

Dear Colleague

**ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000:
PART 5 CODE OF PRACTICE, AS REVISED**

1. This letter provides the revised Code of Practice for Part 5 of the Adults with Incapacity (Scotland) Act 2000 - the third edition - which deals with medical treatment and research. It includes additional wording and guidance about the legality of withholding food and liquids from patients who lack capacity.

Background

2. During themed questions in the Scottish Parliament on 24 September 2009 the Cabinet Secretary for Health and Wellbeing, Nicola Sturgeon MSP, undertook to reinstate wording in the Adults with Incapacity (Scotland) Act 2000, Part 5 Code of Practice, to reinforce the fact that any health or social care professional, like any individual, who acts by any means - whether by withholding treatment or by denying basic care, such as food and drink - with euthanasia as the objective, is open to prosecution under criminal law.

3. After consultation with *bodies as appear to be concerned*, as set out in Section 13 of the 2000 Act, the adjusted Part 5 Code of Practice was laid in the Scottish Parliament for 21 days between 12 April and 3 May 2010. No representations were received from Members and the following wording has now been instated in the Code at Section 2.66:

Any health or social care professional, like any individual, who acts by any means - whether by withholding treatment or by denying basic care, such as food and drink - with euthanasia as the objective, is open to prosecution under criminal law. Nothing in this Act authorises any action that is intended to bring an end to the adult's life. Where practitioners consider withholding any care or treatment that might prolong life, or in the interests of patient safety, they must do so in accordance with the guidance produced by the General Medical Council *Withholding and Withdrawing - Guidance for Doctors*. This can be found at:

http://www.gmc-uk.org/guidance/ethical_guidance/withholding_lifeprolonging_guidance.asp

CEL 34 (2010)

28 September 2010

Addresses

For action

Chief Executives, NHS
Boards

For information

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Clinical Directors, NHS
Boards
Directors of Nursing, NHS
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4. The legal position with regard to withholding food and liquids from patients who lack capacity has always been clear in the Part 5 Code of Practice. The additional wording simply reinforces that position.

Section 47 Certification

5. I would take this opportunity to remind you that a Section 47 Certificate should only be completed following a medical assessment carried out by the relevant registered medical practitioner or health professional to determine the patient's level of incapacity when treatment is proposed. Care or nursing homes should not ask, or expect, the medical practitioner or health professional to complete a Section 47 certificate for each of their patients as assessments must be carried out on an individual basis, at the time of proposed treatment, where capacity to consent to treatment is in question. Not all patients will be assessed as lacking capacity in this regard.

Section 47 Certification by Health Professionals Other Than Registered Medical Practitioners

6. The Smoking Health & Social Care (Scotland) Act 2005 amends section 47 so as to extend the authority to grant a certificate under section 47(1) to health professionals other than 'registered medical practitioners' provided they have successfully completed relevant training in the assessment of incapacity (prescribed by the Adults with Incapacity (Requirements for Signing Medical Treatment Certificates) Scotland) Regulations 2007). The other professionals included in section 35(2)(b) of the 2005 Act are dental practitioners, ophthalmic opticians (optometrists) and registered nurses. A certificate issued by healthcare professionals other than 'registered medical practitioners' will only be valid within their area of practice e.g. a dentist could only authorise dental treatment once they have completed the relevant training.

7. Under the Requirements for Signing Medical Treatment Certificates) Scotland) Regulations 2007 as they stand, only Napier University can provide the relevant training and there is no course in place at present. We appreciate that this places certain pressures on registered medical practitioners and health professionals wishing to carry out treatment under their respective specialties. We are working to resolve this anomaly and will issue an addendum to this CEL once this matter has been resolved.

Action

8. Chief Executives are asked to draw the publication of the revised Part 5 Code of Practice to the attention of all those who have responsibilities for patients who are, or may be, affected by the terms of Part 5 of the Adults with Incapacity (Scotland) Act 2000.

Further Information

9. The Scottish Government's Adult Care & Support Division has recently assumed policy responsibility for Part 5 of the Adults with Incapacity (Scotland) Act 2000. The Division's contact details are provided above.

Yours sincerely



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ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

CODE OF PRACTICE (Third Edition)

**FOR PRACTITIONERS AUTHORISED TO CARRY
OUT MEDICAL TREATMENT OR RESEARCH UNDER
PART 5 OF THE ACT**

EFFECTIVE FROM 10 May 2010

**Laid before the Scottish Parliament by the Scottish Ministers
pursuant to section 13(3) of the Adults with Incapacity (Scotland)
Act 2000**

April 2010

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1. INTRODUCTION

Key points in Part 1

Incapacity is not an “all or nothing” concept – it is to be judged in relation to particular decisions.

Everyone carrying out functions under the Act must apply the general principles of:

BENEFIT

MINIMUM INTERVENTION

TAKE ACCOUNT OF ADULT’S WISHES AND FEELINGS

CONSULT OTHERS

ENCOURAGE EXERCISE OF RESIDUAL CAPACITY.

Medical practitioners have functions of providing certificates and reports under all Parts of the Act and should be aware of the wider provisions. However, this code deals in detail only with Part 5, medical treatment and research. The practitioners able to issue a certificate of incapacity under section 47 of Part 5 are listed in paragraph 1.2.

The code is not mandatory, but may be referred to by the Courts.

The Act

1.1 The law of Scotland generally presumes that adults (those aged 16 or over) are legally capable of making personal decisions for themselves and managing their own affairs. That presumption can be overturned in relation to particular matters or decisions on evidence of impaired capacity. The Adults with Incapacity (Scotland) Act 2000, referred to in this code as “the Act”, sets out the framework for regulating intervention in the affairs of adults who have (or may have) impaired capacity, in the circumstances covered by the Act (such an adult being referred to in this code as “the adult”). The framework is underpinned by general principles and provides more flexibility than before to tailor interventions to the needs of particular cases. In the case of medical treatment and research, it provides a statutory framework for regulating what may and may not be done by practitioners and others acting with their authority.

1.2 For the avoidance of doubt, and following an amendment to section 47 (1) of the Act, the following practitioners may issue a certificate under section 47 giving authority to carry out medical treatment:

- a registered medical practitioner; **or** a dental practitioner, ophthalmic optician or registered nurse who has undergone training on the assessment of incapacity as prescribed in the Adults with Incapacity (Requirements for Signing Medical Treatment Certificates (Scotland) Regulations 2007, which are available at http://www.oqps.gov.uk/legislation/ssi/ssi2007/ssi_20070105_en_1, or any other training which may be prescribed by Scottish Ministers in regulations, or

- any other "individual who falls within a description of persons which the Scottish Ministers may prescribe in Regulations (provided they have undergone appropriate training on the assessment of incapacity as detailed above).

1.3 For the purposes of the Act "dental practitioner" has the same meaning as in section 108(1) of the National Health Service (Scotland) Act 1978 (c.29); and "ophthalmic optician" means a person registered in either of the registers kept under section 7 of the Opticians Act 1989 (c.44) as amended of ophthalmic opticians. Following amendments to the Opticians Act 1989 this should now be read as a reference to a person registered in the register of optometrists kept under that section.

1.4 Importantly, a certificate issued by healthcare professionals other than 'registered medical practitioners' will only be valid within their own area of practice e.g. a dentist should only authorise dental treatment.

1.5 The Act is not exclusive, either in relation to general incapacity law or in relation to medical matters. It allows for intervention in a wide range of property, financial or welfare matters where the adult lacks capacity. But an intervention is only permitted where the adult lacks capacity in relation to the subject matter of the intervention. It is necessary to consider whether the adult lacks capacity in relation to the relevant matter each time a decision or action falls to be taken.

The general principles

1.6 Section 1 of the Act provides that the following principles shall be given effect in relation to any intervention in the affairs of an adult under or in pursuance of the Act.

Principle 1 – benefit

1.6.1 There shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot be reasonably achieved without the intervention.

(So, for instance, if there is a prospect that the adult will regain sufficient capacity to make the necessary decision, and if a decision can reasonably be deferred, then it should be deferred)

Principle 2 – minimum necessary intervention

1.6.2 Where it is determined that an intervention in the affairs of an adult under or in pursuance of the Act is to be made, such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.

1.6.3 All of the components of this principle are important. It does not refer to the simplest or least complex solution.

Failure to follow procedures which are in fact appropriate in the circumstances may be a significant infringement of the adult's freedom, because the proper lawful authority, with resultant protections, has not been obtained. At least the minimum necessary level of intervention must be provided, if the adult would otherwise not receive the benefit referred to in the first principle.

Principle 3 – take account of the wishes of the adult

1.6.4 In determining if an intervention is to be made, and, if so, what intervention is to be made, account shall be taken of the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by mechanical aid appropriate to the adult.

1.6.5 It is compulsory to take account of the present and past wishes and feelings of the adult if these can be ascertained. (see also paragraphs 2.28 to 2.33)

Principle 4 – consultation with relevant others

1.6.6 In determining if an intervention is to be made, and, if so, what intervention is to be made, account shall be taken, so far as it is reasonable and practicable to do so, of the views of:

- The nearest relative and primary carer of the adult;
- Any guardian, continuing attorney or welfare attorney of the adult who has powers relating to the proposed intervention;
- Any person whom the sheriff has directed should be consulted; and
- Any other person appearing to the person responsible for authorising or effecting the intervention to have an interest in the welfare of the adult or in the proposed intervention, where these views have been made known to the person responsible.

1.6.7 It will be necessary to consider the adult's right to confidentiality and any previously expressed wishes about disclosure of information. It will also be advisable to consider any information that is known about the possible financial motives or frictions among family members. It can be helpful to explain to relatives and others that it is relevant to hear their own views even where these differ from those of the adult.

Principle 5 – encourage the adult to exercise residual capacity

1.6.8 Any guardian, continuing attorney, welfare attorney or manager of an establishment exercising functions under this Act shall, in so far as it is reasonable or practicable to do so, encourage the adult to exercise whatever skills he or she has concerning property, financial affairs or personal welfare as the case may be, and to develop new such skills.

1.6.9 Any person exercising functions under Part 5 will want to co-operate with guardians or welfare attorneys who are encouraging the adult to participate in a decision on their medical treatment.

Furthermore, any adult unable to make a decision about medical treatment may be able to make decisions on other aspects of their care, and should be encouraged to do so. Although the statutory application of this principle is limited to the appointees specified above, this and all preceding principles represent good practice in all matters concerning adults with impaired capacity, and should be applied whether or not in particular circumstances it is a statutory requirement. The principles can be particularly helpful when difficult judgements require to be made.

1.7 The general principles will be referred to throughout this code as they apply to the exercise by any of the persons mentioned in subsection (1A) of section 47 of the Act (which subsection has been inserted by the Smoking, Health and Social Care (Scotland) Act 2005) who has issued a certificate for the purposes of subsection (1) of that section.

Assessment of incapacity

1.8 The Act stresses an approach to the assessment of incapacity that is decision or action-specific. It is not an all or nothing condition.

1.9 An adult does **not** have impaired capacity simply by virtue of

- being in community care
- having a psychotic illness
- having dementia, particularly in the early stages
- having difficulties with speech or writing
- having an addiction
- disagreeing with the treatment or those offering it
- having learning difficulties or disabilities
- being vulnerable or at risk from him or herself or others
- behaving irrationally
- being promiscuous
- having a brain injury
- having a physical disability
- having a history of offending
- having an acquired or progressing neurological condition.

- declining to accept the practitioner's advice
- rejecting a recommendation for treatment on emotional rather than rational grounds

1.10 It is central to the Act that adults must **not** be labelled as incapable because of some other circumstance or condition. The assessment of incapacity must be made in relation to the particular matter or matters about which a decision or action is required. An adult assessed as incapable in relation to one matter should not, without proper assessment, be assumed to be incapable in relation to other matters.

