

Guidance for the use of Section 47 certificates when giving medical treatment December 2020

The Adults with Incapacity (Scotland) Act 2000 safeguards the welfare of adults over the age of 16 who lack capacity in making their own healthcare decisions.

It's important for the health professionals to be aware of their responsibilities in relation to proxies such as those appointed under a power of attorney, guardianship or intervention order when making healthcare decisions for adults who are incapable.

This will be relevant and important for administering any healthcare treatment such as **COVID-19 vaccination**.

General principles

The law generally presumes that capable adults are able to make their own decisions regarding the medical care they receive. Under the act, an adult is considered to be incapable if they are unable to:

- Make decisions
- Act on decisions
- Communicate decisions
- Understand decisions
- Retain the memory of decisions.

The act allows adults with capacity to appoint a welfare attorney to make decisions for them in case their condition deteriorates and they lose capacity to make their own healthcare decisions.

It also makes provisions for the appointment of a guardian if the patient has already lost, or never had, capacity to make their own healthcare decisions.

Attorney

The power of attorney is given by the adult while they have capacity in anticipation that it may be lost in the future. A power of attorney can be granted for both financial and welfare decisions and it is important to check what powers the attorney has been granted. This will ensure that consent can be given for welfare decisions by the attorney with the appropriate power.

Guardian/Intervener

A welfare guardian or intervener may be appointed by the Sheriff for a person who lacks capacity to make decisions on behalf of an adult lacking capacity. The guardian or intervener will have been granted powers within the guardianship or intervention order that allow them to look after the adult's affairs. These can be financial and/or related to the personal welfare of the adult.

Medical Treatment

Part 5 of the Adults with Incapacity (Scotland) Act 2000 governs medical treatment and research.

Section 47

Part 5, Section 47 of the Act allows medical practitioners to authorise treatment to be given to safeguard or promote the physical or mental health of an adult who is unable to provide consent themselves.

This can be carried out on the completion of a medical certificate of Incapacity. The certificate can only last for a maximum of 1 year (or 3 years if conditions/circumstances prescribed by Scottish ministers apply). The certificate issued by the doctor would need to state:

- The nature of the incapacity.
- Form of medical treatment proposed.
- Duration (maximum 1 year, or 3 years if conditions/circumstances prescribed by Scottish ministers apply)
- Consultation with relevant others, nearest relatives, primary carers etc.

An individual may have more than one certificate if they have either complex health needs, or need various treatments to which they are unable to make decisions on, dentist, optical treatment, medication etc. Each treatment should be assessed individually and in each case the principles of the Act applied.

Principles of the act must be applied.

It is important to remember that any intervention in the care of an incapacitated adult, either by healthcare professionals or by their welfare attorney or guardian, must:

- Benefit the patient
- Take account of the patient's wishes, if these can be ascertained.
- Take into account the views of others involved in the care of the patient, wherever possible.
- Allow the patient to retain as much of their independence as possible.

Section 49 - Medical treatment where there is an application for intervention or guardianship order

The authority to provide medical treatment under a section 47 certificate **does not apply** where an application has been made to the sheriff for an intervention or guardianship order with powers that cover the medical treatment in question.

Until the application has been determined medical treatment under section 47 cannot be given 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 serious deterioration in his medical condition.

Section 50 - Medical treatment where a guardian, attorney or person authorised under an intervention order has been appointed

Where a guardian, attorney or person authorised under an intervention order has been appointed and has the appropriate powers to cover the proposed medical treatment then they should be consulted by the person who issued the section 47 certificate wherever this is reasonable and practicable. **The authority in relation to the medical treatment in question does not apply unless this consultation has taken place.**

Where there is no disagreement following this consultation, the medical practitioner primarily responsible for the treatment of the adult (where the person who issued the certificate was someone other than this practitioner) or any person having an interest in the welfare of the adult can appeal the decision to the Court of Session.

Disagreement on treatment

If there is a disagreement between the medical practitioner and the proxy decision-maker such as the attorney, guardian, or intervener then the practitioner can consult with the Mental Welfare Commission and ask them for a second opinion as to the medical treatment proposed.

The Mental Welfare Commission will provide a 'nominated practitioner', who they consider has professional knowledge or expertise relevant to medical treatment of the kind in question, to provide a further opinion on the medical treatment that is proposed.

The nominated practitioner will have regard to all the circumstances of the case and must consult the proxy, or a person nominated by the proxy, about it. If the nominated practitioner certifies that the medical treatment should be given, then the person who issued the section 47 certificate may do so, or authorise another person to do so, notwithstanding the disagreement with the proxy.

If the nominated practitioner certifies that the medical treatment should not be given, then the medical practitioner primarily responsible for the medical treatment of the adult, or any person with an interest in the personal welfare of the adult may apply to the Court of Session for a determination as to whether the proposed treatment should be given or not.

Important additional links:

<https://www.gov.scot/publications/adults-with-incapacity-act-principles/>

<https://www.gov.scot/publications/adults-incapacity-scotland-act-2000-code-practice-third-edition-practitioners-authorised-carry-out-medical-treatment-research-under-part-5-act/>