consider if there are increased restrictions that would require a DoLS review or any Safeguarding concerns – share these with the DoLS or safeguarding team.
- Set an appropriate review date and bring forward if anything changes or there are any further concerns.
- Throughout your decision making please refer to and consider the 8 ethical principles set out by the government- see below

### Example 3

Mr White lives in a care home and has been assessed by his GP as needing 'end of life' care. He has dementia and has become unsettled. The restrictions in place at the care home mean that his wife has been unable to visit him for several weeks. Mr White has been asking for her and wishes to see her. He does not understand the current restriction in place.

- Consider the risks to Mr White and others if his wife visits the home. Complete a risk assessment.
- Ensure you have regular contact with Mr White's wife and family and keep them updated on how he is as often as possible.
- Complete an MCA assessment and a Best Interest decision that considers the least restrictive options and the government's latest guidance on enabling family to visit at a person's end of life.
- Consult staff, his family and any external professionals if possible, on solutions to this decision.
- Be creative in how you can support Mr White to have contact with his wife- through video calls?
- Try to accommodate a visit to the home when it is near the end of Mr White's life – You could think about the safest entrance to the home, the time of day for visit, PPE for Mrs White, how to avoid her having contact with other people living in the home.
- It is important that at least one visit is facilitated and if possible, more, if you assess it is safe to do so.
- Consider Mrs White's cultural or religious beliefs and how these could be met where possible.
- Throughout your decision making please refer to and consider the 8 ethical principles set out by the government - see below

*Always keep yourself up to date with the latest government advice.*

\*See attached MCA and Best Interest Decision recording sheet

*Template attached for use if required.*

## Human Rights

The Human Rights Act (HRA) 1998 enables individuals to enforce the fundamental rights and freedoms contained in the European Convention on Human Rights. The ECHR must be considered when making decisions that would impact on a person's human rights. Consideration of Article 5 and 8 are particularly applicable during this time.

**ECHR Article 5 - Protects the fundamental human right to both liberty and security:** This is about freedom to go where a person wants and live where they choose. Deprivation of liberty safeguards are in place for those that lack the mental capacity to make decisions around care and accommodation and are deprived of their liberty in care home or hospital setting in order to keep them safe.

**ECHR Article 8 - Right to respect for private and family life:** This means people having the right to see their families and have privacy. The current circumstances and social distancing rules mean that people in care settings are significantly impacted and are not able to see their families face to face. However, every possible step should be taken to ensure people continue to have contact in line with their wishes. Technology should be used where possible. Care services should maintain regular contact with people's families/friends with the person's consent or when acting in their best interests.

## ETHICAL FRAMEWORK: 8 Principles to use when making decisions during Covid 19 Pandemic.

The government has issued an ethical framework to provide guidance when challenging decisions need to be made, during this crisis. These are set out as in the 8 areas below: We have added guidance for what may need to be thought about for each area.

### **Respect:**

- Consider the person's human rights? How do you ensure people's human rights and individual choices are respected and listened to?
- How are you capturing this information and the impact the Covid 19 crisis is having on individual people's human rights- Care planning?
- When a person has been assessed as lacking capacity to comply with the current restrictions, best interest decisions will need to be made. Ensure that you involve the person, their family, care staff and other professionals in the decisions made. Always consider what the least restrictive option is, with the resources currently available to you.

### Reasonableness:

- How can you ensure that the decisions made are rational and fair? You need to have clear records that demonstrate the decision-making process.
- Is the decision being made a reasonable option given the resources available?

### Minimising Harm:

- Recognise where potential safeguarding concerns may arise - **Continue to make safeguarding referrals where needed** - share information with the local authority to consider these and reduce the potential for harm.
- Consider what the risks are to the individual person, to other people and to staff. Complete risk assessments.
- Have appropriate steps in place to ensure risks are minimised to avoid harm and the spread of Covid 19.

### Inclusiveness:

- Support people to understand the impact of Covid 19, the risks and the need for social distancing. Use resources such as social stories to support people to understand where needed.
- Consider any communication barriers? How can you help people to be involved, understand and make decisions? Do people have hearing aids, or can information be printed in larger text?
- Be open and honest. Involve families and care staff in the difficult discussions about what realistic options are available and why. Acknowledge the impact and discuss all options available. Record all conversations for shared decision making.

