



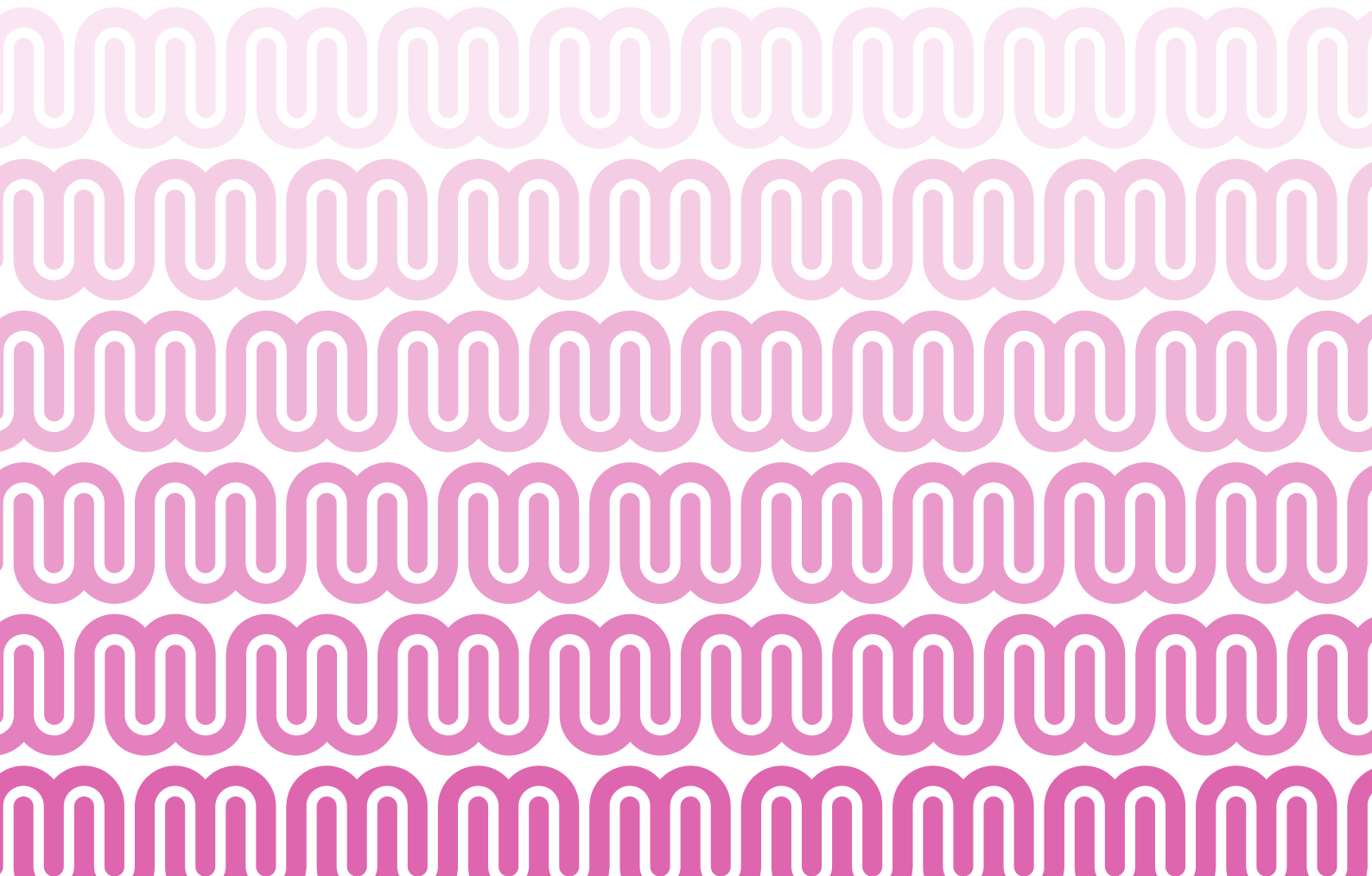
**mental welfare**  
commission for scotland

# **Treatment under section 47 of the Adults with Incapacity Act: overview and guidance**

Good practice guide

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April 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

This document was reviewed in Spring 2021. The previous title was 'The Adults with Incapacity Act in General Hospitals and Care Homes'

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# 1. The Adults with Incapacity Act: a brief overview

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

The 2000 Act sets out the arrangements for:

- Giving medical treatment. This is covered in Part 5 of the Act.
- Granting intervention orders which allow for one-off decisions to be made on behalf of the individual.
- Proxy decision-making such as powers of attorney and welfare and financial guardians who have the authority to make decisions on behalf of a patient.