1.11 Practitioners looking to assess incapacity for the purposes of section 47(1)(a) of the Act (as amended) should bear in mind that they are assessing incapacity in relation to a decision about the treatment in question. Every possible assistance must be given to the adult to understand his or her own medical condition and the decision that is required in relation to treatment. It may be useful to consider the British Medical Association's guidance on capacity to consent to treatment:

- To demonstrate capacity individuals should be able to:
- Understand in simple language what the treatment is, its purpose and nature and why it is being proposed;
- Understand its principle benefits, risks and alternatives;
- Understand in broad terms what will be the consequences of not receiving the proposed treatment; and
- Retain the information long enough to use it and weigh it in the balance in order to arrive at a decision (British Medical Association 2003).

The last bullet point in the BMA guidance was expanded in Scotland by the Adults with Incapacity (Scotland) Act, which requires that an adult should be able to retain the memory of the decision. However, it would be unreasonable to require that an adult must retain the memory of every decision he or she has made. It would be sufficient for the adult to be consistent in his or her decisions and/or to agree with a record of the decision when presented with it at a later point in time.

It may also be useful to refer to the Mental Welfare Commission guidance on Consent to treatment, which is available at

<http://www.mwscot.org.uk/web/FILES/Publications/MWCCConsenttotreatment.pdf>

1.12 Practitioners should be on guard for signs that the adult, although apparently participating in decision-making, is unduly suggestible, as others may have a vested interest in asserting that the adult is, or alternatively is not, capable of taking decisions on medical matters.

1.13 Carers and relatives will have valuable information about the patient's present and past wishes and feelings but care should be taken not to let them simply answer for the adult, or put words into his or her mouth. They should be asked to differentiate between expression of their own views, which may be relevant, and reporting the known views of the adult.

1.14 It is a statutory requirement to take account of the present and past wishes and feelings of the adult, so far as they can be ascertained by any means of communication appropriate to the adult. Such means of communication could include direct human communication or communication by alternative and augmentative communication systems such as mechanical aids. It will be reasonable to use the help of the adult's relatives, friends, social worker, clergy, or others who may be available and in a position to assist. A multidisciplinary approach is recommended, utilising particularly the services of clinical psychologists, neurologists, speech and language therapists and of qualified and experienced interpreters (including British Sign Language interpreters), where it is reasonable and practicable to do so.

1.15 Enquiries should be made as to whether the adult already has an advocate, appointed from an independent advocacy agency, to assist him/her in understanding decisions to be made and in responding as far as possible. If not, it may be desirable for a patient's advocate to be appointed where the adult has no family member or friend to act as a 'natural advocate' or in circumstances where there is disagreement between interested parties as to the views of the adult. (See Annex 4 for contact details)

1.16 In assessing whether an adult is incapable, it can often be useful to consider what is "normal" for that adult. This will assist in cases where there may be incapacity linked to a psychotic illness, dementia, acquired brain injury or a progressive disease which can involve deteriorating capacity in its later stages. In acquired conditions, what is normal for the adult should be the baseline for assessment of incapacity, not any societal norm. The practitioner should draw on his or her own knowledge of the patient, as well as information from relatives, carers and other professionals, to assess whether there has been a deterioration in the patient's capacity, and the likely duration of that deterioration. Ultimately, however, the central issue is whether the adult retains adequate capacity to take the decision or decisions in question. Patients with fluctuating capacity (for example resulting from delirium or hypomanic conditions) will present particular issues. In such cases, it may be best that a certificate of incapacity should be of short duration to ensure that the patient's freedom is not restricted more than necessary. If a decision can reasonably be deferred until the adult is likely to regain sufficient capacity then in accordance with section 1 principles, it must be deferred.

1.17 It is important to note that an adult with learning difficulties may also experience deteriorating capacity as a result of ageing or illness. Many such patients will be capable of consenting personally to medical treatment given proper explanations and support and it will be important to be alert to the possibility that their capacity may also change over time.

1.18 The practitioner should bear in mind that issuing a certificate of incapacity is a potential restriction of the freedom of the patient. If a patient was capable of consenting to treatment previously there will need to be very careful assessment of why the patient is no longer deemed to be capable of doing so. It will be essential to involve relevant others in reaching that assessment and obtain if possible their agreement that this is the correct way forward.

In some cases involving diminishing or fluctuating capacity it may be helpful to ask whether the patient wishes to consider granting someone power of attorney relating to his personal welfare. This person is called a welfare attorney. A practitioner's assessment of incapacity for the purpose of the certificate may be challenged in court and will have to be well grounded in the Act.

1.19 "Incapacity" is defined in the Act only for the purposes of the Act. The Act recognises that a person may be legally capable of some decisions and actions and not capable of others.

1.20 For the purposes of the Act "incapable" means incapable of

- a. acting; or
- a. making decisions; or
- b. communicating decisions; or
- a. understanding decisions; or
- a. retaining the memory of decisions

in relation to any particular matter, by reason of mental disorder or of inability to communicate because of physical disability or neurological impairment. A person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid.

1.21 The definition of "mental disorder" in the Act refers to the definition in the Mental Health (Care and Treatment) (Scotland) Act 2003. Under that definition, a person is not mentally disordered by reason only of sexual orientation; sexual deviancy; transsexualism; transvestism; dependence on, or use of, alcohol or drugs; behaviour that causes or is likely to cause, harassment, alarm or distress to any other person; or acting as no prudent person would act.

1.22 For the purposes of the Act, incapacity must be judged in relation to particular matters, and not as an "all or nothing" generalisation. Practitioners must be alert to this whenever asked to assess incapacity for the purposes of the Act. Normally an assessment under Part 5 should seek to determine whether the adult:

- Is capable of making and communicating their choice
- Understands the nature of what is being asked and why
- Has memory abilities that allow the retention of information
- Is aware of any alternatives
- Has knowledge of the risks and benefits involved
- Is aware that such information is of personal relevance to them
- Is aware of their right to, and how to, refuse, as well as the consequences of refusal

- Has ever expressed their wishes relevant to the issue when greater capacity existed
- Is expressing views consistent with their previously preferred moral, cultural, family, and experiential background
- Is not under undue influence from a relative, carer or other third party declaring an interest in the care and treatment of the adult

1.23 The assessment will depend on the complexity of the proposed treatment and straightforward procedures may not require this level of investigation. Ultimately, it will be for the professional judgement of the healthcare professional to determine what is appropriate in each case.

1.24 It will also be important to investigate whether any barriers to consent are present, such as sensory and/or physical difficulties, undue suggestibility, the possible cognitive or physical effects of alcohol, drugs or medication, possible effects of fatigue, possible effects of pain and mental health status considerations.

1.25 A number of defining characteristics of incapacity clearly relate to communications skills, such as comprehension and expressive skills. Although many health and social care professionals have an awareness and training in human communication, clinical psychologists and speech and language therapists have a specialist knowledge and expertise. Where doubt exists, available expertise should be called upon to help. There is an absolute obligation to facilitate the exercise of capacity, where possible. Where the adult is enabled to communicate a valid decision, the adult's decision applies.

The term “proxy”

1.26 In this code the term “proxy” is used to mean a guardian, a welfare attorney or a person authorised under an intervention order with power in relation to any medical treatment referred to in section 47. There are requirements under Part 5 of the Act to involve such proxies in decision making about medical treatment and to involve guardians and welfare attorneys who have relevant powers in decisions about research. Part 5 also provides a dispute resolution process where proxies and practitioners do not agree about a treatment decision, or where the practitioner and proxy are in agreement but someone else who has a relevant interest disagrees. The proxy, the practitioner responsible for the treatment of the adult and the person with a relevant interest all have a right of appeal to the Court of Session (see paragraph 1.29).

The role of the Courts

1.27 The sheriff court is the main forum for proceedings under the Act. This also applies to medical treatment matters under Part 5. In particular, a decision by the practitioner who issues the certificate for the purpose of section 47(1) (as amended) that an adult is incapable of consenting to a particular form of treatment, and also a decision to treat the adult, where there is no proxy with power to consent to medical treatment, can be appealed to the sheriff, and thence with leave of the sheriff, to the Court of Session.

1.28 In relation to Principle 4, the requirement to consult, the practitioner who issues the certificate should be aware that under section 4(1) of the Act it is possible for an adult to apply to the sheriff to have the nearest relative displaced, or to have information withheld from the nearest relative. The sheriff may nominate another relative to take the place of the nearest relative or may order that no-one shall exercise the functions of nearest relative. Such applications cannot be made in advance of any incapacity.

1.29 The Court of Session is the forum for appeals in relation to treatment decisions under section 50 (as amended) of the Act, where there has been a dispute between the practitioner who issues the certificate for the treatment of the adult and any proxy with powers relating to the medical treatment in question, or between them and someone else having a relevant interest.

The proxy with powers relating to the medical treatment in question and the practitioner responsible for the treatment of the adult each have a right to appeal a decision where there has been a dispute between them. A person with a relevant interest who disputes a decision which has the agreement of both the proxy and the practitioner also has a right of appeal.

1.30 The sheriff has jurisdiction under section 3(3) to give directions to any person exercising functions under the Act. Anyone with an interest can apply. Directions can be given as to the exercise of functions under the Act and the taking of decisions or action in relation to the adult. A practitioner can if necessary use this procedure to obtain a ruling on any matter of significant doubt or difficulty.

Status of this code

1.31 The Act does not impose a legal duty to comply with the code. However, the code is a statutory document and there may, therefore, in certain circumstances, be legal consequences arising from failure to observe the terms of the code. For example someone might raise a legal action for negligence relying on the code as evidence that the person who issues the certificate did not follow best practice.

1.32 A code cannot foresee all the circumstances that might arise in practice. Should it appear that a detailed requirement of the code conflicts with the application of the general principles to a particular real life situation, the general principles should be followed. If the person who issues the certificate departs from the code, it is essential that he or she record the circumstances and reasoning behind that departure in a document which should become part of the patient's medical record.

1.33 The Scottish Ministers are obliged by the Act to prepare and review this code. It should therefore be followed unless there are good reasons for not doing so, such as those outlined above. It is likely that the courts will have regard to the code in considering matters put before them under the Act.

The Mental Health (Care and Treatment) (Scotland) Act 2003

1.34 The Mental Health (Scotland) Act 1984 has been repealed and replaced by the Mental Health (Care and Treatment) (Scotland) Act 2003. Most of the provisions of the new Act came into force on 5 October 2005.

Examination

1.35 The Adults with Incapacity Act does not deal specifically with the issue of whether a certificate is needed for a medical examination. Physical examination could be considered as medical treatment in the Act's definition, "Any healthcare procedure designed to promote or maintain the physical or mental health of the adult". However a general and non-invasive examination may not always require the issue of a certificate. Careful consideration will need to be given as to whether a certificate is needed for procedures which may be considered fundamental healthcare procedures by a person with capacity but must be approached with sensitivity if an adult with incapacity is involved, such as breast scans, cervical smears, x-rays and blood tests. It is likely that a certificate will be needed for invasive procedures such as endoscopy. In any case where the adult appears reluctant to be examined the issue of a certificate should be considered.

2. MEDICAL TREATMENT UNDER PART 5

Key points in part 2

Part 5 of the Act gives a general authority to treat a patient who is incapable of consenting to the treatment in question, on the issuing of a certificate of incapacity.

The general principles of the Act must be applied by the practitioner who issues such a certificate and giving treatment under it.

The common law authority to treat a patient in an emergency situation remains in place.

The general authority may not be used where a proxy has been appointed and it would be reasonable and practicable for the practitioner who issued the certificate to obtain their consent.

Treatment under Part 5 is subject to exceptions. It cannot authorise certain treatments and can only authorise others subject to additional requirements.

Structure of this part of the code

2.1 This part of the code covers the provisions of Part 5 of the Act in relation to the general authority to treat, apart from dispute resolution which is dealt with in Part 3 of the code. It proceeds so far as possible step by step, following the logical sequence of treatment decisions. It gives the statutory requirements followed by good practice guidance on each step.

The general authority to treat

2.2 Prior to the Act, to treat a patient without the consent of either the patient or a proxy with relevant powers, other than in an emergency, could be considered to be assault. Part 5 means that **provided** a certificate of incapacity is issued for the treatment in question and **provided** the general principles of the Act are observed, the treatment may be given. In deciding whether to issue such a certificate, the healthcare practitioner must apply the general principles of the Act. The healthcare practitioner issuing the certificate should be responsible for the provision of the proposed treatment or in a position to delegate appropriately the responsibility for the provision of the treatment.

