

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

EXPLANATORY NOTES

THE ACT

Part 5: Medical Treatment and Research

Section 47: Authority of persons responsible for medical treatment

169. This section provides authority to give to an adult with incapacity medical treatment aimed at maintaining or improving the physical or mental health of that adult.
170. Subsection (1) applies this section where the doctor who has overall responsibility for the medical treatment of an adult has certified that that adult is incapable in relation to a particular decision about medical treatment.
171. Subsection (2) provides that, during the validity of the certificate of incapacity, the doctor primarily responsible shall have authority to do what is reasonable in the circumstances, in relation to the medical treatment, to safeguard or promote the physical or mental health of the adult.
172. Subsection (3) permits the general authority to treat to be conferred also on any other person who is acting on behalf of the medical practitioner primarily responsible, under his instructions, or otherwise with his approval or agreement.
173. Subsection (4) defines medical treatment as including any procedure or treatment designed to safeguard or promote physical or mental health.
174. Subsection (5) makes provision regarding the certificate of incapacity. The certificate will be valid for a year, or for a shorter period, depending on the individual circumstances. Such a certificate shall be in a form to be prescribed by the Scottish Ministers in regulations.
175. Subsection (6) allows for a certificate of incapacity to be revoked, or revoked and replaced by a new certificate, if the condition or circumstances of the adult have changed.
176. Subsection (7) provides that the general authority to treat shall not allow the use of force or detention unless it is immediately necessary, and then only for as long as it is necessary. This subsection also makes clear that the general authority does not authorise any action which is contrary to a court decision, nor does it allow an adult to be placed in hospital for the treatment of mental disorder against his will.
177. Subsection (8) excludes from the general authority to treat certain treatments to be specified in regulations under section 48.
178. Subsection (9) restricts the general authority, in cases where a legal challenge has been mounted to that authority, to life saving treatment or treatment to prevent a serious deterioration in health.

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Act 2000 (asp 4) which received Royal Assent on 9 May 2000*

179. Subsection (10) withdraws the general authority for a particular treatment in all cases and in all circumstances where a court order prohibiting treatment is in force.

Section 48: Exceptions to authority to treat

180. This section provides for certain treatments to fall outside the general authority to give medical treatment to adults with incapacity.
181. Subsection (1) excludes treatments covered by Part X of the Mental Health (Scotland) Act 1984 from the general authority to treat.
182. Subsections (2) and (3) empower the Scottish Ministers to make regulations specifying a particular treatment or classes of treatment which will be excluded from the general authority to treat. The regulations may also make provision about the treatments to which the authority does apply, and the circumstances in which such treatments may be carried out.

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

183. This section covers circumstances in which an application has been made for an intervention order or a guardianship order under Part 6 that would confer powers to consent or refuse consent to the treatment in question.
184. Subsection (1) provides that the general authority to treat shall not apply in such circumstances, where the application is known to the person responsible for treating the adult with incapacity, and where the outcome of the application has not been determined.
185. Subsection (2) permits treatment to save life or to prevent a serious deterioration in health in such circumstances until the application is finally determined.
186. Subsection (3) provides that notwithstanding subsection (2), no medical treatment may be given if a court order prohibiting such treatment has been granted and is in force.

Section 50: Medical treatment where guardian etc has been appointed

187. This section deals with the situation where a guardian or welfare attorney or person appointed under an intervention order has power in relation to medical treatment, and disagreement arises between such a person and a doctor about the desirability of treatment.
188. Subsection (1) applies this section where a guardian, welfare attorney, or person authorised under an intervention order (referred to as a “proxy”) has power in relation to any medical treatment.
189. Subsection (2) withdraws the general authority to treat where the doctor primarily responsible is aware of the appointment or authorisation of a proxy, it would be reasonable and practicable for the doctor to obtain the proxy’s consent, but they have failed to do so.
190. Subsection (3) provides that where the doctor primarily responsible has consulted the proxy and there is no disagreement as to medical treatment, any person who has an interest in the personal welfare of the adult may nevertheless appeal the decision to the Court of Session.
191. Subsection (4) provides that where disagreement arises between the proxy and doctor, the doctor must ask the Mental Welfare Commission to nominate a second doctor to give an independent opinion on the medical treatment.
192. Subsection (5) provides that the authority to give treatment will apply if the second doctor certifies that in his opinion the proposed medical treatment should be given,

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having regard to all the circumstances, and having consulted both the proxy and (if it is reasonable and practicable to do so) another person nominated by the proxy.

193. Subsection (6) permits the doctor primarily responsible, or any other person who has an interest in the personal welfare of the adult, to ask the Court of Session to decide whether or not the proposed treatment should be given if they disagree with the opinion of the second doctor.
194. Subsection (7) withdraws the authority to treat during an appeal to the Court of Session except for life saving treatment or treatment to prevent a serious deterioration in health.
195. Subsection (8) withdraws any authority to treat where a court order has been granted and is still in effect that prohibits the giving of such medical treatment.
196. Subsection (9) provides for the Mental Welfare Commission to establish and maintain a list of medical practitioners from whom they shall nominate independent doctors in terms of subsection (4) above.
197. Subsection (10) provides that the terms “welfare attorney” and “guardian” in this section shall include foreign attorneys and guardians if their powers are recognised in Scotland.

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Authority for research

198. This section provides that research on adults incapable of giving consent to such research may not be carried out except in particular circumstances and subject to conditions. In particular research is not permitted where it could be carried out on adults who are capable of giving consent.
199. Subsection (1) specifies the types of research covered, and provides the general prohibition of such research except in specific circumstances
200. Subsection (2) specifies the circumstances in which research may be carried out. Research must be to obtain knowledge of the causes, diagnosis, treatment or care of the adult’s incapacity, or the effect of any treatment or care given to the adult during his incapacity. The further conditions specified in subsection (3) must also be fulfilled.
201. Subsection (3) defines the conditions under which research is permitted, all of which must normally be met. The research must be likely to produce real and direct benefit to the adult and the adult must not show unwillingness to participate. The research must involve only minimal risk or discomfort to the adult and have been approved by the Ethics Committee. Consent must also have been obtained from the patient’s guardian or welfare attorney or nearest relative.
202. Subsection (4) provides exceptionally for the possibility that research may be carried out even where it is not likely to produce real and direct benefit to the adult. This is permitted where the research is likely to improve the scientific understanding of the adult’s incapacity. The group of people suffering from that incapacity may ultimately benefit from this research. It is still necessary to comply with the conditions in subsections (1), (2) and (3)(b)-(f).
203. Subsection (5) allows the Ethics Committee to attach conditions when granting approval for research.
204. Subsection (6) provides for the regulations establishing the Ethics Committee.
205. Subsection (7) enables the Scottish Ministers to specify in regulations matters which the Ethics Committee must take into account when approving research.

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Section 52: Appeal against decision as to medical treatment

206. Section 52 provides that any decision taken for the purposes of Part 5 as to the medical treatment of an adult (other than a decision by a doctor under section 50) may be appealed by any person who has an interest in the personal welfare of the adult to the sheriff, and thereafter to the Court of Session.