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

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

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<sup>1</sup> The Adults with Incapacity (Scotland) Act 2000  
<https://www.legislation.gov.uk/asp/2000/4/contents>

## 2. Assessment of capacity

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

The 2000 Act defines incapacity as being incapable of:

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

due to mental disorder or inability to communicate because of physical disability.

The 2000 Act says that a person shall not fall within this definition (and be considered incapable) 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. This emphasises the importance of ensuring that the patient is provided with optimal support to communicate.

Capacity is presumed unless the patient is unable to:

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

(These matters should be assessed by a practitioner who is undertaking an assessment of the patient's capacity to consent to treatment.)

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

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

### 3. Treatment under common law “principle of necessity”

Common law allows medical treatment to be given in an emergency to patients who cannot consent. This remains the case and there is no need to go through the steps in Part 5 of the 2000 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.

#### **Case Study 1**

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

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

## 4. Treatment under Part 5 of the 2000 Act

The law in Scotland presumes that adults, those aged 16 years or over, are capable of making decisions. However, particularly in hospital and care home settings, staff will often be faced with individuals who are not capable of making decisions relating to medical treatment. Common examples of when this might occur include patients suffering from delirium or dementia, or who have a learning disability.

When a patient has been determined to lack capacity to consent to medical treatment, it can be given under the authority of Part 5 of the 2000 Act<sup>2</sup> following the completion of a section 47 medical treatment certificate.

### Case Study 2

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

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

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<sup>2</sup> Part 5 of the 2000 Act: Medical treatment and research.  
<https://www.legislation.gov.uk/asp/2000/4/part/5>

## 5. Who can complete a section 47 certificate?

A number of practitioners are authorised to complete this certificate:

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

\*who has undergone the necessary training on the assessment of incapacity and issuing s47 certificates.

A s47 certificate issued by a healthcare professional other than a medical practitioner will only be valid within their own area of practice e.g. a dentist can only authorise dental treatment. The certificate itself is a standard document and can be found on the Scottish Government website<sup>3</sup>. The same web page also contains guidance for the use of section 47 certificates when giving medical treatment.

More detailed guidance on provision of medical treatment under Part 5 of the 2000 Act, including completion of s47 certificates, can be found in the Code of Practice for practitioners authorised to carry out medical treatment or research under Part 5 of the 2000 Act.<sup>4</sup>

The medical practitioner primarily responsible for the adult's treatment, e.g. a GP in primary care, will often complete a s47 certificate authorising treatment that other health and care professionals provide (under the instructions of the doctor, or with their agreement). In practice, there will often not be another health professional involved who can complete a s47 certificate. So, for example, dental treatment will require to be authorised under a s47 certificate written by a doctor if the dentist has not done the training to be qualified to issue a s47 certificate themselves.

When considering the duration of authority for treatment to confer on a s47 certificate, the practitioner should consider the likely duration of the patient's incapacity, and of the treatment. A s47 certificate can be issued with a duration of up to one year (but up to three years in circumstances we have outlined below).

The practitioner should keep the patient's capacity to consent to treatment under review at appropriate intervals during the duration of the s47 certificate.

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 patient has at least one of the following conditions, no curative treatment is available, and their capacity is unlikely to improve:

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

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<sup>3</sup> Scottish Government guidance on the use of s47 certificates when giving medical treatment, and the s47 certificate proforma: <https://www.gov.scot/publications/section-47-certificate/>

<sup>4</sup> Adults with Incapacity (Scotland) Act 2000. Code of Practice (3<sup>rd</sup> Edition). For practitioners authorised to carry out medical treatment or research under Part 5 of the Act. <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/pages/0/>



## **6. When should a section 47 certificate be completed?**

A section 47 certificate is required when a patient requires health care and is unable to consent. For more routine health care needs, multiple treatments can be covered on one s47 certificate. A treatment plan may be completed and attached to the s47 certificate. We discuss the use of treatment plans further below.

A separate s47 certificate is required for any intervention that would normally require the signed consent of the adult. No standard s47 treatment plan can authorise such interventions.

An example is given in the code of practice of an adult needing heart surgery. This will not be included in the authority to treat under an entry for "coronary heart disease" on a s47 certificate treatment plan. This will require a separate certificate and separate consultation.

It is important to bear in mind that, if there is a welfare proxy with the power to consent to medical treatment, their consent should be sought. The proxy may be a welfare attorney or guardian, or a person authorised under an intervention order. We discuss this more below. The consent of the welfare proxy is needed in addition to completing the s47 certificate – it is not the case that the consent of a welfare proxy to the treatment means that a s47 certificate is not required.

## 7. Local section 47 certificate proformas

Section 47 certificates do not have to be written on the form available on the Scottish Government's website.

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. This means that an electronic document such as a Word document can be produced locally and completed electronically.