2.3 As described in the following paragraphs Part 5 of the Act confers on healthcare practitioners a general authority to treat patients who are incapable of consenting to the treatment in question. This is a helpful clarification of the law. Common law allows medical treatment to be given in an emergency (see 2.40 to 2.42) to patients who cannot consent. This remains the case and there is no need to go through the steps in Part 5 of the Act in order to give treatment for the preservation of the life of the adult or the prevention of serious deterioration in the adult's medical condition. What is appropriate in a particular situation is a matter basically for clinical judgement, against the background of the principles and requirements of the Act.

Who may exercise the general authority to treat

2.4 Medical treatment is defined by the Act to include “any procedure or treatment designed to safeguard or promote physical or mental health”. Authority to do what is reasonable in the circumstances in relation to medical treatment is set out in section 47 of the Act. It applies under subsection (1A) to the medical practitioner primarily responsible for the medical treatment of the adult and under subsection (3) to any other person authorised by him or her and acting on his behalf under instructions, or with his or her approval and agreement.

The Smoking Health & Social Care (Scotland) Act 2005 amends section 47 so as to extend the authority to grant a certificate under section 47(1) to health professionals other than 'registered medical practitioners' provided they have successfully completed relevant training in the assessment of incapacity.¹ The other professionals included in section 35(2)(b) of the 2005 Act are dental practitioners, ophthalmic opticians (optometrists) and registered nurses. Additionally, the Act includes a regulation making power which allows Scottish Ministers to add further groups of healthcare professionals, if desirable. A certificate issued by healthcare professionals other than 'registered medical practitioners' will only be valid within their area of practice e.g. a dentist could only authorise dental treatment.

2.5 This authority is obtained by completion of the certificate of incapacity. A copy of the certificate can be found at Annex 3 of this code.

2.6 There will be circumstances where an adult is admitted to hospital at night or at other times. If in these circumstances treatment has to be authorised under section 47 of the Act (as amended), the medical practitioner primarily responsible normally will be the doctor who is in attendance.

2.7 Healthcare is a team effort. The authority granted under section 47 (as amended) may be exercised by the person who issues the certificate or be delegated to another person acting under his or her instructions or with his or her approval or agreement.

2.8 A husband or wife who assists a spouse to take medication prescribed by a doctor does not need delegated authority to do so. The need for delegation of authority arises in cases where treatment that would normally be carried out by a practitioner authorised under section 47(1) of the Act (as amended) is carried out by any other person.

2.9 The Act is not intended to affect the position of practitioners' civil liability. Liability for negligent treatment remains with the negligent practitioner. What he or she can do is to certify in accordance with subsection 47(1) of the Act (as amended) that the adult is incapable in relation to a decision about such treatment.

The certificate of incapacity

2.10 Under subsection 47(1) of the Act (as amended), the general authority to treat is triggered when the person who is authorised to issue a certificate of incapacity is of the opinion that the adult is incapable in relation to a decision about the medical treatment in question.

¹ Subsequently prescribed by the Adults with Incapacity (Requirements for Signing Medical Treatment Certificates) Scotland) Regulations 2007.

2.11 Under subsection 47(5) (as amended), the certificate of incapacity has to be in a prescribed form and must specify the period during which the authority remains valid, being a period which the person who issues the certificate for the medical treatment of the adult considers appropriate to the condition or circumstances of the adult; but does not exceed one year; or if, in the opinion of the practitioner issuing the certificate any of the conditions or circumstances prescribed by the **Adults with Incapacity (Conditions and Circumstances Applicable to Three Year Medical Treatment Certificates) (Scotland) Regulations 2007** applies as respects the adult, 3 years, from the date of the examination on which the certificate is based.

2.12 The maximum duration of 3 years is dependent on the nature of the illness from which the patient is suffering particularly where the level of incapacity may vary or recovery may be anticipated. A certificate of 3 years would only be appropriate where, in the view of the practitioner who issues the certificate, a patient was suffering from at least one of the following conditions:

- Severe or profound learning disability, or
- Severe dementia, or
- Severe neurological disorder,

which causes the adult to lack capacity in respect of decisions about medical treatment as defined in section 47 of the Act (as amended) and which is unlikely to improve and for which no curative treatment is available.

a. 2.13 It is good clinical practice however to review the capacity of the patient on a regular basis and where a treatment plan exists could be reviewed annually. Where a practitioner would normally review and seek fresh agreement from a competent patient, that may well be the appropriate point at which to review and re-certify in relation to a patient, the same principle should apply.

2.14 To demonstrate that the practitioner has fulfilled the requirements of section 47(3) of the Act (as amended), it is good practice to record such instructions, approval or agreement in the patient's medical record.

2.15 Four matters must be considered before completing the certificate of incapacity. Firstly, the practitioner issuing the certificate must have in contemplation some treatment, whether acute or continuing. A medical practitioner primarily responsible for the medical treatment of the adult may issue a certificate in respect of any medical treatment, whereas any other healthcare professional authorised to issue a certificate may only do so for the kind of treatment for which they are responsible. Secondly, the practitioner must be satisfied that the adult is incapable in relation to a decision about the treatment in question. Thirdly, if the person issuing the certificate is aware of the existence of a proxy with welfare powers, that person should, where it is reasonable and practicable to do so, obtain the consent of that proxy. Fourthly, the proposal for treatment must be consistent with the general principles laid down in section 1 of the Act.

2.16 It would be unreasonable, impractical and unnecessary to issue a separate certificate of incapacity for every health care intervention in some people.

For example, an adult with dementia in a nursing home may have multiple physical and mental health care needs in addition to a requirement for fundamental procedures to ensure nutrition, hydration, elimination, etc. On the other hand, a single certificate of incapacity is entirely appropriate when an adult requires a single procedure e.g. an operation. The Act specifies, under section 47(2) (as amended), that “the person who by virtue of subsection (1) has issued a certificate for the purposes of that subsection shall have ... authority to do what is reasonable in the circumstances, in relation to the medical treatment, to safeguard or promote the physical or mental health of the adult”. This could cover not only the operation but also post-operative medical care and pain relief. It is therefore clear that the certificate of incapacity, as designed, will provide an effective and workable means for managing single healthcare interventions but requires careful completion for a person who needs multiple interventions. A possible way to complete the certificate would be by reference to a treatment plan.

Use of Treatment Plans

2.17 For adults requiring multiple or complex healthcare interventions, it is recommended that a treatment plan similar to that suggested at Annex 5 may be drawn up. The treatment plan could outline the healthcare interventions that can be foreseen over the time specified in the certificate of incapacity and may be attached to the certificate of incapacity and held in the adult's case record. The practitioner could write in the line *following “incapable within the meaning of the Adults with Incapacity (Scotland) Act (the 2000 Act) in relation to a decision about the following medical treatment”* the phrase "See attached treatment plan". The treatment plan could contain a list of interventions along with a judgement from the practitioner regarding the adult's capacity to consent to these interventions. The exact content of the treatment plan will be negotiable. The practitioner should follow the general principles of the Act in formulating a plan and seeking the views of other relevant people. The practitioner must strike a balance between a plan that is too broad and therefore at odds with the principles of the Act, and one that is too narrow and might need to be changed on a frequent basis to the detriment of the adult's general health. A plan which is not broad enough is no less inconsistent with the Act's principles and purpose than one which is unnecessarily broad.

2.18 Treatment plans for the physical care of patients are an accepted part of nursing care, although the term 'care plan' is normally used. The completion of these plans is usually part of the general nursing requirement for the patient.

2.19 Examples of treatment plans are shown in Annex 5. It would be appropriate and in keeping with the Act to append any documentation used to outline the management of the adult's healthcare. This could include a chronic disease management plan or a standard review schedule for people in continuing hospital care. The suggested plan in Annex 5 is only a suggestion for an outline of a plan where no other format exists.

2.20 There are certain healthcare procedures to which all adults are entitled. These need not be listed individually on the form but might be included under a general heading of "Fundamental Healthcare Procedures".

This will include nutrition, hydration, hygiene, skin care and integrity, elimination or relief of pain and discomfort, mobility, communication, eyesight, hearing, and oral hygiene. These treatments may require some examination of the adult. Treatment plans might also appropriately include immunisation against influenza, in accordance with the guidance issued annually by the Chief Medical Officer.

2.21 The treatment plan could include a list of conditions for which treatment is required or foreseen in order to safeguard or promote the physical or mental health of the adult. *For example, a treatment plan for an adult in a nursing home suffering from cerebrovascular dementia may need interventions in the areas of coronary heart disease, hypertension, stroke, depression, and sleep.* The interventions would be listed on the treatment plan along with a judgement, in the right hand column, as to whether the adult can or cannot consent to the intervention.

2.22 No treatment plan of this sort can authorise interventions that would normally require the signed consent of the adult. A separate certificate of incapacity will be required for each intervention of this type. *For example, if the adult in paragraph 2.21 needs heart surgery, this will not be included in the authority to treat under "coronary heart disease" and will require a separate certificate and separate consultation.* Note also that, no treatment specified in regulations as needing special safeguards can be included in the treatment plan. (See paragraphs 2.62 to 2.63).

2.23 During the period specified by the certificate of incapacity, other conditions may come to light requiring healthcare interventions. Where this is a single, time-limited intervention, it may be appropriate to write a separate certificate of incapacity to cover this. However, if a condition requiring continuing intervention occurs, it may be necessary to rewrite a treatment plan, if used. A new certificate will need to be issued where any new plan goes beyond the scope of the existing certificate.

2.24 The treatment plan should include names and designations of people consulted. These should include a relative of the patient and must include the patient's welfare attorney or guardian or person authorised under an intervention order if such a person exists and where such a person has authority to consent to treatment on behalf of the adult. Where the adult is in institutional care, consultation with a senior member of care staff should be recorded.

2.25 Where the adult suffers from a disorder that is likely to cause continued incapacity to consent to medical treatment, the practitioner should routinely review treatment no less often than annually. Such a review should consider the present and likely future healthcare needs of the adult. Any other healthcare professionals providing care and treatment should be involved. As the review must follow the principles of the Act, it would be essential to consider the adult's views on treatment. Any welfare proxy where known, or the adult's nearest relative should also be given the opportunity to input to the review.

Seek consent of a proxy with welfare powers, where reasonable and practicable

2.26 The Act requires that even where a proxy has been appointed, a certificate under section 47(1) of the Act (as amended) must also be completed. When considering the issue of a certificate, the practitioner should ascertain whether it would be reasonable and practicable to seek the consent of a proxy with welfare powers. A proxy may be a guardian, a welfare attorney, or a person authorised under an intervention order. (See also paragraphs 2.72 to 2.78 for more detailed guidance on this matter.) It will be desirable for any proxy to make himself or herself known as soon as it appears that capacity is failing or has been lost. If the existence of a proxy with powers to consent to treatment on behalf of the adult is suspected but not known, it would be good practice for the practitioner to check with the adult's close relatives. Contact can also be made, where practicable, with the Public Guardian who will be able to check his registers and provide the name and contact details of any proxy with welfare powers appointed in terms of the Act. The local authority social work department may also have this information.

Apply the general principles to the treatment in contemplation before the certificate is issued

2.27 In deciding to certify the adult's incapacity, the practitioner must apply the general principles to the situation. The practitioner must be satisfied that the treatment would:

2.27.1 Be likely to benefit the adult, and that the potential benefit cannot reasonably be achieved without treatment; and

2.27.2 Be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the treatment. This should include, among other things, considering the duration of the certificate.

The maximum duration is three years, but it will often be appropriate to set down a shorter period. The duration should be related to the expected duration of the incapacity and of the treatment in prospect. Treatment without legal authority is not an option.

Take account of the wishes of the adult

2.28 The person who issues the certificate must also take account of the present and past wishes and feelings of the adult in so far they can be ascertained by any means of communication. This is an unqualified obligation. Guidance on communicating with the adult is given in this Code at paragraphs 1.8 to 1.25 under the heading of *Assessment of incapacity*. The best person to give an account of his or her wishes or feelings is the adult. However if verbal communication is impossible, other methods of communication should be used. If the patient's ability to comprehend information and respond to it appropriately is found to be very limited, other sources of information will have to be used.

