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ADVICE NOTES

Contraception and Adults with Incapacity

April 2016

Contraception and Adults with Incapacity - Advice Note for Professionals, Relatives and Carers

Introduction

The Commission sometimes gets telephone calls to its advice line regarding complex issues relating to contraception and adults who may lack capacity to make such decisions. This advice is intended to guide people through some of the complexities that arise. It is not, and should not be used as, an alternative to seeking legal advice where this is necessary.

- Capacity to consent or refuse consent to contraception is distinct from capacity to consent to a sexual relationship.

- Contraception includes oral contraception, emergency hormonal contraception, contraceptive patches, contraceptive implants and injections, IUDs as well as diaphragms/caps and condoms.

- What are generally regarded as 'irreversible' interventions such as vasectomy or tubal ligation (the cutting or blocking of the fallopian tubes)[1], may be regarded as a form of contraception but these are decided by the Court of Session (unless it is solely for medical reasons).

It can be argued that the use of interventions such as oral or depot contraception over long periods has the equivalent effect to vasectomy or tubal ligation but does not require the same stringent legal process. It is therefore important to consider the moral, ethical and legal basis of such decisions carefully.

Medical intervention that reduces fertility given primarily for health reasons

- It is necessary to consider what are the main reasons for the intervention to reduce fertility. It may be entirely related to medical matters such as polycystic ovaries, menorrhagia/dysmenorrhagia (abnormally heavy/painful uterine bleeding), or a pregnancy which would be harmful to the person's physical health.

- Where a person lacks capacity and intervention that reduces fertility is for the purposes of such medical treatment, this can be prescribed by a medical

[1] 'irreversible' is being used to distinguish these interventions from more immediately reversible forms of contraception which do not require surgery.

practitioner on completion of a section 47 (Adults with Incapacity Act) certificate of incapacity. Where there is a guardianship order in place or a power of attorney with powers to consent or refuse consent to medical treatment, the guardian/attorney must also be consulted and give consent. Where there is disagreement and this cannot be resolved through negotiation or the consideration of alternative treatments, there are dispute resolution procedures under section 50 (AWI Act).

The exception to this is medical treatment due to serious malfunction or disease of the reproductive organs which may lead to sterilisation. This requires an opinion from a nominated medical practitioner from the Mental Welfare Commission under section 48 of the Adults with Incapacity Act 2000. See links to the regulations[2] and Part 5 Code of Practice supplement.[3]

Some forms of intervention such as condoms do not require a prescription so are not covered by the medical consent powers in a guardianship order and do not require a section 47 certificate.

Contraception which is primarily to avoid pregnancy

- Where contraception relates to sexual relationships and preventing pregnancy (other than where this is due to physical health risk), consideration needs to be given to the nature of any current, planned or possible future sexual relationships when considering the need for, and type of, intervention**.**

- There needs to be careful consideration of all the issues in terms of Articles 8 (right to respect for private and family life) and 12 (right to marry and found a family) of the European Convention on Human Rights (ECHR) and the rights of people with a disability under the United Nations Convention on the Rights of Persons with Disabilities.

- There also needs to be careful examination of the principles of the Adults with Incapacity Act (AWI) - the benefits of any intervention, if it is the least restrictive in the circumstances, the views of the person and other involved parties and encouraging the adult to exercise the skills s/he has as far as possible.

- The adult's rights under the ECHR and the principles of the AWI Act have to be balanced with the interventions to protect 'adults at risk' or adults with

[2] http://www.legislation.gov.uk/ssi/2002/275/schedule/2/made

[3] http://www.show.scot.nhs.uk/sehd/mels/HDL2002_50.pdf

incapacity required by the Adult Support and Protection (Scotland) Act 2007 and the AWI Act.

- This balance of rights and risks must be kept under regular review as it will change with age, maturity, education, advice and social circumstances.

