

HEALTH AND SOCIAL CARE ACT 2012

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 11 – Miscellaneous

Supervised community treatment

Section 299 – Certificate of consent of community patients to treatment

1517. This section amends the rules in the Mental Health Act 1983 (the 1983 Act) about the treatment of patients on supervised community treatment. In particular, it changes the circumstances in which their treatment has to be approved by a second opinion appointed doctor (SOAD), appointed (in England) by the CQC or (in Wales) by the Healthcare Inspectorate Wales on behalf of the Welsh Ministers. The effect of the changes is that approval by a SOAD will not generally be necessary if the patient is consenting to the treatment in question.
1518. Supervised community treatment was introduced into the 1983 Act by the Mental Health Act 2007. Patients who have been detained in hospital for treatment for their mental disorder may be discharged by their responsible clinician from detention on to supervised community treatment by means of a community treatment order, provided the relevant criteria are met (see section 17A of the 1983 Act). While on a community treatment order, supervised community treatment patients (referred to in the Act as “community patients”) remain liable to recall to hospital for further treatment, if necessary.
1519. One of the criteria for putting patients on to supervised community treatment is that it is necessary for their own health or safety, or for the protection of others, that they receive medical treatment for their mental disorder. However, supervised community treatment patients may not (in general) be treated against their will unless they are recalled to hospital by their responsible clinician.
1520. The rules on treating supervised community treatment patients for mental disorder (unless recalled to hospital) are set out in Part 4A of the 1983 Act. They differ depending on whether the patient has the capacity, or (in the case of a child under 16) the competence, to consent to the treatment. (For the purposes of these explanatory notes, “capacity” will be used to include competence.)
1521. In brief, patients who have the capacity to consent to treatment may not be treated unless they do, in fact, consent. In addition, whether or not the patient has the capacity to consent, certain treatments could previously only be given if they had been approved as appropriate by a SOAD. This is known as the “certificate requirement”, because approval had to be given by the SOAD on a “Part 4A certificate” in a form set out in regulations by the Secretary of State in England, or by the Welsh Ministers in Wales.
1522. A SOAD’s Part 4A certificate was generally required for medication (after the patient has been on supervised community treatment for one month) and for electro-convulsive therapy. In the 1983 Act, these are known respectively as “section 58 type treatment”

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and “section 58A type treatment”, after the sections of the Act which set out the rules on when the treatments in question may be given to detained patients. In emergencies, certificates are not required where the treatment is immediately necessary.

1523. It is the rules about these certificates which are changed by this section.
1524. The section amends sections 64C and 64E of the 1983 Act so that, if the patient consents to the treatment in question, the approved clinician in charge of the treatment will satisfy the certificate requirement by issuing their own Part 4A certificate stating that the patient consents to the treatment and has the capacity to do so. This new approved clinician’s Part 4A certificate is now sufficient to meet the certificate requirement so long as the patient continues to consent and has capacity to do so. But it is still possible to meet the certificate requirement by means of a Part 4A SOAD certificate instead.
1525. This new rule does not apply to electro-convulsive therapy for patients under 18 (nor to any other treatments for such patients which are in future added to section 58A by order of the Secretary of State in England, or the Welsh Ministers in Wales). That is because, unless it is an emergency, treatments covered by section 58A may not be given to any patient under 18 (whether or not they are otherwise subject to the 1983 Act) without the approval of a SOAD.
1526. The section also inserts a new section 64FA into the 1983 Act to make clear that a supervised community treatment patient who has consented to treatment may at any time withdraw that consent. The new section also sets out what happens if a patient who has consented to treatment subsequently loses the capacity to do so. In both cases, the patient will be treated as having withdrawn consent to the treatment in question. This, in turn, means that any approved clinician’s Part 4A certificate relating to the treatment would no longer be valid, and a SOAD’s Part 4A certificate would be required instead.
1527. However, new section 64FA(5) provides that treatment may continue whilst a new certificate is being sought, if the approved clinician thinks that stopping the treatment would cause serious suffering to the patient. This might allow treatment to continue in the case of a patient who has lost capacity to consent, but it does not allow treatment to continue against the wishes of a patient who still has capacity to consent, unless the patient were recalled to hospital. That is because there is no legal authority to give the treatment even if a SOAD’s Part 4A certificate has been obtained.
1528. The section makes some further amendments to the 1983 Act to reflect the fact that there are now two different types of Part 4A certificate. It amends section 64H to enable the Secretary of State in England, and the Welsh Ministers in Wales, to set out different forms for the different Part 4A certificates in regulations. It amends section 17B so that the power in section 17E, to recall a supervised community treatment patient to hospital for examination with a view to a Part 4A certificate, will continue (as before) to apply only to a SOAD’s Part 4A certificate. It also amends section 61 to provide that the Care Quality Commission and the Welsh Ministers retain the power to withdraw a SOAD’s Part 4A SOAD certificate, but are not able to withdraw an approved clinician’s certificate.
1529. The rules on treating detained patients are in Part 4 of the 1983 Act. For the most part, detained patients may be given treatment for mental disorder without their consent, even if they have capacity to refuse it (although this does not apply to electro-convulsive therapy unless it is an emergency). However, sections 58 and 58A set out circumstances in which detained patients may not be given medication or electro-convulsive therapy unless it has been approved by a SOAD on a certificate, or an approved clinician has issued a certificate saying that the patient consents to the treatment (and has the capacity to do so).
1530. In general, supervised community treatment patients recalled to hospital are subject to the same rules as detained patients, although section 62A provides that a new certificate

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under section 58 or 58A is not required if the treatment has already been expressly approved by a SOAD on a Part 4A certificate.

1531. This section extends the exception in section 62A to approved clinicians' Part 4A certificates. In other words, a new certificate under section 58 or 58A is not required if the treatment in question is already covered by an approved clinician's Part 4A certificate, provided that the patient continues to consent to the treatment (and still has the capacity to do so).
1532. Section 62A also provides that, even if the treatment has not been expressly approved by a SOAD's Part 4A certificate, it may be continued while a new SOAD certificate is sought, if the approved clinician in charge thinks stopping the treatment would cause the patient serious suffering. This section adds a new section 62A(6A) which extends that to include cases where (either before or during recall) the patient withdraws consent to treatment to which an approved clinician's Part 4A certificate applies, or loses capacity to consent to it. As amended, section 62A will allow an approved clinician to continue giving medication to a patient who has withdrawn consent if they consider that its discontinuance would cause serious suffering to the patient, but it does not allow electro-convulsive therapy to be given against such a patient's will (because it is not possible to obtain a SOAD certificate authorising electro-convulsive therapy for a detained patient who has capacity to consent, but is refusing to do so).
1533. None of these changes affects the ability to give medication or electro-convulsive therapy without a certificate in emergencies, where it is immediately necessary.