Non-verbal communication may be taken into account, for example if the patient shows unusual distress at the mention of a particular kind of treatment or the sight of particular apparatus or instruments, even after attempts to reassure have been made. Practitioners are also able to seek assistance from the relevant speech and language therapy service for advice and support in assessing and responding to an individual's receptive and expressive communication capacity.

2.29 Medical records may record the past wishes of the adult from earlier contacts with the medical profession. It will be essential to try to ascertain the adult's past wishes and feelings from those who know him or her. While these reports should be taken into account, the practitioner should guard against taking at face value everything that relatives or carers say about the adult's past wishes and feelings, in case these have been misunderstood or are being misrepresented. If time allows and it is feasible to do so, it may be appropriate to contact the patient's solicitor, member of the clergy or other adviser to ascertain whether the patient at any time in the past expressed wishes or feelings on the subject of his or her medical treatment.

2.30 A competently made advance statement made orally or in writing to a practitioner, solicitor or other professional person would be a strong indication of a patient's past wishes about medical treatment but should not be viewed in isolation from the surrounding circumstances. The status of an advance statement should be judged in the light of the age of the statement, its relevance to the patient's current healthcare needs, medical progress since the time it was made which might affect the patient's attitude, and the patient's current wishes and feelings. An advance statement cannot bind a practitioner to do anything illegal or unethical. An advance statement which specifically refuses particular treatments or categories of treatment is called an 'advance directive'. Such documents are potentially binding. When the practitioner contemplates overriding such a directive, appropriate legal and ethical guidance should be sought.

2.31 The person who issues the certificate will also need to take account of the views of the nearest relative or anyone nominated by the sheriff and primary carer, in so far as it is reasonable and practicable to do so, and of anyone else with an interest in the welfare of the adult. However, this does not require the practitioner to go to undue lengths to seek out such people. It would be good practice to make enquiries of the adult's visitors, social work officer or other personnel currently involved with the adult and make such contacts with relatives as are reasonable and practicable in the circumstances, distinguishing between the personal views of such people, and light they are able to shed on the adult's own views.

2.32 A welfare attorney, and a welfare guardian, have responsibility for encouraging the adult to exercise residual capacity. This does not mean that a patient who is very unwell must be encouraged to decide things for him or herself at all costs, but it does mean that if a practitioner consults an existing proxy about medical treatment, that proxy has a duty to encourage the adult to participate in the medical decision. Practitioners exercising a general authority to treat under section 47(2) of the Act (as amended) do not have this obligation but should try to do so as a matter of good practice. They should be alert to the legal obligation on a proxy who

is involved in a medical decision to do so, and it will be good practice for the practitioner to give appropriate co-operation.

2.33 Where the present wishes and feelings of the adult, so far as they can be ascertained, appear to contradict clearly expressed past wishes and feelings then the most recently expressed view/wish, made while the adult had capacity will prevail.

Meaning of “treatment”

2.34 Under subsection 47(4) of the Act, “medical treatment” includes any procedure or treatment designed to safeguard or promote physical or mental health. Under subsection 47(2) of the Act (as amended), subject to certain exceptions discussed below, the person who by virtue of subsection (1) has issued a certificate for the purposes of that subsection shall have, during the period specified in the certificate, authority to do what is reasonable in the circumstances, in relation to the medical treatment, to safeguard or promote the physical or mental health of the adult. A single certificate may cover multiple treatments (see paragraphs 2.17 to 2.25), which may be facilitated by the use of treatment plans.

2.35 Treatment should depend on clinical need. There is nothing in the Act that would justify discrimination of any form between a patient with and a patient without capacity. The Act is designed to ensure that as far as possible adults with any incapacity have equity of treatment and choice with adults with capacity. The mechanism under section 47 of the Act (as amended) allows for the person who issues the certificate to proceed without the consent of the patient or a proxy where this consent is not available. The certificate authorises the treatment to proceed in the absence of the consent that a capable patient would have given.

2.36 Capacity should be assessed in relation to a decision about the medical treatment in question. In other words, an adult assessed as incapable in relation to one treatment should not necessarily be assumed to be incapable in relation to others. This consideration may, for example, be relevant in relation to interventions such as oral hygiene, taking of routine blood tests or immunisation. What is appropriate in a particular situation is a matter basically for clinical judgement, against the background of the principles and requirements of the Act. Judgement on an individual’s incapacity to consent to any particular treatment should be based on an informed assessment of that incapacity.

2.37 Generally, treatment will involve some positive action. Simple failure to do anything for a patient would not be treatment. However a decision not to do something must accord with section 1 principles. It is difficult to conceive of circumstances in which a practitioner would take no steps at all in relation to a patient.

2.38 It would therefore be good practice to make an assessment and complete a certificate of incapacity – accompanied as appropriate by a treatment plan - where the conditions in section 47(1) of the Act (as amended) apply, whatever the treatment contemplated.

2.39 Treatment includes any procedure designed to promote or safeguard physical or mental health. Where the patient is unable to consent and there is no proxy with the necessary authority to do so, healthcare professionals will be unable to administer the treatment without instructions from, or the approval or agreement of a practitioner who has issued a certificate of incapacity. Good liaison will be needed between the practitioner and others providing healthcare at local level to ensure that such certificates are requested and issued at the appropriate times. Patients themselves and their carers should be made aware of the need for such a certificate by the provision of appropriate information by NHS Boards through all appropriate outlets.

Emergencies

2.40 The Act specifically preserves existing grounds on which treatment may be given. In such circumstances the provisions of the Act are an addition to, rather than a substitute for other grounds on which medical intervention can be authorised. This is particularly so in the case of emergencies. However, the provisions of the Act were introduced with a view to avoiding the uncertainties which existed under the law as to the precise circumstances in which treatment could be given. It could therefore offer added confidence to the practitioner and would also be good practice to make use, so far as reasonable and practicable, of the procedures under Part 5 if this is without risk to the patient. However, it would be contrary to good practice to risk prejudice to a patient's health through any delay in providing necessary treatment, in order to give effect to the procedures under Part 5 of the Act.

2.41 The division between cases where treatment is necessary for the preservation of life or to prevent serious deterioration, urgent cases, a necessity to treat and routine matters is not always clear-cut. What underlies the concepts of emergency and necessity is the issue of immediacy. The definition of emergency will vary slightly from specialty to specialty. There will of course be clinical situations where urgent treatment is required to save life – for example in maternity units or Accident & Emergency Departments, or when the patient is found unconscious through illness or injury. In such circumstances, a decision must often be taken and acted upon within seconds or minutes, if a fatality or severe damage is to be avoided. In other specialties, however, situations can take much longer to develop. An adult could require lifesaving surgery but there may be a period while they are being rehydrated and given antibiotics before they have an anaesthetic and operation. In this time, the practitioner responsible for the treatment could have time to consult and complete the certificate.

2.42 In all normal circumstances, the procedures set out in Part 5 of the Act should be followed. The basic judgement as to whether or not there is time to complete the appropriate certificate and undertake the processes associated with its completion is essentially a medical judgement in the first instance. Ultimately, however it will be for the courts to decide whether a practitioner has acted improperly in failing to secure the authority provided by a certificate under section 47 (as amended) of the Act. It is

recommended that the authority be used in every case where it is reasonable and practicable to do so.

Change of circumstances

2.43 Subsection 47(6) of the Act (as amended) provides that if, after issuing a certificate, the person who issued it is of the opinion that the condition or circumstances of the adult have changed, he may

- a. Revoke the certificate.
- b. Issue a new certificate specifying such period not exceeding one year; or if, in the opinion of that person any of the conditions or circumstances prescribed by the Scottish Ministers apply as respects the adult, 3 years, from the date of revocation of the old certificate as he considers appropriate to the new condition or circumstances of the adult.

2.44 This could apply if the adult's incapacity changes, for example a person with learning difficulties develops dementia, or if the adult's medical condition changes. A change of circumstances could include a significant difference between the type or duration of treatment contemplated when a certificate was first signed, and the treatment that subsequently turns out to be clinically indicated. If this happens, it would be good practice to revoke the first certificate and make out a new certificate covering the new treatment. Good practice would indicate that if a capable patient would have been asked for consent to a change in treatment owing to a new diagnosis or developing knowledge of his or her medical condition, then an incapable patient ought to be subject to a new certificate. The issue of any new certificate would require a fresh assessment of the patient, just as revocation would. There will, however, be cases where a relatively general wording in the certificate will be the most appropriate action. This will obviate developing a multiplicity of certificates where the patient's condition or diagnosis develops rapidly or is complex. It will of course be essential to keep the adult's condition and capacity to consent under regular review.

Change of practice

2.45 Where the person who issues the certificate of incapacity ceases to be primarily responsible for the adult's treatment (for instance, if the adult moves elsewhere, or the practitioner retires or moves to another post) and another practitioner takes over responsibility, that new practitioner should review the adult's circumstances. If the new practitioner believes that the adult's circumstances have not changed since the issue of the original certificate, it may continue to apply until its expiry date. If, however, the new practitioner believes that the adult's circumstances have changed, the new practitioner can revoke the original certificate and, if necessary, issue a new one.

Matters not covered by the general authority to treat

2.46 There are several exceptions to the general authority to treat. These are discussed below.

Treatments falling under the Mental Health (Care and Treatment)(Scotland) Act 2003

2.47 It is not always necessary to detain an adult formally under the 2003 Act because they are unable to consent to treatment for mental disorder. If an adult with incapacity who is not formally detained under the 2003 Act requires treatment for a mental disorder, this may be given under the 2000 Act. If the adult resists that treatment, this should be taken as an indication of the adult's wishes, which must be taken into account in terms of section 1 of the 2000 Act. Consideration should be given to whether it would be appropriate that they should be formally detained under the 2003 Act in order that they might benefit from the added protections which that Act offers. Advice may be sought from a psychiatrist or mental health officer. In difficult cases, the Mental Welfare Commission may be able to advise.

2.48 The authority to treat under section 47(2) is subject to sections 234, 237, 240, 242 and 243 of the Mental Health (Care and Treatment)(Scotland) Act 2003 ("the 2003 Act"). These sections may be found in part 16 of the 2003 Act. Part 16 applies to all patients where the giving of medical treatment to them has been authorised by virtue of the 2003 Act, or similar provisions in the Criminal Procedure (Scotland) Act 1995. Safeguards for neurosurgery for mental disorder (NMD) and the treatment known as "deep brain stimulation" (DBS) extend to any person with a mental disorder for whom these treatments are considered, that is even where the patient is an informal patient and not subject to compulsory measures under the 2003 Act. This means that these treatments cannot be given to patients under Part 5 of the Act unless the conditions in section 236 of the 2003 Act are fulfilled. The opinion of the patient's responsible medical officer (or where the patient does not have a responsible medical officer, the medical practitioner primarily responsible for treating the patient), a designated medical practitioner and 2 lay persons appointed by the Mental Welfare Commission is required.

Where the patient is incapable of consenting, the responsible medical officer must also apply to the Court of Session and the Court must make an order authorising the treatment specified. It would not be expected that a patient under 20 years of age would be considered for such treatments. (DBS is a specified treatment under the Mental Health (Medical treatments subject to safeguards)(section 234) Regulations 2005 (SSI2005/291))

2.49 Part 16 of the 2003 Act covers treatment for mental disorder generally. It also provides additional safeguards for the following treatments:

- ECT, transcranial magnetic stimulation (TMS) and vagus nerve stimulation (VNS) (TMS and VNS are specified treatments under The Mental Health (Medical treatments subject to safeguards)(section 237) (Scotland) Regulations 2005 (SSI2005/292))
- Safeguards apply after 2 months for drug treatments (where the adult's consent OR a second opinion by a doctor appointed by the Mental Welfare Commission is required)
- Safeguards apply immediately for the following treatments (where the adult's consent OR a second opinion by a doctor appointed by the Mental Welfare Commission is required)
- any medication (other than surgical implantation of hormones) given for the purpose of reducing sex drive;
- provision of nutrition to the patient by artificial means;
- such other types of treatment as may be specified in regulations under section 240(3)(d)

2.50 Where an adult is formally subject to compulsory care and treatment including treatment under part 16 of the 2003 Act any treatment for mental disorder must be authorised under that Act rather than by the 2000 Act. Treatment which is authorised to be given without consent under Part 16 of the 2003 Act may be given where the patient is assessed as being unable to consent due to incapacity. The treatment provisions in the 2000 Act cannot override the need for a patient's consent and/or a second opinion under sections 235, 236, 238, 239, 240, 241 and 242 of the 2003 Act.

