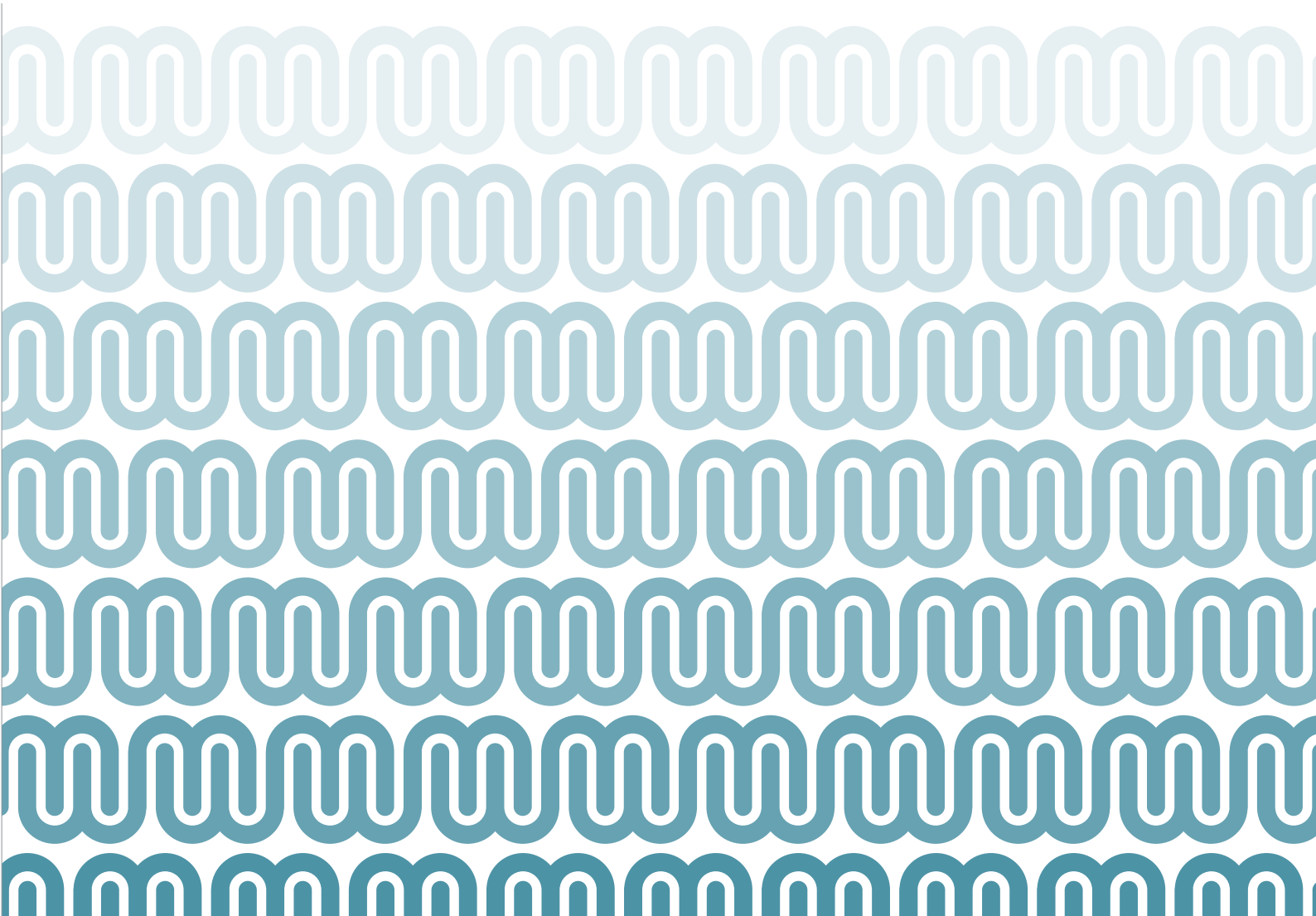
mental welfare commission for scotland

Vaccination for people with mental illness, learning disabilities, dementia and associated conditions

Position statement

February 2022



Our mission and purpose

Our Mission

To be a leading and independent voice in promoting a society where people with mental illness, learning disabilities, dementia and related conditions are treated fairly, have their rights respected, and have appropriate support to live the life of their choice.

