

Supplementary guidance on consent
Legal framework for Scotland:
capacity to consent

1. In Scotland, persons over 16 are presumed to have full legal capacity.
2. The Adults with Incapacity (Scotland) Act 2000 sets out the criteria and procedures to be followed in making decisions when people aged 16 and over lack the capacity to take some or all decisions for themselves, because of a mental disorder or inability to communicate. It also allows other people to make decisions on their behalf. The Act provides various methods of intervening (that is, taking decisions or action) on behalf of an adult who lacks capacity, including in relation to healthcare.
3. The Act sets out the principles that must be followed when deciding whether to intervene. Any intervention must be necessary, must benefit the person and must be the minimum necessary to achieve the purpose. Those making decisions must:
 - a) take account of the person's present and past wishes and feelings, and must try every possible means of communicating with the person to find out what these are;
 - b) take into account the views of the person's nearest relative and primary carer, and of any other person with powers to intervene in the person's affairs or personal welfare, or with an interest in the person, so far as it is reasonable and practical to do so;
 - c) encourage the person to use any skills they have to make decisions; and
 - d) consider whether it would be possible to intervene without using the Act.
4. In this Act, incapacity means being incapable of acting on, making, communicating, understanding, or remembering decisions by reason of mental disorder or inability to communicate due to physical disorder.

5. The Act is supported by codes of practice setting out guidance for those acting under the legislation, including doctors and other healthcare professionals who are treating adults with incapacity. The Code of Practice for Practitioners Authorised to Carry Out Medical Treatment or Research Under Part 5 of the Act covers decisions about medical treatment and research.
6. The Mental Health (Care and Treatment) (Scotland) Act 2003 makes provision as to when a person can be taken into hospital against their will, when they can be given treatment against their will, the rights of patients with an order of the Act applied to them and provides for safeguards to make sure their rights are protected.
7. If you are unsure about a patient's capacity you should get advice from other colleagues, healthcare professionals or people involved in their care. If you are still unsure you may need to consult your professional or representative body or obtain legal advice. Any advice you get or assessments carried out should be properly recorded, along with the outcome.

Adults who lack capacity

8. Most patients will have the capacity to consent. However, if your patient is not able to make decisions for themselves the law sets out the criteria and processes to be followed. It also grants legal authority to certain people to make decisions on behalf of patients who lack capacity.
9. If you believe that a patient lacks capacity to make decisions for themselves, you should consult the codes of practice that accompany the Adults with Incapacity (Scotland) Act 2000. These set out who can make decisions on the patient's behalf, in which circumstances, and how they should go about this.

10. A person may be authorised to provide consent for your patient to be treated if:
 - a. they have previously been named by the patient as someone to be consulted;
 - b. if they are caring for or are interested in the patient's welfare, under a lasting power of attorney or when appointed by the Court (i.e. as a deputy appointed by the Court of Protection); or
 - c. if that person is authorised in respect of personal welfare matters.

11. These principles also apply to decisions about the use of information about patients who lack capacity. For example, the codes of practice must be consulted when deciding to share confidential information about a patient who lacks capacity with their family, next of kin or carer, as well as making decisions about treatment.

Children

12. The capacity to consent depends more on the patient's ability to understand and consider their decision than on their age.

13. A child means anyone aged under 16.

14. As with any patient, a child may have the capacity to consent to some services or treatments but not to others. Therefore it is important that you assess maturity and understanding individually, bearing in mind the complexity and importance of the decision to be made.

15. If a child does not have the capacity to consent, consent must be provided by a person with parental responsibility as defined in Part 1 of the Children (Scotland) Act 1995. If a person with parental responsibility is required to provide consent, you may need to get legal advice if:

- a. you are in any doubt about who has parental responsibility for the individual; or
 - b. the views of those that have parental responsibility differ.
16. Children should be involved as much as possible in decisions about their care, even when they are not able to make decisions on their own.