2.51 Part 16 of the 2003 Act does not apply to treatments for physical conditions unrelated to the mental disorder. Therefore, if a patient is subject to the provisions of the 2003 Act and requires treatment for a physical condition they should be assessed for their capacity to consent to such treatment and, if appropriate, treatment considered under the provisions of the 2000 Act.

2.52 There are some situations where the 2003 Act authorises detention, but does not authorise treatment for mental disorder. However, these situations essentially relate to emergency detention for short periods. In such cases, treatment for mental disorder may be given under Part 5 of the 2000 Act where the adult is assessed as being unable through incapacity to consent to such treatment. If treatment is required during these periods, it is likely to be on an emergency basis, and may

require to be carried out using the common law (see paragraph 2.3). The relevant provisions are:

- a nurse's power to detain pending a medical examination under section 299
- the power to hold a person under the provisions relating to removal to a place of safety under sections 293 and 297
- a warrant granted under a local authority's duty to inquire under section 35
- an order under section 60C of the Criminal Procedure (Scotland) Act 1995, where an acquitted person may be detained for medical examination

2.53 Any patient detained by virtue of the above provisions must therefore provide consent to any treatment for mental disorder. The exception is that a patient detained under an emergency detention certificate issued under section 36 of the 2003 Act may be given urgent treatment administered under the provisions of section 243, without their consent.

2.54 A certificate authorising such treatment under the 2000 Act should only be made out for the shortest possible period. It would not be good practice to continue to treat a patient detained under the above provisions for longer than absolutely necessary. For someone who is no longer formally detained, but who is not objecting to remaining in hospital, or who can be treated in the community, Part 5 of the 2000 Act can continue to be used.

2.55 The Mental Health (Care and Treatment) (Scotland) Act 2003, came into operation on 5 October 2005.

The use of force or detention

2.56 Subsection 47(7) of the Act prohibits the use of force or detention, unless it is immediately necessary and only for so long as is necessary in the circumstances. The interpretation of this will depend on the particular circumstances of each case, but the principles set out in section 1 of the Act must be applied. So, for example, the *degree* of force applied must be the minimum necessary. Where an adult shows continued resistance to treatment for mental disorder consideration should be given to making use of the options available under mental health legislation.

2.57 It may be helpful to refer to the Mental Welfare Commission Scotland's guidance "Rights, Risks and Limits to Freedom", which is available on the MWC's website at

http://www.mwscot.org.uk/web/FILES/Publications/Rights_Risks_web.pdf

Useful guidance may also be found in the Scottish Commission for the Regulation of Care's National Care Standards, which can be obtained from The Stationery Office.

2.58 Placing the adult in hospital for treatment for mental disorder against his or her will can only be carried out by making an application formally to detain the adult in hospital under the 2003 Act. However, where it is not against the patient's will, treatment by way of admission to hospital may be permitted under the 2000 Act.

2.59 Where an adult lacks capacity and resists treatment for physical disorder, consideration should be given to an application for Welfare Guardianship.

This would allow the Sheriff to make an order that the adult complies with the decision of the guardian. Alternatively, in cases where the adult may recover capacity, it may be more appropriate to seek an intervention order to authorise the required treatment.

Covert medication

2.60 The use of covert medication is permissible in certain, limited circumstances e.g. to safeguard the health of an adult who is unable to consent to the treatment in question, **where other alternatives have been explored and none are practicable**. Healthcare staff should not give medication except in accordance with the law, and even where the law allows its use it should not be given in a disguised form unless the adult has refused and their health is at risk because of this. Staff are obliged to record this in the patient's records. Practitioners who may be requested to administer covert medication should make themselves fully aware of the guidance of their own professional bodies. It may also be helpful to refer to the Mental Welfare Commission Scotland's guidance documents "Consent to Treatment" and "Covert Medication – a legal and practical guide" which are both available on the MWC's website at

http://www.carecommission.com/index.php?option=com_content&task=view&id=4365&Itemid=152

Treatments regulated under section 48(2) of the Act

2.61 Under the provisions of section 48(2) of the 2000 Act certain irreversible or hazardous treatments may not be given with the sole authority of a certificate of incapacity under section 47(2) (as amended), though it is still necessary for a certificate to be issued. The administration of these treatments is subject to regulations made under section 48 of the Act, The Adults with Incapacity (Specified Medical Treatments) (Scotland) Regulations 2002, available at:

<http://www.opsi.gov.uk/legislation/scotland/ssi2002/20020275.htm>

Such treatments or types of treatment may not be given to any patient who is unable to consent to them except in the specific circumstances and with the specific approvals detailed in the regulations. The treatments specified by the regulations are:

- Sterilisation where there is no serious malfunction or disease of the reproductive organs
- Surgical implantation of hormones for the purpose of reducing sex drive
- Drug treatment for the purpose of reducing sex drive, other than surgical implantation of hormones
- Electro-convulsive therapy (ECT) for mental disorder

- Abortion
- Any medical treatment which is considered likely by the medical practitioner primarily responsible for that treatment to lead to sterilisation as an unavoidable result.

2.62 A supplementary Code of Practice (NHS HDL (2002) 50) was issued on 17 June 2002. The supplementary Code of Practice contains details of the Regulations related to excepted treatments which came into force with Part 5 of the Act on 1 July 2002. This supplementary Code remains valid.

Welfare guardians and attorneys

2.63 Welfare guardians and attorneys may not consent on behalf of the patient to any treatment which is regulated under section 48(2) of the Act by the Adults with Incapacity (Specified Medical Treatments) (Scotland) Regulations 2002. However, the views of the welfare guardian or attorney should be taken into account when considering treatment falling within the scope of the regulations, and any exceptions to their authority.

Where there is a criminal law prohibition

2.64 The Act introduced a new criminal offence. Under section 83 it shall be an offence for any person exercising powers under the Act relating to the personal welfare of an adult to ill-treat or wilfully neglect that adult. The penalties are on summary conviction up to 6 months imprisonment or a fine of up to £5000 or both and on indictment up to 2 years imprisonment or a fine or both. For example, a practitioner who issued a certificate of incapacity under the Act and then ill-treated or wilfully neglected the adult would be liable to prosecution for this offence, as would anyone acting on his or her instructions or with his or her approval or agreement. Similarly a guardian or a proxy with power to make decisions on medical treatment who ill-treated or neglected the adult would be liable to prosecution.

2.65 The Act does not affect the existing criminal law whereby anybody who acted in such a way towards another person as to unlawfully cause or hasten his or her death would be guilty of a criminal offence. Neither does the Act change the law in relation to euthanasia, which remains a criminal act under Scots Law.

2.66 Any health or social care professional, like any individual, who acts by any means - whether by withholding treatment or by denying basic care, such as food and drink - with euthanasia as the objective, is open to prosecution under criminal law. Nothing in the Act authorises any action that is intended to bring an end to the adult's life. Where practitioners consider withholding any care or treatment that might prolong life, or in the interests of patient safety, they must do so in accordance with the guidance produced by the General Medical Council *Withholding and Withdrawing - Guidance for Doctors*. This can be found at:

http://www.gmc-uk.org/guidance/ethical_guidance/withholding_lifeprolonging_guidance.asp

2.67 The criminal law and the general principles of the Act are consistent on this point. Part 5 only authorises the issuing of a certificate, and the provision of medical treatment under it, if it will benefit the adult and there is no reasonable way of achieving the benefit without the intervention.

Nothing in the Act authorises acts or omissions which harm, or are intended to bring about or hasten the death of, a patient.

2.68 All interventions under the Act (including some omissions to act) must comply with the general principles that all interventions must benefit the adult, and that any intervention must be the least restrictive option in relation to the freedom of the adult. Clearly, an intervention under Part 5 of the Act which adversely affects the well-being of an adult or causes harm or even death to that adult cannot be described as bringing a benefit to that adult. Section 47 of the Act (as amended) only allows intervention to “safeguard or promote the physical or mental health of the adult”. This does not impose a duty to provide futile treatment or treatment where the burden to the patient outweighs the clinical benefit. An intervention which would not produce any benefit would contravene the first principle.

Where there is or could be a conflicting court decision

2.69 Section 47(7)(b) provides that the general authority does not cover action which would be inconsistent with any decision by a competent court.

2.70 Section 47(9) provides that where any question as to the authority of any person to provide medical treatment under the general authority is subject to an application to the court (other than in the case of a specified treatment) and that application has not been determined, the treatment shall not be given. However it is still possible to give treatment where it is necessary to preserve life or prevent serious deterioration in the adult’s medical condition. This would include circumstances where a deterioration would not be immediate but the need for treatment to prevent such deterioration is immediate. It is less clear whether action taken to prevent circumstances arising in which patients’ prospects of a full or more complete recovery are inhibited would be covered by the concept of “prevention of serious deterioration” in all cases. Where practicable the view of the court in question should be taken. It is thought, however, that conventional treatment designed to maintain the patient’s prospects of full recovery may, in many circumstances, be considered to be for the prevention of serious deterioration in the adult’s medical condition.

2.71 Section 47(10) and section 49(3) provide that nothing shall authorise the provision of any medical treatment where an interdict has been granted and continues to have effect prohibiting the provision of such medical treatment.

Where there exists or there is an application to appoint a proxy with powers to consent

2.72 Section 49 of the Act (as amended) prevents treatment, except for the preservation of life or the prevention of serious deterioration, if there is an application

before the sheriff for an intervention order or guardianship order with power in relation to the treatment and that application has not yet been determined. Practitioners should have early discussions with the applicants for such powers where possible, with regard to any potential treatments which would or would not require consultation with them.

2.73 The prohibition only applies where this is within the knowledge of the practitioner. There is no need to make disproportionate effort to find out whether there is such an application but it would be good practice to check with the adult's relatives and social work officer, if they have any, whether they are aware of such an application. The code of practice for persons authorised under intervention orders and guardians makes clear that applicants for relevant powers should make themselves known to the adult's practitioner. This is also required by the principles, because it would be an unnecessary intervention to follow section 47 procedure if a proxy with relevant powers is about to be appointed.

2.74 Subsection 50(2) of the Act disapplies the general authority where there is a proxy (guardian, welfare attorney or person authorised under an intervention order) with powers in relation to the medical treatment **and** the person who issued the certificate for the purposes of section 47 (1) is aware of the appointment **and** it would be reasonable and practicable to obtain the proxy's consent but he or she has failed to do so.

2.75 Persons authorised under intervention orders and guardians with relevant powers should make themselves known to the practitioner who is treating the adult and this information should be clearly displayed in a prominent place in the adult's medical notes. However, it would be good practice to check with close relatives and/or the adult's social work officer (if any) whether such an appointment is known to them. Details of proxies should be systematically recorded in relevant medical records. If the practitioner considers that some further steps should be taken to ascertain whether there is such a proxy, this can be done most readily by contacting the Public Guardian, for those appointed after the Act came into effect.

2.76 If the existence of a proxy is identified, the practitioner should consider whether it would be reasonable and practicable to postpone the treatment until it has been possible to obtain the proxy's consent. It would be reasonable to do so if the proxy is visiting the adult in hospital regularly, or regularly accompanies the adult to outpatient, dental, optometrist or GP/practice nurse appointments. If the proxy is not someone with whom the practitioner otherwise has contact, he or she should ascertain whether the proxy can be readily contacted to discuss the matter face to face. If the existence of an application for an intervention order or a guardianship order with power in relation to the medical treatment is identified, the practitioner must not give any medical treatment unless it is authorised by any other enactment or rule of law for the preservation of the life of the adult or the prevention of a serious deterioration in his or her medical condition.