Our Purpose

We protect and promote the human rights of people with mental illness, learning disabilities, dementia and related conditions.

Our Priorities

To achieve our mission and purpose over the next three years we have identified four strategic priorities.

- To challenge and to promote change
- Focus on the most vulnerable
- Increase our impact (in the work that we do)
- Improve our efficiency and effectiveness

Our Activity

- Influencing and empowering
- Visiting individuals
- Monitoring the law
- Investigations and casework
- Information and advice

The Mental Welfare Commission's guidance on vaccination for people with mental illness, learning disabilities, dementia and associated conditions

The Mental Welfare Commission's Role

The Mental Welfare Commission for Scotland (the Commission) is an independent organisation set up by statute, working to safeguard the rights and promote the welfare of people with a mental illness, learning disability, dementia or related conditions.

One way in which we do this is through a telephone advice line on issues of ethics and law. We receive on average 4,500 calls a year.

At an early stage of the pandemic (April 2020) we set out our duties and how we intended to respond to the pandemic in a position statement[1]. As part of our response we undertook and regularly revised a guidance note that covered our responses to common and serious issues that we were asked for a view on (version 24 was published in March 2021[2]). As we entered a different phase of the pandemic rather than frequently update the Covid-19 advice note when we noted an increase in calls on an area, we published further advice notes to restate, clarify or update existing guidance.

Context for this guidance note

In the context of the drive towards booster doses of the vaccine as a key part of the Scottish Government's strategy to control Covid-19, the Commission is again experiencing an increase in calls and emails to our advice line seeking advice and guidance on vaccinations for some people who are not able to provide consent for this due to an underlying mental health condition or learning disability. We are therefore re-setting out our guidance in relation to this. This guidance note is primarily for practitioners.

Our concern

Research has shown that people with mental health difficulties that might underlie reduced capacity are at greater risk of Covid-19[3].

[1] https://www.mwcscot.org.uk/sites/default/files/2020-04/MentalWelfareCommission-PositionStatementOnRoleAndResponsibilityInRelationToCovid19_20200402_0.pdf
[2] https://www.mwcscot.org.uk/news/covid-19-mental-welfare-commission-advice-note-version-24-19-march-2021
[3] Pre-pandemic psychiatric disorders and risk of COVID-19: a UK Biobank cohort analysis - PubMed (nih.gov)

Our concern is that people who are unable to consent to the vaccine and are resisting should not be disadvantaged because of any uncertainty about how to proceed in these situations.

We wish to ensure that people who are resisting vaccine due to a lack of capacity to consent are treated with dignity and in accordance with the principles of the Adults with Incapacity (Scotland) Act 2000 (AWI 2000 Act).

The Commission's view on vaccination

In the context of this guidance it is important to be clear on the position that the Commission takes on vaccinations. We recognise there are many people who have the capacity to make their own decision and do not wish to be vaccinated. Vaccination, including booster doses of vaccines against Covid-19, continues to be a key part of both the UK and Scottish governments' strategy to reduce cases, the severity of cases, and bring the pandemic under control. Although there are reports that the current dominant variant, Omicron, is less likely to cause hospitalisation than the previous dominant variant, Delta – it is more transmissible. The most recent data (end December 2021) from the UK Health Security Agency on Omicron admissions reflects the continued importance of the vaccination programme[4].

Assessment of Capacity

There is a presumption that adults (persons over the age of 16) have the capacity to make personal decisions for themselves and that would include to make decisions about medical treatment, including vaccinations.

In most cases the person in question will want to be vaccinated against Covid-19 and have capacity to consent to this.

Under the Adults with Incapacity (Scotland) Act 2000, a person lacks capacity to make a decision if they are incapable of making, understanding, retaining the memory of, communicating or acting on the decision due to mental disorder[5].

Most people with mental illness, learning disability and associated conditions will retain the capacity to provide consent or otherwise to vaccination.

For a further group of people who may have impaired capacity, with the appropriate support for decision making, they may be able to reach a decision and provide consent to be vaccinated. This might include using different communication methods, providing the information in more easily accessible formats, and providing a person time and space to make a decision. This is in keeping with the principle of exercising residual capacity under the AWI 2000 Act.

