mentalwelfare
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GOOD PRACTICE GUIDE

The Adults with Incapacity Act in general hospitals and care homes

Reviewed March 2017

This document was reviewed in Spring 2017 in light of changes to the Mental Health Act. It was orginally published in August 2016.

Contents

What we do

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

We do this by:

- Checking if individual care and treatment are lawful and in line with good practice.
- Empowering individuals and their carers through advice, guidance and information.
- Promoting best practice in applying mental health and incapacity law.
- Influencing legislation, policy and service development.

The Adults with Incapacity Act in general hospitals and care homes

The Adults with Incapacity (Scotland) Act 2000[1], (the 2000 Act) sets out how decisions can be made for individuals who do not have capacity. It covers decisions made about welfare, property and finances. Individuals who have a mental illness, learning disability or dementia are often assisted by the use of this piece of legislation. The Act stresses an approach to the assessment of incapacity that is decision, or action, specific, with a patient's capacity not being considered as an "all or nothing" entity.

The 2000 Act sets out the arrangements for the:

- Giving of medical treatment.
- Granting of intervention orders which allow for one-off decisions to be made on behalf of the individual.
- Appointment of proxies such as power of attorneys and welfare and financial guardians who have the authority to make decisions on behalf of a patient.

The 2000 Act sets out principles that guide decisions made on behalf of people who lack capacity. The principles are as follows:

- **Any actions taken on behalf of an individual must benefit them.**
- **Any action must be the least restrictive option that will achieve the desired effect.**
- **Before making a decision on behalf of a patient, account should be taken of the individual's past and present views and preferences.**
- **The guardian, attorney, relatives and carers of an individual should be consulted before any decision is made on behalf of the individual.**
- **Any action involving a patient who lacks capacity must encourage them to develop and exercise as much skill as possible in making decisions or taking action.**

[1] http://www.legislation.gov.uk/asp/2000/4/contents

Assessment of capacity

Patients should be treated with full consent to the treatment proposed unless they lack capacity. Any treatment of a competent patient without consent might be considered assault.

Capacity is presumed unless the patient is unable to:

- **Understand broadly what the treatment is, its purpose and nature and why it is being proposed;**
- **Understand its principal benefits, risks and alternatives and be able to make a choice;**
- **Understand in broad terms what the consequences will be of not receiving the proposed treatment;**
- **Retain the information for long enough to use it and weigh it in the balance in order to arrive at a decision; and**
- **Communicate that decision.**

A problem for this definition, and the definition in the 2000 Act, is the issue of memory. Our view is that the person must be able to retain information for long enough to make a decision. We believe he/she must:

- Remember the decision; and/or
- Make the same decision consistently given the same information; and/or
- Agree with a record of that decision.

What this means in practice

Treatment under common law "principle of necessity"

Case Study 1

Mr E is a 19 year old man who was been involved in a road traffic accident. He has been brought into the Accident and Emergency department and is unconscious. He has sustained potentially life-threatening injuries, all of which require urgent attention.

Mr E lacks capacity as he is unable to understand or communicate due to his head injury. It would not be prudent to wait to see whether he regains consciousness and assess his capacity before treating him. Under common law, practitioners have a duty of care in an emergency to take necessary action to safeguard a person who is unable to consent and without treatment would come to significant harm. In this case, what is required is clear documentation within the casenotes of the treatment given and why it was required under common law.

Treatment under Part 5 of the 2000 Act

The law in Scotland presumes that adults, those aged 16 years or over, are capable of making decisions. However, in a general hospital or care home setting, staff will often be faced with individuals who are not capable of making decisions relating to medical treatment. Common examples of when this might occur include patients suffering from delirium, dementia or learning disability. When a patient has been determined to lack capacity to consent to medical treatment, it can be given under the authority of Part 5 of the 2000 Act[2] following the completion of a section 47 medical treatment certificate.

