

# CORONAVIRUS RESILIENCE PLANNING:

## TELEPSYCHIATRY QUICK REFERENCE GUIDE 4

### LEGAL AND ETHICAL CONSIDERATIONS IN TELEPSYCHIATRY

This document is one of a set of three resources to support use of Near Me for coronavirus resilience in psychiatric settings:

1. Telepsychiatry
2. Telepsychiatry in emergency settings
3. Legal and ethical consideration in telepsychiatry

**THIS DOCUMENT IS INTENDED FOR NHS  
SCOTLAND PSYCHIATRY SERVICES**

#### ACTIONS FOR NHS BOARDS:

1. Ensure all service managers have received this document
2. Inform service managers of any local arrangements that differ from what is described in this document
3. Support all services to be able to introduce Near Me video consulting

Version 1 March 2020

## USE OF NEAR ME IN PSYCHIATRIC SERVICES, LEGAL CONSIDERATIONS

### Licensing and Indemnity

1	<p><b>THE INFORMATION PROVIDED HERE HAS BEEN COMPILED FOLLOWING A REVIEW OF THE LITERATURE, AND CONSULTATION WITH THE CENTRAL LEGAL OFFICE. IN PLACES WE HAVE INCLUDED ADVICE FROM THE MENTAL WELFARE COMMISSION. PLEASE NOTE THAT THIS IS FOR GUIDANCE ONLY DURING THE COVID-19 CRISIS WHILE WE AWAIT LEGAL UPDATES, AND IS NOT TO BE CONSIDERED AS LEGAL ADVICE.</b></p> <p><b>Licensing</b></p> <p>A clinician needs to be licensed with the appropriate regulatory body to practice in Scotland. As an example, for a psychiatrist this would be registration with a license to practice with the General Medical Council, which would cover clinical practice across the UK.</p> <p>To practice as AMPs for the purposes of the Mental Health (Care and Treatment)(Scotland) Act 2003, doctors would need to be registered on the list of AMPs for their Health Board.</p>
2	<p><b>Indemnity - Organisational</b></p> <p>The Clinical Negligence and Other Risks Indemnity Scheme (CNORIS) covers all the NHS health boards in Scotland. This scheme ensures there is organisational indemnity cover, which would cover employer liability and professional indemnity within that organisation. Clinical practice that follows best practice guidelines would therefore be covered, including videoconsultation. It would be for the health boards to agree the proportion of liability they would accept on a case by case scenario in the case of work that crossed health board boundaries. CNORIS indemnity would not extend beyond Scotland.</p> <p><b>Indemnity - Individual</b></p> <p>Individual clinicians are also likely to have their own personal professional indemnity cover. Clinicians should check to ensure their clinic practice is covered. However, indemnity providers and the GMC recognises that these are exceptional circumstances and clinicians will be working at the limits of their comfort zone and in unfamiliar circumstances.</p>

### Capacity and the Adults with Incapacity (Scotland) Act 2000

1	<p>While the default assumption is that patients have capacity, there will be clinical scenarios where a patient is unable to consent to a telepsychiatry appointment. This may be apparent before the consultation or may emerge during the consultation.</p> <p>Where patients lack capacity, clinicians should act in accordance with the general principles of the Adults with Incapacity (Scotland) Act 2000 when making decisions:</p> <ul style="list-style-type: none"><li>• Benefit</li><li>• Minimum intervention</li><li>• Take account of the adult's wishes and feelings</li><li>• Consult others</li><li>• Encourage the use of residual capacity</li></ul> <p>A patient may have appointed a welfare power of attorney, or may have a welfare guardian who</p>
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	<p>can make decisions on their behalf. However, if there is no patient proxy, then clinicians can act in the patient's best interest.</p> <p><b>Patients with incapacity should not be seen alone, and must have the support of peripheral staff or family member.</b></p> <p>Current best practice guidelines when a patient does not have capacity includes:</p> <ul style="list-style-type: none"> <li>• If possible consent should be obtained from the person's attorney or guardian.</li> <li>• Identify that the telepsychiatry appointment is in the best interests of the patient.</li> <li>• If the patient is unable to tolerate the appointment it should be terminated and a face to face appointment arranged.</li> <li>• There should be a family member to support the patient and to work with the mental health clinician to establish treatment plans in the patient's best interest.</li> </ul> <p>The mental health clinician should update the patient's attorney or guardian of the outcome of the videoconsultation.</p>
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### The Mental Health (Care and Treatment)(Scotland) Act 2003

