Essex Autonomy Project

COVID Vaccination and the MCA FAQs[1]

When should capacity be assessed?

There is no need to carry out a formal assessment of capacity if there is no reason to doubt that the person lacks capacity to consent. If there is reason to believe, then an assessment should be carried out. During that assessment, steps should be taken to support the person make the decision. If those steps do not succeed, then a formal record of that fact should be made, and steps be taken to work out whether the vaccine will be administered on the basis of the consent of an attorney or deputy with the relevant power, or on the basis of an agreement that it is in their best interests. Guidance about carrying out and recording capacity assessments can be found here.

Who is the decision-maker if the person does not have capacity to consent?

If there is no attorney or deputy whose powers cover the situation, the healthcare professional administering the vaccine will be the person who has to make the final decision whether or not to administer it. In legal terms, this is because it is this professional who needs to be able to rely upon the defence in s.5 Mental Capacity Act 2005. It is very likely that their decision as to whether or not to administer will be based upon information collected by others, including from family members and others interested in the person's welfare, in particular as to whether or not the person would want the vaccine. It is for this reason that it is so important that steps are taken well in advance of the day when the vaccination is to be delivered to gather that information: see also here (in the care home context) Appendix D of the Standard operating procedure: COVID-19 local vaccination services deployment in community settings.

More guidance about deciding upon best interests in the context of vaccination can be found here.

Can the person be restrained to allow the vaccine to be administered?

Section 6 Mental Capacity Act 2005 makes it lawful to restrain a person who lacks capacity to consent where the restraint is in their best interests, and necessary and proportionate to the risk of harm that they would suffer otherwise. In principle, therefore, restraint is lawful, but careful consideration should always be given as to what other steps can be taken short of restraint – just because you can restrain does not mean that you should.

That a person is subject to a Deprivation of Liberty Safeguards authorisation is not relevant to the question of whether or not restraint can be used, because a DoLS authorisation would not authorise restraint in relation to an individual act or care and treatment.

What happens if a family member does not agree?

If the family member is not either an attorney or deputy whose powers cover the situation, then they cannot refuse the vaccine on behalf of the person (nor can they consent to it on their behalf). The professionals involved should discuss the position, approaching it on the basis that there is a common goal – i.e. the best interests of the person. If the family member still maintains their objection, the professionals will need to decide whether they can properly proceed on the basis that the vaccinator will have a reasonable belief that they are acting in the person's best interests. This

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will depend in large part on the grounds of objection – the more they seem to reflect the family member's own views as to what they want as opposed to the family member's views of what their loved one would want, the less weight the objections will carry. But if there remains a genuine dispute about the person's best interests, an application to the Court of the Protection will be needed before the vaccination can be carried out.

If the family member is an attorney or deputy whose powers cover the situation, then steps should be taken to discuss the position with them, on the same basis as above – i.e. that everyone is seeking to achieve the common goal of ensuring that the person's best interests are secured. If agreement cannot be reached, an application to the Court of the Protection will be needed before the vaccination can be carried out. Depending upon the stance of the family member, it may be that consideration is needed as to whether a safeguarding inquiry under the relevant English or Welsh legislation should be made and/or reference made to the Office of the Public Guardian.

How can an application to the Court of Protection be made?

Information about the Court of Protection can be found here, and guidance about medical treatment cases here. That guidance makes clear (at paragraph 17) that in cases involving issues as to medical treatment, the organisation which is, or will be, responsible for commissioning or providing clinical or caring services to P should normally (although not always) be the applicant.

When should an IMCA be appointed?

In almost every case, it is suggested that vaccination does not amount to serious medical treatment for purposes of the relevant regulations in England and Wales. This means that there is no obligation under either regulation for the relevant NHS body to appoint an IMCA. However, if there is a specific reason to consider that the very process of carrying out the vaccination (for instance to overcome any resistance on the part of the person) would be likely to "involve serious consequences for the patient" or "there is a fine balance between its benefits to the patient and the burdens and risks it is likely to entail", this may tip the balance into the treatment being considered serious. In such a situation, however, it is likely that an application to the Court of Protection might be required (so an IMCA appointment would not add anything by way of protection for the person).

There may well be a role for non-statutory advocacy in complex situations where it is challenging to work out what is in the best interests of the patient, and there are concerns about the family members' ability to represent their voice. A very obvious point is that it would cost significantly less to instruct an advocate who may help 'unlock' the position than it would to make an application to the Court of Protection.

What responsibilities do local authorities have?

As the administration of the vaccine is a matter for healthcare professionals, local authorities will not have a direct responsibility for its administration. However, local authorities will have an important role to play in supporting care homes and (in due course) other placements where vaccinations will be offered to understand their responsibilities.

Is a DNACPR notice relevant in this context?

No. Even if a DNACPR recommendation has been properly made, it is vanishingly unlikely that it could be appropriate or in the person's best interests not to attempt CPR in the event that they suffered anaphylactic shock and required it. The potential for such anaphylactic reaction should be considered carefully as part of the decision whether the vaccine is appropriate.