

## CONSENT TO TREATMENT (April 2006)

- 1 Members of Sub Group 3 and other representatives of Reference Groups have considered the current provisions in Part IV of the Mental Health (Northern Ireland) Order 1986 (the 1986 Order).
- 2 It is a well established principle under Common Law that voluntary patients may not be treated without their consent, except in certain emergencies. Part IV of the 1986 Order introduced new statutory provisions to clarify the circumstances in which detained patients (including patients admitted for assessment) may be given treatment for mental disorder without their consent. In addition safeguards were introduced to protect anyone not liable to be detained who has consented to certain of the most serious forms of treatment by extending to them the same safeguards which apply to detained patients receiving the same forms of treatment. These provisions are based on the corresponding provisions in the English 1983 Act. The present Article 63 covers the most serious forms of treatment such as brain surgery without the patient's consent and a second opinion from an independent doctor. These safeguards apply to both detained patients and voluntary patients.
- 3 The second category, defined in Article 64, covers other serious forms of treatment and requires either the patient's consent or a second medical opinion. These requirements apply only to detained patients.
- 4 The third category, defined in Article 68, deals with cases requiring urgent treatment required for certain specified emergencies which may be given without the patient's consent or a second medical opinion.
- 5 All other forms of treatment for mental disorder fall into the fourth category – and cover the less serious forms of treatment which do not require consent or a second opinion provided they are given by the responsible medical officer or under his direction. The patient's consent must be informed, that is to say the patient must be capable of understanding the nature of the treatment which is proposed for him/her, its purpose and likely effects. To ensure that this is so, the safeguards for the two most serious categories of treatment include procedures for validating the patient's consent.
- 6 The question of the compulsory treatment of patients suffering from mental disorder has been the subject of critical re-examination in Scotland during the deliberations of the Millan Committee and led to the enactment of the Mental Health (Care and Treatment) (Scotland) Act 2003 which sets out in Part 16 a revised classification of medical treatments (including certain surgical operations) with appropriate safeguards in each category. A separate extensive re-appraisal of medical treatments in England and Wales, to replace powers set out in Part 4 of the English 1983 Act, was addressed in a draft Bill introduced at Westminster in 2004 (which has since been withdrawn). The Bill proposed the reclassification of treatments and the establishment of special safeguards which were examined in detail by the Joint Committee in a Report submitted to the House of Lords and to the House of Commons on 9 March 2005.
- 7 In considering how Part IV of the 1986 Order might be replaced it was suggested that a number of factors must be included in any new legislation:
  - there should be clear definitions;

- the range of treatments should be easy to read and understand;
  - the system for providing treatment should be practicable and workable; and
  - the provision of treatment should be arranged with the minimum of delay.
- 8 Particular concern was expressed by service users' and carers' representatives that effective safeguards should be defined in a way which would enable full protection to be afforded to a patient in establishing his/her known wishes – whether communicated through carers, family members, nominated persons, attorneys, or other appropriate representatives. Concern was also expressed about the continuing use of electroconvulsive therapy (ECT) and also the extent to which advance decisions (indicating the refusal of certain treatment) might be ignored by doctors advocating particular treatments. Attention was drawn to the specific recommendations of the World Health Organisation on the use of ECT set out in a Resource Book on Mental Health, Human Rights and Legislation published in 2005.
- 9 The Sub Group has concluded that the revised classification of specified treatments for new legislation in Northern Ireland should follow that defined in Part 16 of the Scottish 2003 Act. In regard to particular surgical operations and other specified medical treatments the provisions set out in sections 234-236 of the Act should be adopted with the requirement that a declaratory order be sought in the High Court. The provision of ECT and other specified treatments, as described in section 237(3) of the Act, should follow the succeeding sections 238 and 239 with the introduction of one additional safeguard for patients who are incapable of consenting. The certificate of the [second] designated medical officer provided under section 239(1) should also record that he has consulted with and noted the views of another person interested in the welfare of the patient. The person to be consulted should be a [nominated] or [named] person, an attorney (under a [registered] Lasting Power of Attorney), an advocate [already engaged on behalf of the patient] or a professional person (Approved Social Worker, psychologist, community psychiatric nurse or other mental health worker) involved in the care of the patient. In relation to continuing treatments, referred to in section 240 of the Act, it is considered that the treatment specified in sub section (3) should be allowed to continue for a period of 3 months (rather than 2 months) before the provisions of sections 238 or 241 are invoked.

### **Recommendations**

1. Provision to replace Part IV of the 1986 Order (defining categories of treatment for mental disorder) should adopt the classification of treatments found in Part 16 of the Mental Health (Care and Treatment) (Scotland) Act 2003 – (the Scottish 2003 Act).
2. In addition to the safeguards set out in section 239 of the Scottish 2003 Act (in respect of special medical treatments – including ECT) the [second] medical practitioner engaged to provide a confirmatory certificate should be required to record in writing that he has consulted the [first] [responsible] medical officer and another independent person [interested in the welfare of the patient].
3. The list of “other persons” who should be consulted by the [second] medical practitioner for the purpose described at 2 above should be defined in the statute [and state the “hierarchy” of consultees to be approached].
4. The provisions governing continuing treatments found in section 240 of the Scottish 2003 Act should allow the relevant period described in subsection (4) to extend to 3 months – rather than 2 months.

## **References**

The Draft Mental Health Bill 2002

The Draft Mental Health Bill 2004

The Report of the Joint Committee on the Draft Mental Health (2004) Bill – Session 2004-05

The Draft Mental Health Bill 2006

The (Irish) Mental Health Act 2001

The Mental Health (Care and Treatment) Scotland Act 2003

The (Scottish) Code of Practice on the MHCT (Scotland) Act 2003 – published August 2005