- With no recent reported case law in Scotland in this area, judgements made in the English Family court may be persuasive or helpful in establishing capacity in this area, and therefore the need for or the extent of intervention. The case of A LA versus Mrs A and Mr A 2010 EWHC 1549 (Fam), is the most relevant. The judgment is the first detailed examination of the capacity to make decisions about contraception.

- The case involved Mrs A, who was born in 1980 and had severe learning disabilities (IQ 53). She married Mr A in 2008. He had an IQ of 65 and was very controlling of her. She already had two children who were removed at birth and later adopted. The local authority applied for a declaration that Mrs A lacked the capacity to decide whether to use contraception. The judge rejected the local authority's submission that the capacity to decide on this issue should include awareness of what is actually involved in caring for and committing to a child, because it set the bar too high.

- In his judgement he stated ''*the test for capacity should be so applied as to ascertain the woman's ability to understand and weigh up the immediate medical issues surrounding contraceptive treatment (''the proximate medical issues'') including:*
  (i) the reason for contraception and what it does (which includes the likelihood of pregnancy if it is not in use during sexual intercourse);
  (ii) the types available and how each is used;
  (iii) the advantages and disadvantages of each type;
  (iv) the possible side-effects of each and how they can be dealt with;
  (v) how easily each type can be changed; and
  (vi) the general accepted effectiveness of each.
  I do not consider that questions should be asked as to the woman's understanding of what bringing up a child would be like in practice; nor any opinion attempted as to how she would be likely to get on; nor whether any child would be likely to be removed from her care.''

- The judge chose to make no order as to Mrs A's best interests. He did so on the grounds that Mr A had not as yet been included in any meaningful discussion on the issue of contraception and the couple had not had any therapeutic input or been given an opportunity to understand the matter: these avenues should be pursued first.

- In summary, the judge chose **not** to widen the test for understanding the "reasonably foreseeable consequences" of contraceptive decisions from an understanding of "*proximate medical issues*" to an understanding of the "*social consequences*". [4]

- The capacity to consent to contraception was therefore less stringent than it might have been. It only required a basic understanding of contraception, rather than also requiring an understanding of the social consequences of pregnancy and parenthood. The majority of people with a learning disability who are sexually active are therefore likely to have the capacity to consent to contraception, where they have the appropriate education, advice and support.

- This case illustrates the need to consider contraception for people who lack capacity to consent separately from other forms of medical treatment and to consider whether specific legal measures are required to assess and authorise its use.

- Where contraception is planned which primarily relates to preventing pregnancy, or that is an intended consequence of medical treatment, and the adult does not have the capacity to consent to this, the Commission advises that specific guardianship powers should be sought by the applicant (usually a relative or the local authority). We do not believe that the general powers of 'consent/refusal to consent to medical treatment' are appropriate. We consider that the medical powers should specify that this includes decisions on contraception or, particularly where the adult wants to have a child, these should be in a separate power to allow the Sheriff to fully examine what is involved in the application and hear the views of all parties.

- Where a guardianship order already exists with powers to consent to medical treatment, it would be appropriate to consider when renewing the order whether contraception should be specified in the powers.

- In addition, we would consider it good practice to ensure:

    - such intrusive guardianship powers are not granted on an indefinite or long term basis, so they are subject to legal scrutiny on application for renewal,

[4] www.bailii.org/ew/cases/EWHC/Fam/2010/1549.html

- there is regular review by the local authority of the continued relevance of such powers in any guardianship order and the need to exercise these,
- there is meaningful discussion and ongoing education and advice to the person/s involved on contraception; the short and longer term consequences of its use, including sexually transmitted disease, pregnancy and parenthood; and on the wider aspects of sexual relationships. This can be as part of school leaver programmes, from Community Learning Disability Teams, or from social care workers or others with the necessary knowledge and expertise;
- the involvement of advocacy to assist the person in articulating their views,
- regular review of capacity, where this may have changed or might be likely to change due to maturity or increased understanding of contraception,
- regular health checks to monitor the benefits and risks of contraception in line with the principles of the AWI Act, including the type of contraception.