2.77 Attorneys may be individuals or professionals such as solicitors. Welfare guardians and persons authorised under an intervention order may be individuals,

professionals or social work officers exercising guardianship powers delegated by the chief social work officer. Proxies who are acting in a professional capacity should be prepared to make time to discuss the adult's treatment even if they do not have day to day contact with the adult. For private individuals, much will depend on their accessibility. It is reasonable to expect that proxies with power in relation to medical treatment will make themselves available to consult with practitioners.

Although there will be times that the proxy is unavailable, simple failure to respond should be reported to the appropriate authorities. Everything will depend on the particular circumstances of the case, but it is expected that proxies will have a continuing interest in and knowledge of the adult, and should be contacted.

2.78 It may emerge in the course of seeking a proxy's consent that the adult is not receiving the attention he or she should from that proxy in terms of the proxy's duties. In such circumstances it would be good practice for the practitioner to take some action to draw this to the attention of the authorities. Local authorities have a statutory duty to investigate complaints received about welfare proxies, and the practitioner should contact the local authority for the area in which the adult normal resides if he or she considers that a proxy is not acting properly. If in doubt, the practitioner may also be able to receive guidance from the Public Guardian, the Mental Welfare Commission or a range of voluntary bodies (see contacts list in Annex 4).

3. DISPUTE RESOLUTION

Key points in part 3

It is best to proceed with consensus on medical treatment matters; but consensus is not always attainable.

In the event of a dispute with a proxy, the practitioner who issued the certificate has recourse to the MWC's list of Nominated Practitioners.

Proxies have a right to be consulted by, and to choose their own nominee to be consulted by, the Nominated Practitioner.

If the Nominated Practitioner agrees with the practitioner who issued the certificate, the treatment may be given.

If the Nominated Practitioner agrees with the proxy, the practitioner who issued the certificate may appeal to the Court of Session.

The practitioner primarily responsible for the medical treatment of the adult or any other practitioner having an interest may apply to the Court of Session for a determination as to whether the treatment should be given or not.

Procedure under section 50

3.1 Section 50 of the Act (as amended) envisages that a proxy with powers which cover the proposed treatment should be given the opportunity to consent to the proposed medical treatment wherever reasonable and practicable. Where such a proxy consents, that consent is sufficient authority to proceed.

Disputes

Disagreements between proxies (or other interested parties) and practitioners

3.2 Even after discussion, proxy decision-makers will not always agree with the medical treatment proposed by the doctor in charge of the case. Others close to an adult may also disagree with the doctor and, indeed, with the opinion of the proxy. Section 50 of the Act (as amended) sets down a procedure for resolving such disagreements. This procedure applies in cases where a practitioner proposes a treatment to which the proxy or other person having an interest in the welfare of the adult objects. In cases where the proxy or another person with an interest in the welfare of the adult wishes the adult to have a particular treatment which the responsible practitioner does not consider appropriate and refuses to authorise, the proxy or the other interested person should either ask the NHS organisation for a second opinion or use the NHS Complaints procedure. The Section 50 procedure applies only in cases where a proxy decision-maker has been appointed, but it gives rights not only to the proxy, but also in certain circumstances to the practitioner responsible for the medical treatment of the adult or any person having an interest in

the personal welfare of the adult. Such a person may be a close relation of the adult, or a person who has lived with, or cared for or about them, over a significant period. The term does not extend to those whose interest is that of an onlooker, such as interested pressure groups, uninvolved neighbours, or those seeking to achieve objectives which are of wider import than the welfare of the particular adult. It should be noted that, while proxies can legitimately object to particular courses of medical treatment, they may not act unreasonably by, for example, refusing fundamental care procedures. Proxy decision-makers have a duty of care to the adult on whose behalf they act, and a duty to abide by the general principles set out in section 1 of the Act.

What if delay will put the adult at risk?

3.3 Treatment in emergencies is specifically exempted from the scope of the Act. There is already a common-law authority for a practitioner to treat a patient for the preservation of the life of the adult or the prevention of serious deterioration in his or her medical condition. There should be no question, therefore, of consultation putting a patient's life at risk. What is meant by "reasonable and practicable" will vary from situation to situation. It will normally be reasonable and practicable to consult relatives, proxies or carers, where these people are present or easily contactable.

Where there is no disagreement between the practitioner who issued the certificate for the purposes of section 47(1) and the proxy

3.4 Where there is no disagreement as to medical treatment between the practitioner who issued the certificate for the purposes of section 47(1) and the proxy decision-maker, medical treatment as proposed may normally be given. The exception to this is where a person having an interest in the personal welfare of the adult (as described above) is of a different opinion. In such circumstances, the Act gives such a person the right to appeal to the Court of Session on the question of medical treatment. Where an appeal is initiated, further treatment must not be given, except for the preservation of the life of the adult or the prevention of serious deterioration in his or her medical condition. It will obviously be preferable for the practitioner to take account at an early stage of the views of such persons in terms of section 1 (4) (d) of the Act, rather than have the courts involved.

Nominated Practitioners

3.5 As part of the procedure for resolving disagreements, the Act requires the Mental Welfare Commission to establish and maintain a list of practitioners. From this list, the MWC can nominate a practitioner from the appropriate specialty (the "Nominated Practitioner") to give an opinion as to medical treatment which is independent of that of the practitioner who issued the certificate for the purposes of section 47(1). "Nominated Practitioners" may include medical practitioners or dental practitioners, ophthalmic optician or registered nurses who have undergone training on the assessment of incapacity as prescribed in the Adults with Incapacity (Requirements for Signing Medical Treatment Certificates (Scotland) Regulations 2007.

Where there is disagreement between the practitioner who issued the certificate for the purposes of section 47(1) and the proxy

3.6 In situations where a disagreement arises between the practitioner and the proxy decision-maker, the practitioner must request that the Mental Welfare Commission provide a “Nominated Practitioner” to give a further opinion as to the medical treatment proposed. The Nominated Practitioner must, in such circumstances, have regard to all the circumstances of the case and must consult the proxy about it. The Nominated Practitioner must also consult any other person nominated by the proxy, if it is reasonable and practicable to do so. Such a person may be the GP of the adult, a consultant in a relevant speciality, or a relative, a carer, an independent advocate or someone else who knows the adult well.

Where the Nominated Practitioner agrees with the practitioner who issued the certificate for the purposes of section 47(1)

3.7 If, after taking these steps, the Nominated Practitioner certifies an opinion that the proposed medical treatment should be given, then the practitioner who issued the certificate for the purposes of section 47(1) may give the treatment in spite of the disagreement with the proxy, unless an application to the Court of Session is initiated. The opinion of the Nominated Practitioner in such circumstances must be confirmed in writing in the patient’s medical notes.

Where the Nominated Practitioner does not agree with the practitioner who issued the certificate for the purposes of section 47(1)

3.8 Where the Nominated Practitioner does not agree with the practitioner who issued the certificate for the purposes of section 47(1), that person may ask the Court of Session to determine whether the proposed treatment should be given or not. The same right to apply to the Court is also extended to any person having an interest in the personal welfare of the adult (as described above). In such a case, further treatment must not be given, except for the preservation of the life of the adult or the prevention of serious deterioration in his or her medical condition.

The need for full and careful discussion and documentation

3.9 It will be seen from the foregoing paragraphs that the Act requires detailed consultation with proxies and, if necessary, with the Nominated Practitioner. It is the responsibility of the practitioner who issued the certificate for the purposes of section 47(1) to ensure that such consultation is carried out and fully documented. The Nominated Practitioner has an additional duty to consult a person nominated by the proxy, if reasonable or practicable, and should ensure that an agreed record of such consultation is kept with the patient’s medical notes. It will be necessary, in terms of section 1 of the Act for the practitioner who issued the certificate for the purposes of section 47(1) and the Nominated Practitioner to consult relatives or carers who express a desire to be consulted. Consideration and discussion of such opinions at this stage are likely to reduce the chances of lengthy and costly court action at a later stage.

Where an action is taken to the Court of Session

3.10 Where action in the Court of Session is initiated by the practitioner who issued the certificate for the purposes of section 47(1) or by any person having an interest in the personal welfare of the adult, there is no authority to treat until the Court of Session has determined the matter. The only exception to this is the common-law authority to give emergency treatment, that is, treatment for preservation of life or prevention of serious deterioration in the patient's condition. Such emergency treatment can be given, so long as there is no interdict in force prohibiting the giving of such medical treatment.

Appeals on decisions as to medical treatment

3.11 All decisions taken on medical treatment under Part 5 of the Act are open to appeal to the courts. Section 52 of the Act establishes a comprehensive appeals procedure which may be used by any person having an interest in the personal welfare of an adult with incapacity. Appeals may be heard by the sheriff, and may be taken further, by leave of the sheriff, to the Court of Session. It is important to note that this section extends to all provisions for medical treatment under Part 5 – with the exception of decisions made by doctors under section 50 (as amended), which are appealed direct to the Court of Session. The process of appeal will of course be made easier if practitioners and others making decisions under Part 5 have recorded their decisions and, where relevant, the reasons for those decisions at the time they are made.

3.12 Section 14 of the Act allows a decision taken by a person as to the incapacity of an adult to be appealed by the adult. It may also be appealed by any person claiming an interest in the adult's personal welfare for the purposes of Part 5 of the Act.

What if the court decision conflicts with the principles of the practitioner who issued the certificate for the purposes of section 47(1)

3.13 The great majority of decisions on treatment under Part 5 of the Act are likely to be resolved with no difference of opinion between the doctor and proxy decision-maker. Only a very small number of cases are likely to go to court for decision. Having heard the evidence, the court will be able to make a ruling on whether or not a patient should have a particular course of treatment. Courts will not be able to instruct a particular practitioner to give a certain type of treatment against his or her principles - merely to instruct that the patient should receive that form of treatment.

4. AUTHORITY FOR RESEARCH

Key points in Part 4

Research on adults incapable of consenting is authorised under the Act provided that

It will further knowledge;

It is of benefit to the adult or others in a similar condition;

It entails little or no risk or discomfort;

the adult is not objecting;

consent has been obtained from a person with relevant powers; and

the research has been approved by The Ethics Committee.

Authority for research

4.1 Section 51 sets out the circumstances and conditions which must apply when research involving adults with incapacity is undertaken. Subsection (1) of that section specifies that the term 'research' embraces surgical, medical, nursing, dental or psychological research. Subsection (2) provides that the purpose of involving adults with incapacity in research is to gain knowledge of the causes, diagnosis, treatment and care of the adult's incapacity or the effect of any treatment or care given to the adult while he or she is incapable.

4.2 One of the overriding conditions attached to involving adults with incapacity in research is that similar research cannot be done by involving adults who can consent. This condition is paramount. It is **not** sufficient to say there are no capable volunteers.

4.3 The other conditions which must be fulfilled are in section 51(3) (a) to (f):

a. (a) The research must be of direct benefit to the adult involved. (There are circumstances in which this qualification can be waived. These are discussed below.)

(b) The research must not be carried out if the adult indicates unwillingness.

(c) Ethical approval for the research must be obtained from The Ethics Committee. The Ethics Committee, specifically established by regulations made by Scottish Ministers, The Adults with Incapacity (Ethics Committee) (Scotland) Regulations 2002, available at:

<http://www.opsi.gov.uk/legislation/scotland/ssi2002/20020190.htm>

has the discretion to attach conditions other than those listed, when granting ethical approval. Local Research Ethics Committees have no power to grant approval for research on adults with incapacity, or to consent to it.

(d) The research involves no foreseeable risk or only minimal risk to the adult and should impose no or only minimal discomfort. These conditions should be seen in the context of the adult's standard treatment, if that is appropriate.

(e) Before any research involving the adult is undertaken consent must be obtained from a guardian or welfare attorney of the adult who has powers to consent in relation to participation in research. If none has been appointed, the consent of the adult's nearest relative is required. These conditions, which are in no particular order, must all be fulfilled before an adult who cannot consent can be involved in research.

