Browne Jacobson

Managing the mental health act (MHA) during Covid-19

Useful and comprehensive guidance has been issued for practitioners assessing and managing patients detained under the Mental Health Act ("MHA") during the Covid-19 pandemic.

23 July 2020

Please note: the information contained in this legal update is correct as of the original date of publication.

Key messages

Useful and comprehensive guidance has been issued for practitioners assessing and managing patients detained under the Mental Health Act ("MHA") during the Covid-19 pandemic.

At the time of publication, the amendments to the MHA set out in schedule 8 of the Coronavirus Act are not yet in force (save for some minor provisions relating to the mental health tribunal hearings in Wales). The government has confirmed that the changes set out in Schedule 8 of the Coronavirus Act 2020 will only be enacted if patient safety is considered to be at considerable risk.

In the interim this guidance provides some helpful advice about the implementation of MHA Code of Practice during the COVID-19 pandemic, particularly in view of some of the ongoing day to day restrictions and challenges we are all living with. This is helpful in light of the predicted rise in Covid-related mental health issues and MHA detention we are facing.

The guidance helpfully emphasises the following key points:

- MHA powers must not be used to enforce treatment or isolation for any reason unrelated to the management of a person's mental health.
- Wherever possible, health and social care services and professionals should continue to guard against overly restrictive practice.
- Mental health services and Local Authorities should continue to follow their organisational policies & not impose blanket restrictions.
- Professionals and staff should make use of digital technologies to support communication including MHA assessments.
- When assessing patients with learning disabilities with regards to MHA detention, non-compliance with Covid management is not "seriously irresponsible" conduct for the purposes of MHA detention and practitioners should be reminded that the use of MHA detention is not permitted solely for the management of a physical disorder
- Practitioners are still required to have regard to the Code and must records any departures from the Code
- This guidance only applies during the pandemic and is not in any way a "new normal"
- Any departure in practice from the Code should only occur where that is appropriate and proportionate and should be considered on a case by case basis
- S.17 leave should still be made available where appropriate
- During the pandemic, providers should cohort patients into three groups:
  - confirmed Covid
  - non Covid
  - awaiting test
- Organisations should provide refresher physical health training to their staff and appropriate PPE

- Practitioners should use digital technology where appropriate, for example with consideration of paper and virtual managers hearings, and virtual CPA and s.117 meetings

MHA Assessments – use of digital technology

Personally seen/Personally examine requirements of the MHA

The MHA makes it a legal requirement that doctors must “personally examine” a person before recommending that they be detained, and that an Approved Mental Health Professional (AMHP) must have “personally seen” the person before applying for a detention.

This guidance states “It is the opinion of NHS England and NHS Improvement and the DHSC that developments in digital technology are now such that staff may be satisfied, on the basis of video assessments, that they have personally seen or examined a person in a ‘suitable manner’.

Bearing in mind the need to prevent infection and to ensure the safety of the person and staff, in some circumstances the pandemic may necessitate the use of such digital technology for MHA assessments….. While NHS England and NHS Improvement and DHSC are satisfied that the provisions of the MHA do allow for video assessments to occur, providers should be aware that only courts can provide a definitive interpretation of the law.

The risk/benefit assessment to determine whether a virtual assessment is appropriate should take into consideration:

- The person’s presentation, including any complex needs
- Whether a video assessment would be likely to cause unnecessary distress to the patients where they are acutely unwell
- Whether reasonable adjustments can be made to ensure a fair experience for the person being assessed.

The guidance states that video assessments can be considered if:

- There is a significant risk of harm via transmission to the person and/or staff - for example:
  - the person and/or person living near them is showing COVID-19 symptoms
  - personal protective equipment is unavailable, inadequate, or its use may result in significant distress to the person being assessed
  - social distancing (greater than two meters) is not possible at the assessment location
  - the nature and degree of the person’s presentation, for example hyperactivity, may present an increased risk to being able to maintain physical distancing and other safeguards against the transmission of infection AND
- There is a significant risk of harm due to the delay of assessment and/or subsequent intervention, in the instance that an assessment is deemed absolutely necessary and cannot be conducted in person in a safe and timely way. Delays may result from:
  - limited availability of staff, including staff who might be shielding
  - Inability of external staff members to access the assessment location (for example a COVID-19 ward)

  AND

- The minimum quality standards and safeguards are met to ensure that a meaningful and high-quality assessment can occur in a safe environment

How the assessment via digital technology should happen

The guidance states that time should be provided to the patient for questions and clarification ensuring that the digital process is understood.