### Accountability:

- Have clear processes in place for how and why decisions are made, even when they are the 'least worst' decisions.
- Acknowledge the impact of some decisions on people's human rights but clearly record rationale for this. What are the risks to person and others?
- Take responsibility for the decisions made. If you have clear records that involved others in the decision and have considered the least restrictive option, you will be able to demonstrate defensible decision making.

### Flexibility:

- Review decisions made and adapt frequently.
- Consider any new information or guidance and how these impact on previous decisions made.

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- Enable a way people and families can easily challenge decisions- have open honest communication and listen to other's views.
- Consider innovation- technology- How could this help reduce impact of decisions made?

### Proportionality:

- Recognise and accept some difficult and challenging decisions will need to be made.
- Support care staff to undertake their caring role to the best of their ability with the resources available.
- Consider the choices available in the current circumstances – what decisions are necessary ones, and which are not?

### Community:

- Don't be isolated. Share your experiences and seek support and guidance where needed.
- Work together with partners to make difficult decisions – involve others in the process.
- Share information and learning with people, their families and staff.
- Offer advice and support where you can and share the responsibility of difficult decision making that could impact on people's human rights.

### Useful Contacts:

Deprivation of Liberty Safeguards (DoLS) Team - Ginny Smith, Consultant Practitioner - Tel: 821000 Ext: 5946

Initial Adult Social Care Contact Team (IASCC) –01983 814980 and/or email [AdultFirstResponseReferrals@iow.gov.uk](mailto:AdultFirstResponseReferrals@iow.gov.uk)

Safeguarding Team - Tel: (Initial contact through IASCC) 01983 814980 or email [safeguardingconcerns@iow.gov.uk](mailto:safeguardingconcerns@iow.gov.uk)

Integrated Quality Care Support Lead, Quality and Safeguarding Team - Fiona O'Regan - 01983 822099 Ext:3116

Care Quality Commission (CQC) Coronavirus (COVID-19) pandemic: information for providers: <https://www.cqc.org.uk/guidance-providers/all-services/coronavirus-covid-19-pandemic-information-providers>

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Care Workforce App - advice and guidance for all care staff:

<https://www.gov.uk/government/news/dedicated-app-for-social-care-workers-launched>

Isle of Wight Council Public Health Service - <https://www.iow.gov.uk/Residents/Care-Support-and-Housing/Community-Health-and-Wellbeing/Public-Health-Living-Well/Contact>

### Reference List:

The Mental Capacity Act (2005) <https://www.legislation.gov.uk/ukpga/2005/9/contents>

The Mental Capacity Act (2005) (MCA) and Deprivation of Liberty Safeguards (DoLS) During the Coronavirus (COVID-19) Pandemic Guidance for Hospitals, Care Homes and Supervisory Bodies [v0.1]

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/878910/Emergency\\_MCA\\_DoLS\\_Guidance\\_COVID19.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/878910/Emergency_MCA_DoLS_Guidance_COVID19.pdf)

Mental Capacity Act Code of Practice: Code of practice giving guidance for decisions made under the Mental Capacity Act 2005.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/497253/Mental-capacity-act-code-of-practice.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf)

Deprivation of liberty safeguards: Code of Practice to supplement the main Mental Capacity Act 2005 Code of Practice

<https://www.cqc.org.uk/sites/default/files/Deprivation%20of%20liberty%20safeguards%20code%20of%20practice.pdf>

Guidance -Responding to COVID-19: the ethical framework for adult social care

<https://www.gov.uk/government/publications/covid-19-ethical-framework-for-adult-social-care>

Human Rights Act 1998

<http://www.legislation.gov.uk/ukpga/1998/42/contents>

Coronavirus (COVID-19): guidance for care staff supporting adults with learning disabilities and autistic adults

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<https://www.gov.uk/government/publications/covid-19-supporting-adults-with-learning-disabilities-and-autistic-adults/coronavirus-covid-19-guidance-for-care-staff-supporting-adults-with-learning-disabilities-and-autistic-adults>

Social Care Institute for Excellence (SCIE)

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