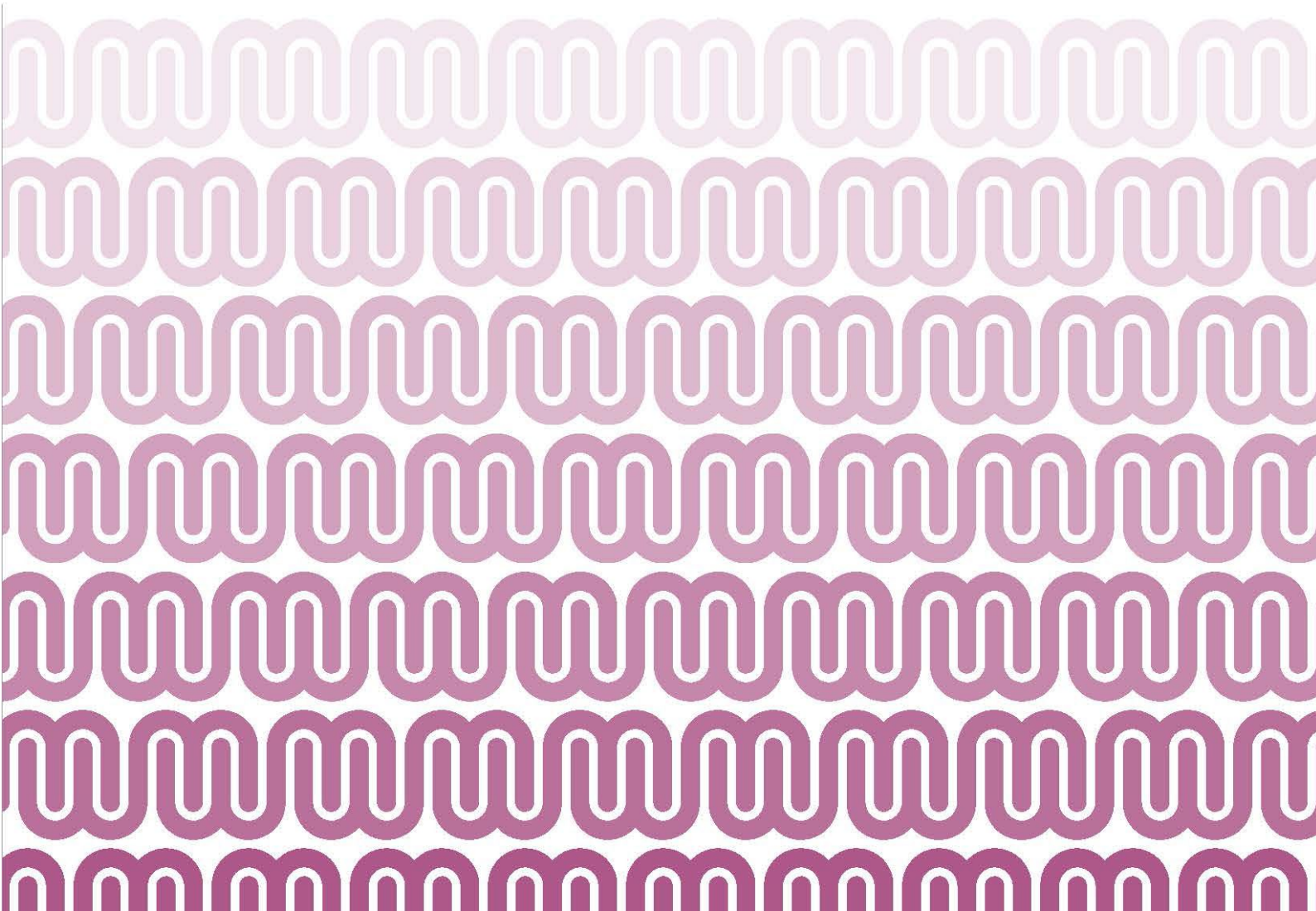
mental welfare commission for scotland

Advance directives refusing life-sustaining treatment

Advice note

July 2026



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 guidance was first published in June 2021. It was reviewed and updated in July 2026.

Contents

Summary

In Scotland, there is no statutory scheme for advance refusals of treatment equivalent to that contained in the Mental Capacity Act 2005 in England and Wales. However, this does not mean that advance directives can be ignored. A clear advance directive may provide important evidence of a person's wishes, values and beliefs and may, in some circumstances, have legal effect. Practitioners should consider any advance directive carefully and document the reasons for their decisions.

Background

An advance directive is a statement made by a person with capacity setting out treatments that they would wish to refuse in specified circumstances should they lose capacity in the future.

Advance directives should be distinguished from advance statements made under the Mental Health (Care and Treatment) (Scotland) Act 2003 (Mental Health Act). Advance statements relate to treatment for mental disorder and have their own statutory framework. This advice note concerns advance directives refusing physical healthcare treatment.

The legal position in Scotland

A person with capacity is entitled to refuse medical treatment, even where that refusal may result in serious deterioration in health or death.

Unlike England and Wales, Scotland has no statutory framework equivalent to sections 24–26 of the Mental Capacity Act 2005 governing advance refusals of treatment. The Adults with Incapacity (Scotland) Act 2000 (AWI Act) does not create a formal statutory scheme for advance directives.

Nevertheless, advance directives are important. They may provide compelling evidence of the person's wishes, values, beliefs and preferences and should be taken into account when decisions are made on behalf of an adult who lacks capacity.

When applying the principles of the AWI Act, practitioners must take account of the adult's present and past wishes and feelings so far as they can be ascertained. A clear advance directive may therefore be highly relevant to any decision about treatment.

The weight to be given to an advance directive will depend upon the circumstances of the individual case.