Case Study 2
Ms F is a 75 year old lady with a diagnosis of vascular dementia. She also has multiple physical health problems. Her son has welfare power of attorney. She is admitted to the general hospital following a fall at home where she sustained a broken hip. Basic investigations, treatment for her fracture and her ongoing physical problems were given under authority of a section 47 certificate and accompanying treatment plan. Her son was consulted by the doctor completing the certificate.

It was appropriate for her care to be delivered under the authority of a section 47 certificate. As noted above, if an adult lacks capacity but is compliant, this certificate is still required and any intervention carried out without this in place may be considered unlawful.

Who can complete a section 47 certificate?

A number of practitioners are authorised to complete this certificate:

- a registered medical practitioner
- a dental practitioner*
- an ophthalmic optician*
- a registered nurse*

*who has undergone training on the assessment of incapacity

A certificate issued by a healthcare professional other than a medical practitioner will only be valid within their own area of practice e.g. a dentist should only authorise dental treatment. The certificate itself is a standard document and can be found on the Scottish Government website[3]. Guidance on its completion can be found in the Code of Practice (Third Edition) for practitioners authorised to carry out medical treatment or research under Part 5 of the 2000 Act[4].

[2] http://www.legislation.gov.uk/asp/2000/4/part/5
[3] http://www.gov.scot/Resource/Doc/254430/0086221.pdf
[4] http://www.gov.scot/Publications/2010/10/20153801/0

Once completed, the section 47 certificate authorises treatment for up to three years, although the practitioner should keep capacity to consent to treatment under review at appropriate intervals.

When should a section 47 certificate be completed?

A section 47 certificate is required when a patient requires health care and is unable to consent. For more routine health care needs, multiple treatments should be covered by a treatment plan, which accompanies the section 47 certificate. Outwith this a separate section 47 certificate should be completed for each intervention following an assessment of capacity in each case. It is also important to bear in mind that the consent of an authorised proxy, such as a welfare power of attorney or guardian, should be sought in these circumstances where applicable, in addition to the completion of the certificate.

What are the limitations of a section 47 certificate?

If an adult with incapacity who is not formally detained under the Mental Health (Care and Treatment) (Scotland) Act 2003[5] (the 2003 Act) requires treatment for a mental disorder, this may be lawfully given under the 2000 Act. If the adult refuses that treatment, this should be taken as an indication of their wishes. Should this situation arise, consideration should be given to whether it would be appropriate for the individual to be formally detained under the 2003 Act in order that they might benefit from the added protections which that Act offers. Advice could be sought from a psychiatrist and mental health officer, a section 47 certificate cannot be used to convey a patient to, or detain them in, hospital for treatment of mental disorder against their will. Also force should only be used where immediately necessary and for as short a time as possible.

There are treatments which a section 47 certificate cannot authorise.

These include:

TREATMENTS REQURING THE APPROVAL OF THE COURT OF SESSION

1. *Neurosurgery for mental disorder.*
2. *Sterilisation where there is no serious malfunction or disease of the reproductive organs.*
3. *Surgical implantation of hormones for the purpose of reducing sex drive.*

[5] http://www.legislation.gov.uk/asp/2003/13/contents

TREATMENTS APPROVED BY A PRACTITIONER APPOINTED BY MENTAL WELFARE COMMISSION (under section 48)

1. *Drug treatment for the purpose of reducing sex drive, other than surgical implantation of hormones.*
2. *Electro-convulsive therapy (ECT) for mental disorder.*
3. *Abortion.*
4. *Any medical treatment which is considered likely by the medical practitioner primarily responsible for that treatment to lead to sterilisation as an unavoidable result.*

It can often be difficult to decide whether or not a section 47 certificate or the use of the mental health act is required for a given situation. For example, in an older adult ward or care home, a patient who lacks capacity may ask to be allowed to leave. Simple re-orientation and persuasion may be enough to convince the patient to remain in the ward. In this case a section 47 certificate would be sufficient. However, if the person continually expresses a desire to leave or attempts to leave and has to be prevented from doing so then we do not think that the certificate gives authority for that level of intervention. In that situation we would recommend detention under mental health legislation if the necessary criteria are met.