In addition, where possible, agreement should be reached with the patient about the use of a video assessment, this needs to take into account capacity and best interests. Staff must be satisfied that the person understands what is happening.

The person should be given the opportunity to have a family member or advocate present during the assessment where practicable. Where appropriate, families and carers should be contacted through the usual process, and the situation (including use of video consultations) explained to them.

Discontinuing the video assessment

There may be instances where an assessment is started remotely and then cannot be completed.

Examples include if the person reacts adversely to the situation or if there is a hardware or software failure. In such situations an assessment should be convened in person as rapidly as possible in line with a pre-determined contingency plan.

The reasons for cancelling a video assessment should be clearly recorded and shared with the team to support continuous improvement.

Documentation & Digital Technology

Clear processes should be in place which ensure that staff can safely access, complete and submit the appropriate documentation remotely.

The guidance confirms that to support remote working arrangements, services may complete and communicate statutory forms electronically.

This includes the use of electronic signature.

It is recommended that wherever possible this be supported by the use of encrypted/secure signing. However, in exceptional circumstances, the guidance states that other forms of signing electronically (for example, PDF of handwritten signature or typing a name into the electronic form) are permitted during this pandemic period.

SOADs will be sending electronic copies of certificates to services Certificates issued electronically will remain valid after the pandemic period is over and neither the SOAD nor CQC are required to issue the original hard copy certificates retrospectively.

All electronic files should be processed and stored in line with the GDPR and Data Protection Act 2018

Minimum Standards and safeguards

Community settings (including home)

Recommended that the AMHP and, at least, one section 12 doctor should attend the assessment in person and, if necessary, the second doctor may join via video.

Place of Safety

In all situations, it is a requirement that at least one mental health trained professional must attend the assessment in person.

Mental health hospitals

This should be assessed on a case by case but at least one mental health trained professional must attend the assessment in person.

Acute hospitals

Video assessments should only be considered in exceptional circumstances, including when there is significant risk from delayed assessment/ interventions.

Police stations

There may be opportunities for either a single doctor or AMHP to visit in person the detainee in order to carry out an assessment without significant personal protective equipment. This might enable one (either the AMHP or the doctor) to be remote via video conference with one present in person.

s.17 Leave

The guidance confirms that hospitals should, as far as possible be facilitating leave, in line with public health guidance, in order to support the health and wellbeing of patients. This is particularly important in the case of patients with a learning disability and autistic patients

Patients who have the capacity to understand public health advice, such as social distancing measures, should be assumed to be able to comply with this advice, unless there is evidence to the contrary.

Measures can be taken to reduce close interaction between patients, by staggering leave and by imposing time restrictions.

Visitors

Providers should ensure that the welfare of patients – mental as well as physical – underpins decisions taken to limit visits during the pandemic

Every effort should be made to facilitate a visit by one visitor – a close family member or carer where the visitor is a parent or appropriate adult visiting a child; or a person supporting someone with a mental health issue such as dementia, a learning disability or autism, where not being present would cause the patient to be distressed.

Decisions on limiting visits should be made on an individual basis and based upon active risk assessment, rather than blanket bans.

Patients should also be supported to maintain contact with family and friends through digital means.

Escorting patients detained under the MHA

If a patient is detained under s.41 or s.49 MHA, with potential COVID-19 symptoms, the requirement for an escort will have to be considered in individual risk assessments.

The need for an escort must be balanced with the risks of infection control for those involved.

Comment

This is welcome, useful and well thought out guidance that mental health commissioners, providers and practitioners should have regard to when carrying out their statutory MHA functions.

Whilst the clarification of the DHSC and NSE/I's views on remote MHA assessments is very welcome and helpful, there remains some ongoing discussion nationally as regards remote MHA assessments, and as the guidance rightly points out, only the courts can provide a definitive interpretation of the law.

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