Factors that may be relevant include:

- whether the person had capacity when the advance directive was made;
- whether the decision was made freely and without undue pressure;
- whether the person understood the implications of the refusal;

- whether the treatment being refused is clearly identified;
- whether the circumstances that have arisen are those contemplated by the directive;
- whether there is evidence that the person's wishes subsequently changed;
- whether there is a welfare attorney or welfare guardian with relevant powers;
- whether there is any other reliable evidence of the person's values, beliefs and preferences.

The position in England and Wales

The position differs in England and Wales under the Mental Capacity Act 2005.

Sections 24–26 of that Act establish a statutory framework for advance decisions to refuse treatment (ADRTs). Where an ADRT is valid and applicable, it has effect as if the person had made the decision at the relevant time while possessing capacity.

Additional formal requirements apply where life-sustaining treatment is being refused. In particular, the ADRT must be in writing, signed, witnessed and contain a statement that the refusal is to apply even if life is at risk.

However, even under the Mental Capacity Act 2005, an ADRT is not automatically binding in every situation. The Act provides that an ADRT is not applicable where there are reasonable grounds for believing that circumstances exist which the person did not anticipate when making the decision and which would have affected their decision had they anticipated them.

Clinical judgement therefore remains necessary even where a statutory ADRT exists. Practitioners must consider whether the circumstances that have arisen are those that the person intended the ADRT to cover.

People moving between jurisdictions

Questions occasionally arise where a person has made an ADRT in England or Wales and subsequently moves to Scotland.

Such a document does not have the same statutory status in Scotland that it would have under the Mental Capacity Act 2005. However, it should not be disregarded on that basis alone.

An ADRT made elsewhere in the United Kingdom or an advance statement made in another country may provide strong evidence of the person's wishes, values and beliefs. Practitioners should have careful regard to its contents and consider it alongside the principles of the AWI Act and any other available evidence about the person's wishes and preferences.

Life-sustaining treatment

Advance directives most commonly come to attention when decisions are required about life-sustaining treatment, such as:

- cardiopulmonary resuscitation;
- mechanical ventilation;
- clinically assisted nutrition and hydration;
- dialysis;
- blood transfusion;
- other treatments intended to sustain life.

A refusal of life-sustaining treatment should be especially clear and specific. Practitioners should carefully consider whether the directive applies to the treatment and circumstances that have arisen.

For example, a person may have refused blood transfusion on religious grounds, refused clinically assisted nutrition and hydration in specified circumstances, or expressed wishes regarding invasive life-sustaining treatment at the end of life.

Treatment provided contrary to a clear and applicable advance directive may create legal risk. This may be particularly relevant where there is compelling evidence that the person would have refused the treatment if they had capacity at the time. Blood transfusions refused on religious grounds are a commonly cited example.

When there is uncertainty

There will be cases where the validity, meaning or applicability of an advance directive is unclear.

Practitioners should be particularly cautious where:

- the directive is old;
- the wording is ambiguous;
- circumstances differ from those envisaged by the person;
- there is evidence that the person's views changed after the directive was made;
- family members or professionals disagree about its interpretation;
- there is uncertainty about the person's capacity when the directive was created.

Where significant doubt exists, practitioners should seek appropriate advice. This may include consultation with senior clinical colleagues, legal advisers, welfare attorneys or guardians, and others with an interest in the person's welfare.

In urgent situations, treatment necessary to preserve life or prevent serious deterioration may be required while legal or clinical advice is sought.

Record keeping

All decisions involving an advance directive should be carefully documented.

Records should include:

- the advance directive itself;
- any assessment of its validity and relevance;
- the factors taken into account;
- the person's known wishes, values and beliefs;
- the views of those consulted;
- the role of any welfare attorney or guardian;
- the clinical risks and benefits considered;
- the reasons for the final decision.

Conclusion

Although advance directives do not have a dedicated statutory framework in Scotland, they remain an important source of evidence about a person's wishes and preferences. Practitioners should consider them carefully, apply the principles of the AWI Act, and document clearly the reasons for the decisions reached. The absence of a Scottish statutory scheme does not mean that advance directives can be ignored, nor does it remove the need for careful clinical and legal judgement in individual cases.

Further reading

- **Adults with Incapacity (Scotland) Act 2000:** Code of Practice for Medical Practitioners (Part 5 Medical Treatment)
- **Scottish Government 2018:** Adults with Incapacity Reform Consultation (Advance Directives chapter). Although not law, this is one of the clearest Scottish Government summaries of the current legal position:
  "Although the AWI Act does not make any specific provision for advance directives, the principles of the Act should mean that any advance directive has considerable force..."
- **Mental Welfare Commission:** AWI Act
- **Mental Welfare Commission**: Right to treat? Delivering physical healthcare to people who lack capacity and refuse or resist treatment
  This good practice guide addresses treatment refusal, incapacity and physical healthcare.
- **Mental Welfare Commission:** Advance Statements
  Useful because as the advice note explains: advance statements and advance directives are different legal concepts. Advance statements have a statutory basis under the Mental Health Act.
- **Mental Capacity Act 2005:** sections 24–26
  The definitive source on ADRTs.
- **NHS (England and Wales) 2023:** Advance Decision to Refuse Treatment
  Clear public-facing explanation of validity, applicability and life-sustaining treatment requirements in England and Wales.
- **General Medical Council 2024:** Treatment and Care Towards the End of Life
  Particularly the sections on advance refusals and advance care planning.
- **British Medical Association 2025:** Adults with Incapacity in Scotland Toolkit
  Helpful on the Scottish position regarding advance directives and treatment refusal.

If you have any comments or feedback on this publication, please contact us:

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