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[4] Omicron daily overview: 29 December 2021 (publishing.service.gov.uk)

[5] *the term 'mental disorder' is a legal one based on Section 328 of the Mental Health (Care&Treatment) (Scotland) Act. Our use of the term is to follow legal convention although we recognise this term is not considered suitable by many people who speak to us.

However there will be people who lack capacity to consent to a vaccination. Where there is any uncertainty, we suggest a second medical opinion on the capacity to consent or refuse the vaccine.

Vaccinating a person who lacks capacity

If a person does lack capacity to consent to the vaccination, the next step would be to determine if an intervention (in this case, Covid-19 vaccination (including boosters)) should follow. In making that decision, the practitioner must consider these principles of the Adults with Incapacity Act (AWI):

- **Benefit** – the intervention, the vaccination, must be of benefit to the individual (wider societal benefit or public health concerns are **not** a specific consideration under the AWI Act)[6].
- **Minimum intervention** – the vaccination can only be given by intramuscular injection, at the current time there is no oral alternative**.** Consideration also needs to be made for the vaccination schedule/s and the role of boosters within the schedule and whether this represents the minimal intervention. We would expect that clinicians would take into account the current Scottish Government guidance on vaccination scheduling including the most recent Joint Committee on Vaccination and Immunisation (JCVI) guidance that informs the approach to vaccination[7].
- **Take account of the adult's wishes and feelings** – e.g. what has the person's view been about vaccinations generally? Is there an advance decision refusing the Covid-19 vaccination?[8]
- **Consult others** – consultation with relevant others, including relatives, to determine their views and also what information they can provide about any past wishes of the person. Welfare proxies with relevant powers (through an intervention order, or if there is a welfare guardian or welfare attorney) should be consulted and can provide consent.
- **Exercise residual capacity** – ensure support for the person to make a decision wherever possible and practicable.

[6] There are other pieces of legislation that provide measures to mitigate the impact of a person's health status on others such as the Public Health (Scotland) Act 2008. The provisions of the 2008 Act is beyond the scope of this guidance note.

[7] Scotland's autumn/winter vaccination strategy 2021: December update - gov.scot (www.gov.scot)

[8] Although Advance Decisions to Refuse treatment do not have legal standing in Scotland in the way that they do under the MCA 2005 in England& Wales, nonetheless clinicians in Scotland would be expected to be guided by a competently made expression of wishes to refuse treatment made by someone who has subsequently lost capacity. Advance Statements under the Mental Health Act (Care and Treatment) (Scotland) (2003) pertain to treatment for mental disorder (see footnote 4) and would not have applicability here).

Authority to administer the vaccine for a person who lacks capacity to provide consent

Medical treatment under AWI 2000 Act is set out as *any procedure or treatment designed to safeguard or promote physical or mental health* and therefore covers vaccinations. If a person is deemed to lack capacity to consent to the relevant treatment, the practitioner responsible for the treatment may do what is reasonable to treat the person under the general authority to treat and this also covers the actions of those authorised or acting on their behalf.

A certificate covering the relevant treatment (i.e. Covid-19 vaccination) should be issued in accordance with section 47 of the AWI 2000 Act and this then provides authority for Covid-19 vaccinations for a person who lacks capacity to consent. In our view, a pre-existing section 47 that authorises fundamental healthcare procedures would provide authority for the relevant vaccination during a viral pandemic. Please see our guidance note on section 47 certificates for further details including recommended Scottish Government forms for recording treatment under section 47[9].

We do not think it would be lawful for a vaccination to be administered as treatment under the provisions of the Mental Health (Care and Treatment) (Scotland) 2003[10].

The use of force in administering a Covid-19 vaccine

Section 47 only authorises the use of force or detention if it is immediately necessary, and only for so long as is necessary in the circumstances. The Commission has been asked about practice (generally) around giving Covid-19 vaccines to people who are incapable of consenting and who resist, e.g. some elderly people in care homes, inpatients in secure psychiatric care, and we have also had calls about people with a learning disability who resist vaccination.

We appreciate that many healthcare professionals want to ensure that their patients benefit from Covid-19 vaccinations, and the concerns that some may not receive vaccines due to their refusal based on incapacity and their physical resistance to the injection procedure.

