**Capacity and consent to agree to COVID-19 social distancing / movement restrictions on the inpatient units**

**Aim**

* To ensure that patients’ capacity and consent to agree to restrictions placed on their movements by the government’s social distancing advice are considered.
* To assist staff in managing patients who, for whatever reason, do not comply with the government’s guidance on social distancing.
* To ensure staff are aware that the Mental Health Act should not be used to enforce treatment, restrictions or isolation that is unrelated to the management of a person’s mental health.

The degree of restriction of movement will depend on individual circumstances eg whether the patient is suspected to have symptoms suggestive of COVID-19 or requires shielding due to their physical health care needs.

All patients should have completed documentation of capacity for assessment and treatment on admission. The discussions involved should also include potential risks pertaining to COVID-19 and requirements for social distancing. The inpatient treating team should review these assessments to see that they agree with the outcomes and that they are accurate e.g. with regard to the social distancing measures in place.

The treating team may find the following of use when supporting patients to comply with the social distancing guidance:-

**For informal patients with capacity who are consenting to restrictions:**

Where patients are deemed to have capacity to agree to the recommended restrictions, this should be documented in the notes along with social distancing measures in place.

**For Informal patients with capacity and patients subject to the Mental Health Act regardless of capacity who are not consenting:**

Where an informal patient with capacity or a patient detained under the Mental Health Act will not adhere to social distancing rules due to suspected or confirmed infection with COVID-19, consideration should be given as to whether they require isolation under the COVID-19 Protection Regulations. This would require a registered public health consultant or the Secretary of State to direct that the patient be kept in isolation. See below for contact details.

In the event that you do require the attendance of a registered public health consultant to direct isolation the following law may be of use in containing any potential risk to staff or other patients prior to their arrival. Consideration can always be given as to whether a patient is well enough to be discharged by the MDT.

Non-compliant non-aggressive patient

S. 3(1) Criminal Law Act 1967 – this enables a person to use reasonable force in the circumstances to prevent a crime. The purposeful spread of COVID-19 is considered a criminal offence. This power enables staff to restrain and detain in the short term patients who may be assessed as being an immediate risk to other members of the public if discharged or allowed to leave. It can be used regardless of capacity. It can be used on or outside of Trust premises.

Non-compliant aggressive patient

Similarly, if a patient becomes aggressive towards staff who are trying to implement COVID-19 restrictions the common law power of preventing a breach of the peace, or to control a person who is a potential danger to himself or others may be used. Again, this is not capacity specific.

In these clinical situations, particularly where the patient is deemed to have capacity, the necessity for continued admission on the ward will need to be considered. This should be considered within the Multi-Disciplinary Team on a case-by-case basis. If it is felt that continued admission in hospital is not necessary to manage risks associated with the psychiatric disorder, then consideration should be given as to whether the risks associated with transmission of COVID-19 would be better dealt with through liaison with the police and the public health consultant.

**Potential scenarios**

Non-compliant non-aggressive patient cannot be discharged

* informal patient has capacity or detained under the MHA regardless of capacity
* unable to be discharged
* risk of transmission of COVID-19
* not following the self- isolating guidance
* staff have exhausted all options to engage and obtain consent from the patient –

Then staff can utilise the aforementioned S. 3(1) Criminal Law Act 1967 – this enables a person to use reasonable force in the circumstances to prevent a crime. The purposeful spread of COVID-19 is considered a criminal offence. This power enables staff to restrain and detain in the short term patients who may be assessed as being an immediate risk to other members of the public if discharged or allowed to leave. It can be used regardless of capacity. It can be used on or outside of Trust premises.

Non-compliant aggressive patient cannot be discharged

* informal patient has capacity or detained under MHA regardless of capacity,
* unable to be discharged
* risk of transmission of COVID-19
* not following the self-isolating guidance
* staff have exhausted all options to engage and obtain consent from the patient
* patient became aggressive towards staff who are trying to implement COVID-19 restrictions

The common law power of preventing a breach of the peace, or to control a person who is a potential danger to himself or other may be used.

Where a patient cannot be discharged staff must contact the police and inform them a potential crime is being committed in relation to the failure of the patient to self -isolate in relation to COVID-19. The patient must be informed that the police will be contacted.

**Process for calling a public health consultant:-**

The staff must inform the public health consultant on the following numbers

0344 2254 524 option 1 (Clinical) in hours

0344 2254 524 select option 1 (Clinical) out of hours.

The staff must inform the Public Health Consultant that they have a patient who is refusing to self -isolate and has symptoms of or has been diagnosed with COVID-19.

The public health consultant will advise on a course of action and will request that an incident meeting will need to take place. The Public Health has the powers to authorise enforced isolation. This will include a Public Health Consultant, staff and may include the police or any other agency that the Public Health Consultant wishes to have present.

**Patients who lack capacity under DoLS**

A person is considered to be deprived of their liberty if he or she is lacking in capacity to consent to the arrangements for their care and treatment, is under continuous supervision and control, and is not free to leave. Staff should continue to seek consent on all aspects of care and treatment to which patients can consent.

**Restrictive measures should be absolutely necessary to prevent harm to that person. DoLS cannot be used if the arrangements are purely to prevent harm to others.**

If the reasons for the isolation are purely to prevent harm to others or the maintenance of public health, then public health officer powers should be used. If the person’s relevant capacity fluctuates, the public health officer powers may be more appropriate.

Where patients lack capacity to agree to the social distancing measures for their own protection and are under DoLS, it should be noted what the restrictions in movement and that they are considered to be in the patient’s best interests. The Paris capacity forms can be used for this purpose. The principles of the MCA and the Code of Practice should continue to be followed.

Where a patient has a DoLS application in place, the changes in a person’s care and treatment may not constitute of new deprivation of liberty. However, if the new arrangements are more restrictive than the current authorisation, then a review should be carried out. If the current authorisation does not cover the new arrangement, then a referral for a new authorisation should be made to the local authority. 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 a new authorisation is required, an urgent authorisation can come into effect instantly when the application is completed and lasts for up to a maximum of seven days, which can be extended for a further seven days if required.

During the pandemic, a shortened form is needed (appendix A) to grant an urgent authorisation and request an extension to that urgent authorisation from the local authority. 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.

Where the person is receiving end of life care, staff should use their professional judgement as to whether DoLS assessments are appropriate and can add any value to the person’s care or treatment (Ferreira judgment).

For further advice, please contact either:

Dr Kopal Tandon, Consultant Psychiatrist/Mental Capacity Medical Lead [kopal.tandon@nhs.net](mailto:kopal.tandon@nhs.net)

Andrew Coburn, Legal Services Manager  
 [a.coburn@nhs.net](mailto:a.coburn@nhs.net)

Guidance issued 17 April 2020

**Appendix A**

[DoLS urgent authorisation form Covid-19](http://connect/sites/ConnectTeams/Resources/ApprovedForms/Clinical%20Forms/DoLS_urgent_authorisation_form_Covid19.docx) – please note that this form is stored on Approved Forms (Clinical) on Connect. If you are working from home, you will need to be using the Remote Access Service or Cisco AnyConnect/Swivel to download this form.