"Emergency" Research

4.4 (An amendment to section 51 permitting adults who lack the capacity to consent to be involved in "emergency" research, in the context of a clinical trial, provided the consent of the legal representative² is obtained was implemented by The Medicines for Human Use (Clinical Trials) Regulations 2004, available at:

<http://www.opsi.gov.uk/si/si2004/20041031.htm>

Subject to the trial having been approved by an ethics committee such "emergency" research can proceed without ethics committee approval and without the consent of any guardian or welfare attorney, or the adult's nearest relative, if :-

(i) it has not been practicable to contact any such person before the decision to enter the adult as a subject of the clinical trial is made, and

(ii) consent has been obtained from a person, other than a person connected with the conduct of the trial, who is:-

- (a) the practitioner responsible for the medical treatment provided to the adult, or
- (b) a person nominated by the relevant health care provider.

Where no direct benefit to the adult exists

4.5 The first of the conditions set out above is that the research must be of real and direct benefit to the adult involved. However, subsection 51(4) of the Act provides exceptionally for the possibility that research may be carried out even where it is not likely to produce real and direct benefit to the adult. This is where the research is likely to improve the scientific understanding of the adult's condition and in the long term contribute to the attainment of real and direct benefit to persons suffering from the same form of incapacity.

² Legal representative' has the same meaning as given by Part 1, Schedule 1(2) of The Medicines for Human Use (Clinical Trials) Regulations 2004

Were such research to cease altogether, there could be serious consequences for future prevention and treatment of serious conditions (e.g. into the treatment of stroke, serious head injuries, and Alzheimer’s disease). It is still necessary in these circumstances to comply with subsections (1), (2), and (3) (b)-(f) of section 51 of the Act.

The Ethics Committee

4.6 Section 51 enables the Scottish Ministers to make regulations to establish The Ethics Committee and prescribe those matters which that Committee must take into account when approving research. This is not an exclusive list and The Ethics Committee may examine such other matters as are relevant and appropriate to the applications for ethical appraisal submitted to them.

STATUTORY BODIES WITH RESPONSIBILITIES UNDER THE ACT

The Office of the Public Guardian

The Office of the Public Guardian (OPG) registers both welfare and financial powers of attorney, intervention orders and guardianship orders, and has extensive functions and powers in relation to financial provisions and appointments. The OPG intends to develop an on-line public register in the foreseeable future, which can be accessed at www.publicguardian-scotland.gov.uk

The Mental Welfare Commission for Scotland

The Mental Welfare Commission for Scotland (MWC) retains protective functions for adults whose incapacity stems from mental disorder. The MWC has a special role in relation to Part 5 of the Act. It is given the duty to establish and maintain a list of healthcare professionals whom it can nominate to give an additional opinion in the case of disputes between the healthcare professional and a proxy about treatment under Part 5 (see part 3 of this Code). It also has various powers and responsibilities in relation to welfare matters and appointments under the Act.

Local authorities

Local authorities have a wide range of functions under the Act. As adults coming within the scope of Part 5 will often be in the community, or returning to the community, it is important for practitioners to be aware of the functions of local authorities which may impinge on medical treatment. Duties of local authorities include the following:

To investigate circumstances where personal welfare of adult at risk

- To investigate any circumstances made known to them in which the personal welfare of an adult seems to be at risk.

To provide information and advice to those exercising welfare powers

- To provide a guardian, welfare attorney or person authorised under an intervention order, when requested to do so, with information and advice in connection with the performance of his or her functions in relation to personal welfare under the Act.

To investigate complaints in relation to those exercising welfare powers

- To receive and investigate any complaints about the exercise of functions relating to the personal welfare of an adult made in relation to welfare attorneys, guardians or persons authorised under intervention orders.
- To consult Public Guardian and MWC
- To consult the Public Guardian and the MWC on cases or matters relating to the exercise of functions under the Act in which there is, or appears to be, a common interest.

To supervise attorneys and guardians

- To supervise a welfare attorney or a person authorised under an intervention order where ordered to do so by the sheriff; and to supervise a guardian appointed with functions relating to the personal welfare of an adult in the exercise of those functions.

Intervention or guardianship orders

- Where it appears to the local authority that an intervention order is necessary for the protection of an adult, and that no application has been made or is likely to be made for such an order, the local authority is obliged to apply for an intervention order.
- Where it appears to a local authority that:
 - an adult is incapable in relation to decisions about, or of acting to safeguard or promote his interests in, his or her property or financial affairs and is likely to continue to be so incapable; and
 - no other means provided by the Act would be sufficient to enable these interests to be safeguarded or promoted, and
 - no application has been made or is likely to be made for a guardianship order; and
 - a guardianship order is necessary for the protection of the property or financial affairs of the adult, or of the adult;

a. then the local authority must apply for a guardianship order.

To provide reports to the sheriff relevant to applications for intervention orders or guardianship orders relating to personal welfare

- The local authority must make a report to the court in relation to applications for intervention orders or guardianship orders with welfare powers. Where the adult's incapacity results from mental disorder, the report must be made by a Mental Health Officer (MHO). But where the adult's personal welfare is in jeopardy only because of the inability of the adult to communicate, this report must be made by the Chief Social Work Officer.

To act as welfare guardian where necessary and no-one else is applying to do so

- Where the guardianship order is to relate only to the personal welfare of the adult, the Chief Social Work Officer of the local authority may be appointed as guardian.

TECHNIQUES COVERED BY OTHER PARTS OF THE ACT

The Act introduces some new or modified techniques for managing the property and financial affairs and taking decisions about the welfare of adults. This code describes briefly below all such techniques because they may impinge at different times on the functions of practitioners. It does not, however, deal with these techniques in any detail. They are covered in other codes of practice and in regulations made under the Act.

Power of attorney

Under part 2 of the Act an adult may anticipate his or her own incapacity by granting a power of attorney relating to his or her property or financial affairs (**a continuing power of attorney**) or his or her personal welfare. The latter power of attorney is called a **welfare power of attorney**. To be effective a power of attorney must be registered with the Public Guardian (see below). The Public Guardian will only register a power of attorney if it incorporates a certificate in prescribed form to the effect that the granter understood the nature and extent of the power and was not acting under undue influence. This certificate is prescribed in the Adults with Incapacity (Certificates in Relation to Powers of Attorney) (Scotland) Regulations 2001 (Scottish Statutory Instrument 2001 No. 80). A doctor may on occasion be asked by a solicitor for assistance in assessing the capacity of a potential granter. Doctors may later be involved in helping to assess when a specific event, such as the onset of incapacity, has occurred in order to determine at what point a power of attorney becomes effective.

A welfare power of attorney can only be operated after an adult loses capacity in relation to the welfare decision in question. A welfare power of attorney can include powers to consent to (or to refuse) medical treatment but a welfare attorney may not:

- place the granter in hospital for treatment of mental disorder against his or her will; or
- consent on behalf of the granter to treatment to which Part 16 of the Mental Health (Care and Treatment) (Scotland) Act 2003 applies.

Intromission with funds

Under Part 3, an individual may apply to the Public Guardian for authority to intromit with (have access to) funds held by the adult with a body such as a bank or building society, for the purposes of meeting the adult's living expenses. Medical practitioners will be called upon to certify in connection with such an application that the adult is incapable in relation to decisions about the funds, or incapable of acting to safeguard or promote his interests in the funds. The form of this certificate is prescribed in the Adults with Incapacity (Certificates from Medical Practitioners) (Accounts and Funds) (Scotland) Regulations 2001 (Scottish Statutory Instrument 2001 No. 76). They may also be called on to countersign the application confirming that the applicant is a fit and proper person to have access to the funds (but this would have to be done by a different doctor from the one signing the medical certificate).

Management of residents' finances

Part 4 of the Act, which is effective from October 2003, allows registered establishments to manage the financial affairs of residents with impaired capacity up to a prescribed limit. A practitioner must be asked by the managers of a registered establishment to issue a certificate in prescribed form to the effect that the resident in question is incapable in relation to decisions as to, or the safeguarding of his or her interest in, the relevant financial affairs. This part is effective from April 2003. The responsibilities and accountability of the manager

of a registered establishment are detailed in the Management of residents' Finances Information Leaflet. The leaflet can be accessed on the Scottish Government website at <http://www.scotland.gov.uk/library5/justice/awimrf-00.asp>

Intervention orders and guardianship

Under Part 6, it is possible to apply to the sheriff for an intervention order to deal with clearly defined financial, property or personal welfare matters in relation to an adult on a one-off basis. Guardianship can include powers over property, financial affairs or personal welfare or a combination of these. In this code a guardian with powers over financial affairs and property is referred to as a "financial guardian" and a guardian with powers over personal welfare is referred to as a "welfare guardian". Persons authorised under an intervention order, and welfare guardians, may be given power by the sheriff to make decisions about medical treatment on behalf of the adult, subject to the same exceptions as apply to welfare attorneys. Part 6 of the 2000 Act came into force on 1 April 2002.

Medical practitioners have formal responsibility for providing reports of incapacity in relation to applications for intervention orders or guardianship. At least two such reports are needed for each application. In a case where the cause of incapacity is mental disorder, one of these reports must be made by a medical practitioner approved for the purpose of section 22 of the 2003 Act.

Situations where intimation to the adult is not required

Under various provisions in the Act, where intimation or notification to the adult would normally be required by the court or the Public Guardian, such intimation may be dispensed with if intimation or notification would be likely to pose a serious risk to the health of the adult. This will normally require the evidence of two medical certificates. Good practice would suggest that intimation to the adult should only be dispensed with in the most exceptional circumstances.

ADULTS WITH INCAPACITY
(SCOTLAND) ACT 2000

Certificate of Incapacity under Section 47 of the
Adults with Incapacity (Scotland) Act 2000

I [redacted] (name)
of [redacted] (address)

*am the medical practitioner primarily responsible for the medical treatment of; or

*am a person who is *a dental practitioner/an ophthalmic optician/a registered nurse and who satisfies such requirements as are prescribed by the Adults with Incapacity (Requirements for Signing Medical Treatment Certificates) (Scotland) Regulations 2007 and who is primarily responsible for treatment of the kind in question of:

[redacted] (name)
of [redacted] (address) [D][D][M][M][Y][Y] (date of birth)

for whom the *guardian/welfare attorney/person appointed by intervention order/nearest relative/carer

is [redacted]

I have examined the patient named above on [D][D][M][M][Y][Y] (date). I am of the opinion that *he/she is incapable within the meaning of the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act") in relation to a decision about the following medical treatment:

[redacted]

because of (nature of incapacity) [redacted]
[redacted]
[redacted]

This incapacity is likely to continue for [redacted] months.

*I therefore consider it appropriate for the authority conferred by section 47(2) of the 2000 Act to subsist from: [D][D][M][M][Y][Y] (date of examination) until [D][D][M][M][Y][Y], being a period which does not exceed one year from the *date of the examination on which this certificate is based/date of revocation of the certificate issued previously by me; or

*I am of the opinion that (a) *he/she is suffering from *a severe or profound learning disability/dementia/a severe neurological disorder; and (b) *what he/she is suffering from is unlikely to improve within the meaning of the Adults with Incapacity (Conditions and Circumstances Applicable to Three Year Medical Certificates) (Scotland) Regulations 2007/ [Y][Y] and therefore consider it appropriate for the authority conferred by section 47(2) of the 2000 Act to subsist until:

[D][D][M][M][Y][Y] being a period which does not exceed three years from the *date of the examination on which this certificate is based/date of revocation of the certificate issued previously by me.

The authority conferred by section 47(2) of the 2000 Act shall subsist for the period specified above or until such earlier date as this certificate is revoked.

In assessing the capacity of the patient, I have observed the principles set out in section 1 of the 2000 Act.