Where there is no physical resistance or objection to receiving the vaccine, in the vast majority of cases it would be of benefit for the individual to receive the vaccine.

Whether it is justified to give a Covid-19 vaccine where this would involve overcoming physical resistance and objections by the person who lacks capacity, needs to be considered on an individual basis for each person. As well as considerations of whether force is immediately necessary, the degree of force required, and whether that would be

[9] Treatment under Section 47 TreatmentUnderSection47oftheAdultsWithIncapacityAct_April2021.pdf (mwcscot.org.uk) (accessed 28 January 2022)

[10] This is because even if a person held fixed, false beliefs about vaccinations due to their mental health condition, a vaccination cannot be considered to be a treatment for mental disorder or treatment for a condition resulting from the mental disorder.

proportionate in the individual circumstances of the person needs to be carefully considered.

Unless there is a specific intervention order or welfare guardianship power authorising restraint for medical treatment, a certificate issued under section 47 provides no authority for restraint beyond for the use of immediately necessary force.

To take some examples: in many cases minimal force might be a proportionate response e.g. providing support through gently holding an arm on irregular and relatively sporadic occasions determined by Covid-19 vaccination and booster schedules (as is the case at this time). However, a restraint involving multiple staff members for someone who is actively resisting and has long-held views about refusing all vaccinations is not likely to be a proportionate response and may indeed pose greater risks. Against these two cases there will be a range of situations across the spectrum.

There are matters to consider in accordance with the principles when determining the proportionality of the force being considered where a person, who lacks capacity, is resisting or is likely to resist e.g.

- How distressed the person may be by being given the vaccine (particularly if they have firm, fixed beliefs (whether these are correct or not) that there will be positive or negative consequences for them if they refuse it or are given it)?
- Consideration of the level of risk to the person if they do not have the vaccine e.g. do they have underlying vulnerabilities?
- What would the consequences of not receiving the vaccine be for the individual? This may have a particular meaning for those people living in supported/shared accommodation settings, longer term rehabilitation settings, or patients in hospital environments. For example, consideration of what measures would, or might, be required and would be fair and proportionate if the person does not have the vaccine. How would they feel about measures for their own protection if other people in their shared environment have Covid-19, or measures to protect others if the person develops Covid-19?
- What are the practicalities of giving the injection? Is the vaccine available in the care setting or would the person need taken to another setting while resisting?
- Also consider environmental factors in balancing the risks, including Covid-19 prevalence levels in current setting; factors that increase or decrease the risk of the person contracting Covid-19; whether they might choose to revisit the decision given more time, etc.
- What will the impact be of physical restraint to administer the vaccine on wider issues of trust between the person with incapacity and those caring and treating them and the impact this might have on future care and treatment?

The list of considerations above is not exhaustive but intend to be illustrative and demonstrate the careful consideration needed. After these discussions with the person, those important to them, and the team who may be involved in administering the vaccine, if

they are still resisting, consider clearly what level of force or restraint would be required to administer the vaccine. The least restrictive measure should be identified[11].

Time and space and appropriate communication with the person and those who know them best is vital.

The authority, if under s47 alone, would be dependent on the treating practitioner being of the view that force was immediately necessary.

The doctor or board could seek legal advice from the Central Legal Office, and/or the practitioner could ask their defence union for advice.

In a case heard at the Court of Protection in April 2021, a judge ruled that it would not be in the best interests of an 86-year-old woman, SS, living at a care home with dementia who lacked capacity to make a decision on the vaccine to be administered this. The judge considered the options available, the risks of her losing tentative trust established with care home staff if she was forced to have the vaccine, the fact that she was rejecting medical treatment generally, and that in the past, prior to developing dementia, she had refused seasonal flu vaccinations. He also refused the suggestion that the patient might be told that her father wanted her to have the vaccine (the father, was long dead but SS believed that he was alive) making reference to the inherent dignity of the woman she was and is. It was clear that force would be required to administer the vaccine and the judge was not convinced that the overall benefit justified this[12].

Is the consent of the welfare proxy (welfare guardian or welfare attorney) needed if the vaccination is to be administered under section 47?

If there is a welfare proxy with the power to consent or refuse consent to the treatment, the proxy's consent is required for treatment to proceed under a section 47, except where it would be unreasonable or impractical to obtain the proxy's consent.