This wording of the s47 certificate is prescribed in regulations.<sup>5</sup>The text for a local s47 certificate proforma can be cut and pasted from the regulations.

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<sup>5</sup> The Adults with Incapacity (Medical Treatment Certificates) (Scotland) Regulations 2007. SSI 2007, No. 104.  
[https://www.legislation.gov.uk/ssi/2007/104/pdfs/ssi\\_20070104\\_en.pdf](https://www.legislation.gov.uk/ssi/2007/104/pdfs/ssi_20070104_en.pdf)

## 8. What are the limitations of a section 47 certificate?

If an adult with incapacity who is not formally detained under the Mental Health (Care and Treatment) (Scotland) Act 2003 (the 2003 Act)<sup>6</sup> requires treatment for a mental disorder, this may be lawfully given under the 2000 Act. If the adult refuses that treatment, this should be taken as an indication of their wishes. Should this situation arise, consideration should be given to whether it would be appropriate for the individual to be formally detained under the 2003 Act in order that they might benefit from the added protections which that Act offers. Advice could be sought from a psychiatrist and mental health officer.

A s47 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.

The Commission's good practice guidance *Right to treat?*<sup>7</sup> provides information about providing physical healthcare for people who lack capacity and who refuse or resist treatment (including the situation where a patient refuses to be taken to hospital).

There are treatments which a section 47 certificate cannot authorise. These include:

### **Treatments requiring the approval of the Court of Session**

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

### **Treatments approved by a practitioner appointed by Mental Welfare Commission (under section 48)**

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

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<sup>6</sup> Mental Health (Care and Treatment) (Scotland) Act 2003  
<https://www.legislation.gov.uk/asp/2003/13/contents>

<sup>7</sup> Mental Welfare Commission guidance. *Right to treat?* Delivering physical healthcare to people who lack capacity and refuse or resist treatment.  
<https://www.mwscot.org.uk/node/509>

## 9. What if a patient or resident tries to leave?

It can often be difficult to decide whether or not a section 47 certificate will suffice, or the use of the mental health act or an application for welfare guardianship is required for a given situation.

For example, in a hospital ward for older adults or a care home, a patient who lacks capacity may ask to be allowed to leave. Simple re-orientation and persuasion may be enough to convince the patient to remain in the ward or unit. In this case no other legal authority may be required for them to remain, and a section 47 certificate for their treatment may be sufficient.

However, section 47 certificates are only for treatment, when a patient is unable to consent due to incapacity, and force can only be used if immediately necessary and for as short a time as possible. A section 47 certificate does not give authority for deprivation of liberty.

If the person continually expresses a desire to leave, or attempts to leave and has to be prevented from doing so, the certificate does not give authority for that level of intervention. In that situation appropriate legal authority is required such as detention under mental health legislation if the necessary criteria are met (in hospital), or welfare guardianship.

## 10. Use of treatment plans

It will often be the case that patients in hospital wards for older adults or care homes have multiple care needs that need to be addressed by AWI legislation. Where there are multiple or complex ongoing healthcare need(s), the use of a treatment plan is recommended. There is more information about use of treatment plans in the code of practice for Part 5<sup>8</sup>, including a copy of a treatment plan with examples in Annex 5 at the end<sup>9</sup>.

In the same way as the section 47 certificate, the treatment plan should be completed by the clinician with overall responsibility for the patient.

The treatment plan should be written to include all of the healthcare interventions that it is foreseen may be required during the time specified in the certificate. It is recommended that, when a treatment plan is being used, the phrase "See attached treatment plan" is entered on a section 47 certificate where it says to record the "following treatment".

Certain basic healthcare procedures can be authorised under a single entry on the treatment plan for "fundamental healthcare procedures" (if the adult is incapable of consenting to any of those procedures). The code of practice for part 5 says in Annex 5 what is covered by the term "fundamental healthcare procedures": nutrition, hydration, hygiene, skin care and integrity, elimination or relief of pain and discomfort, mobility, communication, eyesight, hearing, and oral hygiene.

Each patient should be comprehensively assessed and foreseeable interventions that fall outside of these fundamental healthcare procedures should be listed separately, with a note made of whether or not the patient is felt to be capable or incapable of deciding on each intervention.

This treatment plan should be reviewed annually. In the event that a new condition becomes apparent, an additional section 47 certificate should be completed or the treatment plan should be re-written, incorporating the relevant details.

(NB the practitioner should date the treatment plan after their signature at the bottom, although a prompt for the date was left off the proforma in Annex 5 of the code of practice).