1	<p>There are no legal cases in Scotland that set a precedent as to this form of examination and its use in the 2003 Act. Face to face interviews are considered the expected practice for assessment as part of a medical examination for the purposes of the Act.</p> <p>A videoconsultation could be considered only in exceptional circumstances where there are either:</p> <ul style="list-style-type: none"> <li>• Transport difficulties</li> <li>• Time restrictions</li> <li>• It is impracticable for the patient or health care worker to travel</li> </ul> <p>These exceptional circumstances were identified prior to the COVID-19 pandemic. The Mental Welfare Commission for Scotland (MWC) recognises that exceptional circumstance will occur more frequently during the current crisis. When face to face is not possible a videoconsultation is preferable to a telephone consultation. Any such interview should be followed by a face to face interview as soon as possible.</p> <p>The doctor must be fully satisfied that their review of the patient via videoconsultation allows for adequate assessment of the patient's mental health to enable a decision on the treatment of the patient, and the application of the 2003 Act. When the examination forms part of an application to the Tribunal or to court, or if an appeal is made against the detention, the Tribunal or court will decide whether it considers the examination/evidence provided via a telepsychiatry review to be acceptable.</p>
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2	<p><b>Patient Consent and the MHA</b></p> <p>The patient must have consented to a telepsychiatry interview. If a patient does not have capacity to consent but is compliant with the interview then "the clinician should consult with others including care staff, relatives and advocates as to whether the interview should proceed by video-link".</p> <p>A Section 47 certificate would not be appropriate or needed for an assessment if the Mental Health (Care and Treatment)(Scotland) Act 2003 is being considered.</p> <p>If the patient is actively refusing a telepsychiatry assessment, whether the patient has capacity or not to decide this, then a face to face assessment must be arranged. If there has already been a partial assessment up until the point where it is clear the patient withdraws consent for telepsychiatry and refuses to continue to engage, then "the medical practitioners and the MHO will need to decide whether they have each been able to carry out a good enough assessment".</p>
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3	<p><b>Clinical Applications and Considerations</b></p> <p>This advice would apply to situations in which an EDC, STDC, CTO or revocation are being considered. However, it is envisaged that an EDC is rarely completed via telepsychiatry given that in the majority of cases there would have been an onsite fully registered medical practitioner involved in assessing and referring the patient to mental health services.</p> <p>Patients must be accompanied by a health care professional, and with an advocacy worker, family or friend if they wish. This best practice may not always be possible in the current circumstances. Recommendations in the other quick reference guides and in the full guidelines relating to technology, security and training will ensure best practice in telepsychiatry consultations, which will support the clinician in making accurate assessments of patients using videoconsultation.</p> <p><b>It should be clearly documented in the mental health act paper work and patient notes that the assessment was undertaken via a videoconsultation, and any difficulties or limitations faced.</b></p>
4	<p><b>Tribunals</b></p> <p>The Mental Health Tribunal for Scotland has clarified that all hearings will take place via teleconference during the COVID-19 outbreak, from 23 March 2020 onwards. Participants at individual tribunals will be sent specific instructions in relation to this.</p> <p>Support should be provided to patients to participate in the tribunal proceedings. For inpatients there is an expectation that a member of hospital staff would accompany the patient for the duration of the tribunal hearing. In the community examples of similar patient support would include an MHO, advocacy worker or solicitor.</p>
5	<p><b>At the time of publication of this document (25/03/2020) emergency legislation is being considered. The information in this document may become rapidly out of date. As such it is recommended that the Mental Welfare Commission for Scotland website is checked for any updates as they emerge. These updates may specifically relate to emergency powers during the COVID-19 crisis, and may not necessarily result in changes to telepsychiatry best practice as outlined in these guides.</b></p>
<p><b>Data Protection</b></p>	
1	<p>A national System Security Policy, Privacy Impact Assessment, Data Processing Agreement and Data Protection Impact Assessment have been undertaken for the Attend Anywhere platform that powers Near Me, produced by Technology Enabled Care Programme, Scottish Government.</p> <p>Health boards must endorse the various assessments and policies relating to Attend Anywhere before adopting its use, and any existing privacy statements will need to be updated to cover the data processing operation carried out in the context of telepsychiatry.</p> <p>Advice is that Attend Anywhere is safe to use and has no threat to NHS systems. It also does not retain any patient details, including patient location. It does retain information about the call dates, time, duration and central clinician.</p>
<p><b>Ethical Considerations</b></p>	

1	<p>The various quick reference guides cover issues related to competent safe care, confidentiality, consent and continuity of care.</p> <p>The role out of Near Me needs to take into account patient populations to ensure equivalent access to services, and that patient populations that have limited access to technology or ability to use this are not subject to discrimination.</p>
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### References/Contributors

	<p>Mental Welfare Commission for Scotland, (2020), COVID-19 FAQs for practitioners (version1, 24 March 2020), viewed 25 March 2020, &lt;<a href="https://www.mwscot.org.uk/sites/default/files/2020-03/Covid-19%20advice%20note%20v1%2024%20March%202020_1.pdf">https://www.mwscot.org.uk/sites/default/files/2020-03/Covid-19%20advice%20note%20v1%2024%20March%202020_1.pdf</a>&gt;</p> <p>Scottish Centre for Telehealth and Telecare, (2016), Video Consultations for Adults with Incapacity, viewed 17 March 2020, &lt;<a href="https://sctt.org.uk/wp-content/uploads/2016/06/Consent-with-incapacity-v10.pdf">https://sctt.org.uk/wp-content/uploads/2016/06/Consent-with-incapacity-v10.pdf</a>&gt;</p> <p>GMC, Coronavirus information and advice - Our guidance for doctors, viewed 30 March 2020 &lt;<a href="https://www.gmc-uk.org/news/news-archive/coronavirus-information-and-advice/our-guidance-for-doctors?dm_i=OUY,6SWVW,BURNQZ,R8B48,1">https://www.gmc-uk.org/news/news-archive/coronavirus-information-and-advice/our-guidance-for-doctors?dm_i=OUY,6SWVW,BURNQZ,R8B48,1</a>&gt;</p>
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## APPENDIX 1: FURTHER INFORMATION

Further information about setting up Near Me is available if required. The aim of this document is to enable fast set up: previous documentation was designed around a slower timescale so is more detailed.

1. Resource Centre with information about the underpinning platform (Attend Anywhere): <https://tec.scot>

2. Clinician Near Me user guide



3. Posters for clinician walls



4. Guidance developed and authored by Dr Idris Thomas, Locum Psychiatrist, NHS Highland [idristhomas@nhs.net](mailto:idristhomas@nhs.net), supported Robbie Wightman, Senior Solicitor, Central Legal Office and Mike Warwick, Medical Officer, Mental Welfare Commission.

### Contact details for further information:

For technical queries:

<https://www.vc.scot.nhs.uk/attendanywhere/>

For process queries: in the first instance, please contact the Near Me Lead in your NHS Board/HSCP