- Where a guardian has decision-making powers in relation to medical treatment or contraception, they should be consulted by the staff involved. There may be occasions, however, where there is a conflict of interest between the adult and the guardian. The key to this is to apply the principles of the Act, involve the guardianship supervisor and possibly advocacy. Conflict may be also avoided by the guardian discussing in advance with relevant staff how they wish to delegate their powers, particularly over a sensitive issue such as contraception.

- There are specific safeguards where a person who lacks capacity to consent is being sterilised to prevent pregnancy. This requires consent from the Court of Session.

Interventions to reduce fertility where the reasons are not clear cut

There are situations which are not clear cut, where parents, relatives or informal carers want to make ‘protective decisions’ about contraception. For example they may be anxious that a young woman is in shared accommodation or in day or respite care with sexually active men and, whilst there is no evidence of immediate risk, they have concerns about her vulnerability.

Whilst the young woman may be in a supervised situation and may be getting some education and advice on how to protect herself, she may lack the capacity to understand the consequences of unprotected sexual intercourse.

In some instances contraception may be considered the best option in this circumstance to avoid unwanted pregnancy.

Alternatively it may be preferable to ensure there is more intensive education and counselling, rather than contraception being the first option. Some practitioners have expressed concerns that in providing contraception, the risk of pregnancy is avoided and there is less likely to be educational input to support the individual to develop skills and make choices in this area.

Similarly a young woman may be given a contraceptive implant, for example, to regulate her periods (i.e. medical treatment). This is not seen as a long term option but an interim measure whilst she is supported to develop the skills to manage her periods herself so she may no longer need this treatment. This support and education may not happen, and the woman may remain on the treatment due to the anxiety around her vulnerability and possible pregnancy.

We consider in these cases where contraception is also being used as a 'safety measure', it should be explicit in the powers applied for in a guardianship order. Again good practice should also be followed in terms of the length of orders sought, review of the exercise of the powers in the order by the local authority, the need for ongoing educational input and support, review of capacity and the availability of advocacy.

As an interim measure, whilst an application is being made, contraception could be given on a section 47 certificate, depending on the assessment of risk and benefit.

Summary of Advice

- Where a person lacks capacity, and intervention which reduces fertility is **to treat a medical condition**, this can be prescribed by a medical practitioner on completion of a section 47 (AWI Act) certificate of incapacity, in the same manner as other medical treatment. Where there is an order in place with powers to consent or refuse medical treatment, the guardian/attorney must also be consulted and give consent. Dispute resolution is available under section 50 of the Act.

- Where contraception primarily relates to **preventing pregnancy**, or that is an intended consequence of medical treatment, and the adult does not have the capacity to consent to this, the Commission advise that specific guardianship powers should be sought. We do not think that the general powers of 'consent/refusal to consent to medical treatment' are sufficient. We consider that the medical powers should specify that this includes decisions on contraception or, particularly where the adult wants to have a child,

these should be in a separate power to allow the Sheriff to fully examine what is involved in the application and hear the views of all parties.

- We consider it good practice that orders with such powers are not granted on an indefinite basis, the exercise of the powers is reviewed regularly by the local authority, ongoing education and support is provided to maximise capacity and minimise risk, capacity is reviewed regularly, where relevant, and advocacy is available.

- Sterilisation to prevent pregnancy and any medical treatment which may lead to sterilisation have specific safeguards which must be followed.

Note: any contraception or medical intervention that reduces fertility which requires to be prescribed by a medical practitioner **either for health reasons or to prevent pregnancy, is regarded as 'treatment'**. Therefore, in addition to any guardianship powers, a section 47 certificate of incapacity must be completed by a medical practitioner when prescribing such treatment to an adult who lacks capacity to give informed consent.

Our good practice guide 'Consenting Adults?' discusses some of the wider aspects of sexual relationships.[5]

[5] http://www.mwcscot.org.uk/media/51782/updated_consenting_adults.pdf


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