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<sup>8</sup> Code of practice for Part 5 of the 2000 Act: 2 - Medical treatment under Part 5  
<http://www.gov.scot/Publications/2010/10/20153801/2>

<sup>9</sup> Code of practice for Part 5 of the 2000 Act: Annex 5 - Treatment plan for patients.  
<http://www.gov.scot/Publications/2010/10/20153801/9>

## 11. Who needs to be consulted?

The section 47 certificate has a section which allows the clinician to clearly document who has been consulted in the creation of the plan. The names and designations of people consulted should be recorded in this section. The principles of the 2000 Act require anyone exercising functions under the Act to take into account the views of relevant others. This specifically includes the views of the nearest relative and the primary carer of the adult, as far as it is reasonable and practicable to do so.

It is essential that if a patient has an appointed welfare attorney/guardian or person authorised under an intervention order then that person's opinion must be taken where practicable. We discuss this more below.

Where the adult is in a care home or other residential setting, the code of practice states that consultation with a senior member of care staff should be recorded on the plan.

## 12. Who can consent for an adult with incapacity?

As above, practitioners completing s47 certificates need to consult the nearest relative and primary carer if practicable. This is not the same as them being able to consent to treatment. The only people who can consent or withhold consent to medical treatment for an adult are the adult themselves (if they are capable), or a welfare proxy with a power to make a decision about the proposed treatment. However it is not the case that the consent of a welfare proxy removes the need for a s47 certificate for treatments that the proxy consents to.

A welfare proxy will usually be a welfare attorney or a welfare guardian. Either of these may have powers to consent to medical treatment on behalf of the patient. The third type of welfare proxy is a person with an intervention order appointed by the sheriff, and the decision they are authorised to make may be to consent to medical treatment.

A welfare attorney is appointed by the adult when they are capable of appointing them. The welfare attorney becomes able to make welfare decisions if the adult loses capacity to make those decisions themselves. In some cases the document may specify additional conditions for these powers to become operational, such as a medical assessment of capacity.

Welfare power of attorney can be used to confer authority for a range of life decisions, from where a patient stays to who they are able to see and what medical treatment can be consented to. It is therefore important when working in hospital or residential settings to establish, for individuals who lack capacity, whether or not there is an appointed welfare attorney with the relevant powers, and to consult them as early as possible.

Where there is a welfare attorney, they should be asked for a copy of the relevant documentation, which should be kept within the patient's case notes. More information about power of attorney and how this operates can be found in the Commission's good practice guidance Common concerns with power of attorney.<sup>10</sup>

A welfare guardian is appointed in court by the sheriff to make welfare decisions that an adult no longer has capacity to make themselves, and to act on their behalf. A guardianship order can be for finances, welfare, or both, and works similarly to a power of attorney.

A welfare guardian is usually either a relative (or more than one relative as joint guardians), or the Chief Social Work Officer (CSWO). If the CSWO is the welfare guardian, they will usually delegate the guardianship powers to another local authority worker to operate on their behalf (this will often be the adult's care manager). A financial guardian who is not a relative will usually be a solicitor.

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<sup>10</sup> Mental Welfare Commission guidance. Common concerns with power of attorney. Good practice guidance. <https://www.mwscot.org.uk/node/229>

## 13. Welfare proxies and their consent to treatment

As we said earlier, if there is a welfare proxy with the power to consent to medical treatment, their consent should be sought. In fact, the 2000 Act says that a s47 certificate does not confer authority to treat if there is a welfare proxy, the person issuing the certificate is aware of that, and they do not consult the proxy (the exception is where it would not be reasonable or practicable for them to consult the welfare proxy)<sup>11</sup>.

Consent of the welfare proxy is needed in addition to completing the s47 certificate – it is not the case that the consent of a welfare proxy to the treatment means that a s47 certificate is not required.

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<sup>11</sup> s50(2) of the 2000 Act <https://www.legislation.gov.uk/asp/2000/4/section/50>



## 14. What if a welfare proxy refuses consent to treatment?

In some instances a welfare proxy with the power to make a decision about the proposed treatment may disagree with it and withhold their consent. In these circumstances, the treatment cannot be given (unless it is required for the preservation of the life of the adult or the prevention of serious deterioration in their medical condition – there is always common law authority to give such treatment).

If the practitioner responsible for the proposed treatment cannot reach agreement with the welfare proxy about whether or not to give it, the 2000 Act contains arrangements to resolve such disputes under section 50.<sup>12</sup> The practitioner should contact the Mental Welfare Commission. We will identify a nominated practitioner to give an opinion on the proposed medical treatment, independent from the practitioner who issued the original s47 certificate. If the nominated practitioner determines that the treatment should be given, it can then be given, unless the welfare proxy appeals to the Court of Session.

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<sup>12</sup> Section 50 of the 2000 Act: <https://www.legislation.gov.uk/asp/2000/4/section/50>

Code of practice for Part 5 of the 2000 Act: 3 – Dispute Resolution.  
<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/pages/3/>



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