Use of treatment plans

It will often be the case that patients in a general hospital or care home have multiple care needs that need to be addressed by AWI legislation. Where there is an ongoing healthcare need, the use of a treatment plan is recommended. A copy of a treatment plan with examples can be found at the Scottish Government website[6]: In the same way as the section 47 certificate, the treatment plan should be completed by the clinician with overall responsibility for the patient.

The treatment plan should be written so as to include all of the healthcare interventions that may be required during the time specified in the certificate. It is recommended that when a treatment plan is being used, in the area on a section 47 certificate where the “following treatment” is to be recorded, the phrase "See attached treatment plan" is used.

[6] http://www.gov.scot/Publications/2010/10/20153801/9
[7] http://www.gov.scot/Publications/2010/10/20153801/2

Certain healthcare procedures, referred to as fundamental healthcare procedures, can be included. According to the code of practice, these include: nutrition, hydration, hygiene, skin care and integrity, elimination or relief of pain and discomfort, mobility, communication, eyesight, hearing, and oral hygiene. Each patient should be comprehensively assessed and foreseeable interventions that fall outside of these fundamental healthcare procedures should be listed separately, with a note made of whether or not the patient is felt to be capable or incapable of deciding on each intervention. This treatment plan should be reviewed annually. In the event that a new condition becomes apparent, an additional section 47 certificate should be completed or the treatment plan should be re-written, incorporating the relevant details.

Who needs to be consulted?

The section 47 certificate has a section which allows the clinician to clearly document who has been consulted in the creation of the plan. The names and designations of people consulted should be recorded in this section. This should include a relative of the patient. However, it is essential that if a patient has an appointed welfare attorney/guardian or person authorised under an intervention order then that person's opinion must be taken where practicable. Where the adult is in institutional care, the code of practice states that consultation with a senior member of care staff should be recorded on the plan.

Who can consent for an adult with incapacity?

It is made clear in the 2000 Act that it is possible for other parties to consent on behalf of a patient, provided that they have been granted the appropriate authority. The 2000 Act makes provisions for relatives and carers to be involved in two ways: through the appointing of welfare power of attorney and welfare guardianship orders.

Welfare power of attorney can be used to confer authority for a range of life decisions, from where a patient stays to who they are able to see and what medical treatment can be consented to. It is therefore important when working in the general hospital setting or care home to establish, in individuals who lack capacity, whether or not there is an appointed welfare power of attorney and to consult them as early as possible. Where a welfare power of attorney is present, they should be asked for a copy of the relevant documentation, which should be kept within the patient's casenotes.

A guardianship order is similar to a power of attorney in that it allows for a person to make decisions for a patient who no longer has capacity. Unlike a power of attorney, a guardian is someone who has been appointed by a court to act on behalf of the individual who lacks capacity. This can be for finances, welfare or both. Again, if a patient lacks capacity and has a welfare guardian, they may be able to consent on behalf of the patient. It is important to note that this should always be done with an accompanying section 47 certificate.

In some instances consent maybe withheld and in these circumstances treatment may not be given. The 2000 Act contains arrangements to resolve such disputes under section 50. The Commission will identify a nominated practitioner to give an opinion on medical treatment, independent from the medical practitioner who issued the original certificate in these cases.


npm
national
preventive
mechanism

mentalwelfare
commission for scotland

Thistle House
91 Haymarket Terrace
Edinburgh
EH12 5HE
Tel: 0131 313 8777
Fax: 0131 313 8778
Service user and carer
freephone: 0800 389 6809
enquiries@mwcscot.org.uk
www.mwcscot.org.uk

Mental Welfare Commission (Mar 17)