What if it is felt that section 47 does not provide authority to proceed?

If it is felt that a Covid-19 vaccination should be given with force, but that section 47 alone does not authorise this for the individual patient, an application could be made for an intervention order or a welfare guardianship order with powers to authorise this. If there is a welfare guardianship order already in place, an application for a (AWI) section 70 compliance order could be considered.

[11] Our wider guidance on restraint may be relevant. For details please see Rights Risks and Limits to Freedom.

[12] SS v London Borough of Richmond Upon Thames & Anor [2021] EWCOP 31 (30 April 2021) (bailii.org)

What happens if the welfare proxy disagrees with the decision to vaccinate?

In England and Wales several cases were heard in the courts in 2021, where the family or carers disagree with the clinical view that vaccination should be authorised. These cases provide a structure of the sort of factors that ought to be considered in these complex situations.

A case in 2021 (E (Vaccine) [2021] EWCOP 7) was the first judgement on capacity and benefit in the context of the Covid-19 vaccination in which the Court of Protection judged that it was in the best interests of an 80-year-old woman who lacked capacity to consent to the vaccine due to dementia to have the Covid-19 vaccine despite her son's scepticism and objection to her having the vaccine.

In another case CR, Re [2021] EWCOP 19, involving a younger person with learning disability, living in a care home, who lacked capacity to make a decision on the vaccine and whose family objected to the vaccine, the judge at the Court of Protection agreed with the clinicians that they could proceed to administer the vaccine but he did not authorise force[13].

Similarly, in re:AD, a judge ruled that a mild sedative could be used in advance of the vaccination procedure, but not physical restraint, for a man in his 30s who lacked capacity to consent to the vaccine. He had moderate learning disabilities, Downs Syndrome, autism, was clinically overweight, and lived in supported accommodation. His mother had objected to the vaccine in part because she was concerned that the restraint would be too traumatic for him[14]. [2021] EWCOP 47.

Finally, in the 'Greenwich case' the local authority submitted that not only was the vaccination in the best interests of a 17-year-old with learning disability who lacked capacity to make a decision due to autism and severe learning disability but it was also in the best interests of the carers (to minimise risk to them) that he had this. His family objected to the vaccination in part because of their views on the MMR vaccine. The judge ruled that on balance of benefits and risks the vaccination should go ahead [2021] EWCOP 65.

In Scotland, section 50 of the Adults with Incapacity (Scotland) Act 2000 provides a process for dispute resolution where a proxy (or other interested party) disagrees with a proposed treatment for a person who lacks capacity to consent. The process involves the Commission appointing an independent practitioner to review the treatment being proposed, the views of the person, the proxy and others, and the circumstances of the situation and determine whether the treatment proposed should proceed.

During the pandemic, we have been contacted about several situations where a welfare proxy (guardian or attorney) has refused consent for Covid-19 vaccination.

The Commission's view is that a multidisciplinary meeting should be arranged, if not done so already, including the guardian or attorney and advocacy, to discuss the benefits and risks of

[13] CR, Re [2021] EWCOP 19 (12 March 2021) (bailii.org)
[14] [2021] EWCOP 47. A, Re (Covid-19 vaccination) [2021] EWCOP 47 (07 May 2021) (bailii.org)

vaccinating or not vaccinating the adult, taking into account their unique circumstances and past and present wishes, and the reasons the proxy has for objecting.

If after this meeting the proxy refuses consent for the vaccination, and the practitioner considers that, in the individual's specific circumstances, the vaccine is warranted, the medical practitioner should trigger the AWI section 50 dispute resolution by contacting the Mental Welfare Commission to request that we nominate a practitioner to give an opinion on the treatment proposed. The practitioner we nominate will be independent from the practitioner who issued the original section 47 certificate.

If the nominated practitioner determines that the treatment should be given, it can then be given. The welfare proxy can however appeal this decision to the Court of Session.

Further Advice

Each particular case will be different but we hope this summary of the sort of considerations that we've been discussing with colleagues is helpful. For further advice please contact the Commission here: https://www.mwcscot.org.uk/contact-us

February 2022

If you have any comments or feedback on this publication, please contact us:

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