Children with competence

17. Children are not presumed to have the capacity to consent; instead, the issue is whether children can demonstrate their competence.
18. A child is competent and can give consent if you are satisfied that they have the maturity, intelligence and ability to fully understand the information given and what they are consenting to, including any implications of the treatment they are consenting to. In this case you do not also need consent from a person with parental responsibility. However, it is considered good practice to explore whether you can involve the child's parent or guardian by seeking consent from the child.
19. The Age of Legal Capacity (Scotland) Act 1991 sets out at section 2 when a child may have the legal capacity to consent. Where a competent child has been provided with appropriate information and voluntarily gives his or her consent to treatment, that consent cannot be overridden by a person with parental responsibility. This principle derives from the case of *Gillick v West Norfolk and Wisbech AHA [1986] AC112* and is often referred to as the test of 'Gillick competency'.
20. If you consider that the decision of a competent child is not in their best interests, you should consult colleagues and get legal advice before proceeding.

When competent children refuse to give consent

21. When a child has capacity to make a decision and the child declines the recommended treatment, it is likely that the law would expect you to respect and comply with an informed decision. If such a situation arises, you should obtain legal advice. Of course if circumstances change, for example, the child's condition is at risk of deterioration, a further dialogue will probably be necessary. Depending on the circumstances, it might be necessary to involve another member of the healthcare team or other family members or carers in that dialogue, depending on any issues of confidentiality. As with all these discussions and decisions, full and proper records should be kept.

Children without competence

22. When a child lacks competence to give consent, any person with parental responsibility for that child, or the court, can give consent on their behalf. Who will be considered to have parental responsibility may also vary. You should seek legal advice and/or advice from your professional or representative body.
23. While the consent of only one person with parental responsibility is required, where there is disagreement between those with parental responsibility you may wish to seek further advice.

Advance decisions on healthcare arrangements

24. People with capacity can say in advance how they want to be treated if they later suffer loss of mental capacity. An advance decision can only be used to refuse treatment, as a patient cannot demand specific treatment. These are unlikely within the optical sector context, but professionals should be aware of these if, for example, a patient makes an advance decision which refuses all types of healthcare.

25. An unambiguous advance refusal for a treatment, procedure or intervention which is voluntarily made by an adult with capacity and does not appear to have been withdrawn or is not applicable in the circumstances is likely to have legal force.
26. An advance refusal of treatment cannot override the legal authority to give compulsory treatment as set out in legislation.
27. Any advance decision can be superseded by a later decision by the person concerned at any time when they have capacity. This later decision may be made at any point between the making of the advance decision and the beginning of treatment. An advance decision will only apply in relation to treatment if the person giving it does not have capacity at the point that consent would be sought or treatment is given.
28. The Adults with Incapacity (Scotland) Act 2000 does not specifically cover advance decisions. However, it says that health professionals must take account of the patient's past and present wishes, however they were communicated.
29. Advance decisions are also known as advance directives, living wills, advance directions and advance statements. Provided that the advance decision was made by an adult with capacity who was properly informed, and clearly sets out the person's intentions, it is likely that a Court would consider it binding. If however the factual situation falls outside the scope of the advance decision, or if the assumptions upon which it was based are rebutted, then the advance decision is likely to cease to be effective. You should obtain legal advice on the effectiveness of any advance decision.

Further reading: Scotland

Adults with Incapacity (Scotland) Act 2000

www.legislation.gov.uk/asp/2000/4/contents

Adults with Incapacity Act Codes of Practice

www.gov.scot/Publications/2010/10/20153801/0

Age of Legal Capacity (Scotland) Act 1991

www.legislation.gov.uk/ukpga/1991/50/introduction

Adults with Incapacity (Requirements for Signing Medical Treatment Certificates) (Scotland) Amendment Regulations 2012 SSI 2012/170

www.scotland.gov.uk/Topics/Justice/Civil/awi

Children (Scotland) Act 1995

www.legislation.gov.uk/ukpga/1995/36/contents

The Office of the Public Guardian in Scotland also provides guidance with the Adults on Incapacity (Scotland) Act 2000

www.publicguardian-scotland.gov.uk