Signed [redacted] Date [D][D][M][M][Y][Y]

*delete as appropriate

CONTACTS LIST

Documents

For copies of the Act, the Explanatory Notes and any Regulations, and also for any other related legislation:

The Stationery Office Bookshop
71 Lothian Road
Edinburgh EH3 9AZ
Tel 0870 606 5566
Fax 0870 606 5588

For copies of the other codes of practice relating to the Act:

<http://www.tso.co.uk/>

Scottish Government
Justice Directorate
Civil Law Division
Floor 2 West (Rear)
St Andrews House
Regent Road
Edinburgh EH1 3DG
0131 244 2193

All documents may be downloaded from the Website:

<http://www.scotland.gov.uk/Topics/Justice/law>

Statutory authorities under the Act

Public Guardian
Hadrian House
Callendar Business Park
Falkirk FK1 1XR
Tel: 01324 678300
www.publicguardian-scotland.gov.uk

Mental Welfare Commission for Scotland
K Floor
Argyle House
3 Lady Lawson Street
Edinburgh EH3 9HS
Tel: 0131 222 6111
Fax: 0131 226 6111
e-mail: enquiries@mwscot.org.uk
www.mwscot.org.uk

Local authority

To contact your local authority on matters relating to the Act you should ask for the social work department or community services department at your own local council offices. Their address is in your phone book.

You can also get information about your own local authority from the Convention of Scottish Local Authorities, at the address below.

Convention of Scottish Local Authorities

Rosebery House
9 Haymarket Terrace
Edinburgh EH12 5XZ
0131 474 9200
www.cosla.gov.uk/

The Courts

Scottish Court Service
Hayweight House
23 Lauriston Street
Edinburgh EH3 9DQ
0131 229 9200
www.scotcourts.gov.uk/

The address and telephone number of your local sheriff court should be in your telephone directory.

Contacts on specific issues referred to in the code

Advocacy

Independent Advice and Support Services

Local Citizens Advice Bureaux (CAB) are funded by NHS Boards to provide patients, carers and members of the public with independent advice and support to:

- make a complaint; and/or
- obtain the information and support they need to access and make better use of NHS services.

CAB Addresses in your local phone book or from

Citizens Advice Scotland
Spectrum House
2 Powderhall Road
Edinburgh EH7 4GB
0131 550 1000
info@cas.org.uk

For information on independent advocacy and on projects active in Scotland:

Scottish Independent Advocacy Alliance



69a George Street
Edinburgh
EH2 2JG
0131 260 5380

Education

Your local education authority will provide information.

For copies of “Enquire- the parents’ guide to special educational needs” and “Your Future Needs Assessment”:
Children in Scotland
5 Shandwick Place
Edinburgh EH2 4RG
0131 228 8484

Health

You can find addresses for your local health services in your phone book, from the local library or Citizen’s Advice Bureau, or through <http://www.show.scot.nhs.uk/> Or you may contact:

NHS Health Scotland
The Priory
Canaan Lane
Edinburgh EH10 4SG
0131 536 5502

Social security

Contact your local Jobcentre Plus office (details in your phone book)
There is also a free Benefit Enquiry Line for People with Disabilities on 0800 88 2200 (textphone users 0800 24 33 55).

Housing

Local authority housing departments or units

Scottish Federation of Housing Associations
38 York Place
Edinburgh EH1 3HU
0131 556 5777
www.sfha.co.uk

Legal Aid

Scottish Legal Aid Board
44 Drumsheugh Gardens
Edinburgh EH3 7SY
0131 226 7061
www.slabb.org.uk

Law Society for Scotland
26 Drumsheugh Gardens
Edinburgh EH3 7YR
0131 226 7411
www.lawscot.org.uk



Other useful contacts:

Alzheimer Scotland- Action on Dementia
22 Drumsheugh Gardens
Edinburgh EH3 7RN
0131 243 1453
www.alzscot.org

Dementia Helpline
Freephone 0808 808 3000

ENABLE
6th Floor
7 Buchanan Street
Glasgow G1 3HL
0141 226 4541
www.enable.org.uk

Capability Scotland
22 Corstorphine Road
Edinburgh EH12 6HP
0131 337 9876
www.capability-scotland.org.uk

Scottish Association for Mental Health
Cumbrae House
15 Carlton Court
GLASGOW G5 9JP
Tel: 0141 568 7000
www.samh.org.uk

Sense Scotland
5th Floor
45 Finnieston Street
GLASGOW G3 8JU
Tel: 0141 564 2444
www.sensescotland.org.uk

Citizens Advice Bureau
Address in your local phone book or from
Citizens Advice Scotland
Spectrum House
2 Powderhall Road
Edinburgh EH7 4GB
0131 550 1000
info@cas.org.uk

Criminal Injuries Compensation Board
Tay House
300 Bath Street
Glasgow G2 4LN



0141 331 2726
www.cica.gov.uk

Royal College of Speech and Language Therapists
2 White Hart Yard
London SE1 1NX
Tel : 020 7378 1200

Treatment plan for patients

receiving ongoing treatment under the terms of Part 5 of the Adults with Incapacity (Scotland) Act 2000.

Name of patient..... Date of birth...../...../.....

Address.....

I have examined the patient named above on...../...../.....(Date) and consider that he/she needs to undergo procedures to safeguard or promote physical or mental health in relation to the treatment plan below. I have assessed his/her capacity to consent to treatment in relation to each area of intervention.

Disorder/intervention (See note A)	Capacity C = capable I = incapable
1. Fundamental healthcare procedures (see note B)	

I have consulted the following people over this treatment plan and over the patient's capacity (see note C):

Name.....Designation.....
 Address.....

Name.....Designation.....
 Address.....

Signed.....

NOTES ON COMPLETION OF TREATMENT PLAN

This plan is intended to guide healthcare professionals who are caring for patients who have multiple and complex needs. It should be attached to a certificate of incapacity and retained in the patient's multidisciplinary case record.

A. Under the Act, you can only intervene if it will benefit the patient. Your intervention must be the least restrictive in relation to the patient's freedom in order to achieve the required benefit. You must take the patient's views into account and you must consult other relevant people, where reasonable and practical.

Include all present or foreseeable disorders and/or interventions for physical and mental disorders not included in "Fundamental Healthcare Procedures" (see note B). You should consider the patient's capacity to consent to each intervention. Under the Act, the patient is incapable if he/she is incapable of acting, or making decisions, or communicating decisions, or understanding decisions, or retaining the memory of decisions. **Exclude** all interventions that would ordinarily need the signed consent of the patient. Interventions of this sort need a separate certificate of incapacity. *For example, if you write "coronary heart disease and hypertension" on the plan, this authorises you to prevent disease with aspirin, or treat disease with anti-hypertensive drugs, but not operate to bypass blocked arteries.*

You may not include on this form any treatment regulated under section 48 of the Act. Please consult the regulations and separate guidance issued on these treatments.

B. Fundamental healthcare procedures include all measures to promote or safeguard the following: nutrition, hydration, hygiene, skin care and integrity, elimination, relief of pain and discomfort, mobility, communication, eyesight, hearing and simple oral hygiene.

C. The Act requires you to take the views of others into account when deciding on an intervention. You should discuss this plan with professional carers and relatives of the patient. Any person with an interest in the welfare of the patient may appeal a treatment decision to the Sheriff. If the patient has a Welfare Attorney or Guardian with the authority to consent to treatment, you must consult this person where reasonable and practical. You can find out if your patient has a Welfare Attorney or Guardian by contacting the Public Guardian on 01324 678300. If this person disagrees with any element of your plan, you must obtain a second opinion from a Nominated Practitioner appointed by the Mental Welfare Commission for Scotland, tel. 0131 222 6111.

You may find that you need to treat a condition that is not specified in your treatment plan. If this is a short lived condition, a separate certificate in relation to it might suffice. If it is a condition that is likely to need ongoing intervention, you should consider rewriting the treatment plan.

This treatment plan is only valid for the period specified in the certificate of incapacity.

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

Treatment plan for patients receiving ongoing treatment under the terms of Part 5 of the Act

Name of patient...Mary Smith.....

Date of birth...1/...1/...21

Address...1 Sulven Road.....

.....Edinburgh.....

I have examined the patient named above on...../...../.....(Date) and consider that he/she needs to undergo procedures to safeguard or promote physical or mental health in relation to the treatment plan below. I have assessed his/her capacity to consent to treatment in relation to each area of intervention.

Disorder/intervention (See note A)	Capacity C = capable I = incapable
1. Fundamental healthcare procedures (see note B)	I
2. Iron deficient anaemia	I
3. Coronary artery disease	I
4. Cerebrovascular disease	I
5. Osteoarthritis	I
6. Behaviour disturbance associated with dementia <i>except for treatment with conventional neuroleptic drugs</i>	I
7. Prevention and treatment of infection <i>except for treatment with penicillin</i>	I

I have consulted the following people over this treatment plan and over the patient's capacity (see note C):

Name...Christine Smith.....

Designation.....Daughter.....

Address.....As above.....

Name.....Sarah Jones.....

Designation.....Ward Manager.....

Address.....Cairngorm Nursing Home, Edinburgh.....

Signed.....

Print name...John Foster.....

Address...Grampian Hospital.....

Designation...Consultant Physician.....

.....Edinburgh.....

Date1/4/02.....

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

Treatment plan for patients receiving ongoing treatment under the terms of Part 5 of the Act

Name of patient.....Jack Green.....

Date of birth...1../...1../..80...

Address.....22 Ochil Road.....

.....Aberdeen.....

I have examined (within the last 30 days) the above patient and consider that he/she needs to undergo procedures to safeguard or promote physical or mental health in relation to the treatment plan below. I have assessed his/her capacity to consent to treatment in relation to each area of intervention.

Disorder/intervention (See note A)	Capacity C = capable I = incapable
1. Fundamental healthcare procedures (see note B)	C
2. Psychological treatment for aggression	I
3. Epilepsy (Except for barbiturate drugs and phenytoin)	I
4. Treatment for mood disorder <i>except for lithium</i>	C


I have consulted the following people over this treatment plan and over the patient's capacity (see note C):

Name.....Harriet Green.....Designation.....Mother.....

Address.....As above.....

Name.....Chris Black.....Designation.....Psychologist.....

Address.....Sidlaw Centre, Aberdeen.....

Signed 

Print name...Clare Goodfellow.....

Address.....Eildon Surgery.....

Designation.....General Practitioner....

.....Aberdeen.....

Date1/4/02.....

Notes on worked examples

Example A: Mrs Smith is an elderly lady in hospital continuing care. She has been suffering from stroke disease, dementia and has other medical conditions. She now has an advanced degree of dementia and her physical condition is very poor. She can be aggressive and uncooperative with simple interventions, including bathing and hygiene. She is incontinent and her mobility is declining. She has suffered from recurrent chest infections and should have annual influenza vaccination.

The Consultant reviews the treatment plan as part of an annual review and discusses the future with the ward manager and the patient's daughter. The plan allows for all fundamental healthcare to be given despite her resistance as she is agreed to be incapable in relation to many of these interventions. **It would not be reasonable or practical to decide on capacity in relation to each individual aspect of fundamental care.** The other aspects of the treatment plan reflect present and predicted interventions. Discussion reveals that she is allergic to penicillin and has reacted badly to certain classes of medication for behaviour disturbance in the past. The daughter insists that these are listed as exceptions in the treatment plan. This is recorded on the treatment plan and on separate documentation in accordance with NHS Board policy.

Example B: Mr Green suffers from learning disability and epilepsy. He lives with his parents and receives input from the Community Learning Disability team. He has some problems with behaviour and has been treated for episodes of bipolar mood disorder. He has no need for interventions listed under "Fundamental Healthcare procedures" except for speech therapy. He is judged to be capable in relation to this procedure. A case review is held to discuss the rest of the treatment plan. All agree that he needs a psychological approach to his behaviour problems but that he lacks the capacity to fully understand what this procedure involves. He also does not appreciate that he has epilepsy and sometimes refuses his medication. The treatment plan gives his carers more authority to try to get him to take medication when he is reluctant. However, he knows that his mood can be unstable and agrees that he needs treatment for this. He was treated with lithium once and had severe side effects. All agree that he is capable of deciding that this treatment should be excluded and this is recorded on the treatment plan. **If he resists other treatment for mental disorder, treatment under the Mental Health (Care and Treatment) (Scotland) Act 2003 should be considered.**

These examples illustrate the importance of following the general principles of the Act. They also show how the Act can help to reinforce good medical practice in making decisions in consultation with other relevant parties.