



mental welfare
commission for scotland

The scope and limitations of the use of section 47 of the Adults with Incapacity Act

Advice notes

October 2021



Our mission and purpose

Our Mission

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

Our Purpose

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

Our Priorities

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

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

Our Activity

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

The scope and limitations of the use of section 47 of the Adults with Incapacity (Scotland) Act 2000

Introduction

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

In May 2021, the Commission published [*Authority to discharge: Report into decision making for people in hospital who lack capacity*](#). The report looked at decision making for people in hospital who lack capacity and the range of legal authorities which were used to authorise moves for these people from hospital to care homes over the initial period of the Covid -19 pandemic.

We highlighted instances where people who lacked capacity had been moved without legal authority and raised concerns in relation to instances where the reported legal authority was unsafe.

One example of this was where practitioners reported that some people who lacked capacity were able to be moved as they were “subject to AWI”. On further examination, this was found to relate to section 47 of the Adults with Incapacity (Scotland) Act 2000 and did not offer a competent legal authority for a move from hospital to a care home.

The Commission has since received a number of enquiries in relation to the use of section 47 of the Act and has prompted this brief advice note to clarify the scope and limitations of this part of the legislation.

What Section 47 can authorise

Part 5 of the Act gives a general authority to treat a person who is incapable of consenting to the medical treatment in question, on the issuing of a certificate of incapacity for that treatment (a “section 47 certificate”). For the purposes of Part 5, “medical treatment” includes any procedure or treatment designed to safeguard or promote physical or mental health.

The section 47 certificate usually needs to be completed by the medical practitioner (doctor) who is primarily responsible for the person’s medical treatment. Section 47 certificates can be issued by dental practitioners, ophthalmic opticians and registered nurses, but only if they have undergone the necessary training on the assessment of incapacity and the issuing of section 47 certificates and only for treatment that they are primarily responsible for.

The section 47 certificate is in prescribed form ([here](#)) and must specify the period during which the authority to treat remains valid following the date of the examination of the person’s capacity to make a decision about the treatment in question (i.e. the examination that determined their incapacity in relation to that decision, and on which the issuing of the certificate was based). The period should not exceed one year unless the circumstances below apply, in which case the period can be up to three years.

A section 47 certificate can be completed to authorise treatment for up to three years if, in the view of the practitioner who issues the certificate, the person’s incapacity in relation to the treatment is caused by:

- severe or profound learning disability; or
- severe dementia; or
- severe neurological disorder;

which is unlikely to improve, and for which there is no curative treatment available¹.

It is good clinical practice, however, for the treating practitioner to keep the person’s capacity to consent to treatment under review at appropriate intervals during the duration of the section 47 certificate. Where a treatment plan attached to the section 47 certificate is used, this should be reviewed at least annually. (Please refer to the code of practice noted below for information on treatments plans).

Where there is a proxy decision maker in place with powers relevant to the medical treatment, and the practitioner completing the section 47 certificate is aware of that, the practitioner must seek the proxy’s consent to the treatment (unless it is not reasonable or practicable for them to do so). A welfare proxy can be a welfare power of attorney, welfare guardian or, less frequently, a person authorised under an intervention order. The Act provides that a section 47 certificate does not confer authority to treat if there is a welfare proxy, the person issuing the certificate is aware of that, and they have failed to obtain the consent of the proxy when it would be reasonable and practicable for them to do so.

Section 50 of the Act contains provisions for resolution of disputes about a welfare proxy’s decision to consent to treatment or to refuse consent to treatment.

Any intervention under Part 5 of the Act requires that account is taken of the principles found in Section 1 of the Act.

¹ “These conditions or circumstances are prescribed by the Adults with Incapacity (Conditions and Circumstances Applicable to Three Year Medical Treatment Certificates) (Scotland) Regulations 2007” <https://www.legislation.gov.uk/ssi/2007/100/contents/made>

What Section 47 does not authorise

Section 47 of the Adults with Incapacity (Scotland) Act 2000 relates only to the provision of medical treatment. The certificate only attests to incapacity in relation to making a decision about the medical treatment authorised by the section 47 certificate (the “medical treatment in question”).

A section 47 certificate does not provide authority to convey a patient to hospital. It does not provide authority to detain a patient in hospital for treatment of mental disorder against their will. Also, force can only be used where immediately necessary and for as short a time as possible.

Section 47 **does not** authorise wider welfare decisions in relation to an adult who lacks capacity.

The Scottish Government has produced a prescribed section 47 form, although it is lawful to use a self-produced local document for this, as long as the wording is exactly the same as the wording on the Government’s form but the form should not be amended to include wider welfare decisions.

It should not be assumed, if a person has been assessed as lacking capacity to consent to medical treatment(s), that this assessed incapacity can be applied globally to include other welfare decisions.

Where wider welfare decisions are required, assessment of capacity is required in relation to these specific decisions and appropriate legal authority sought e.g. use of existing power of attorney if it includes relevant powers or welfare guardianship.

During visits to services, our practitioners are often advised that a person is “under AWI” when in fact this relates to the presence of a section 47 certificate authorising medical treatment only. This description of being “under AWI” is open to misinterpretation and can give the impression of more robust legal authority being in place. We would urge services to be specific when recording and using this legal authority to ensure it is not used beyond its intended scope.

Guidance available

Scottish Government

Adults with incapacity: code of practice for medical practitioners can be found [here](#).

Mental Welfare Commission

Treatment under section 47 of the Adults with Incapacity Act: overview and guidance can be found [here](#).



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