

# MIDNIGHT LAW: Scotland Approaching Treatment Plans for the Person with a Disability



## SITUATION:

Clinical tools used to assess the benefits and outcomes of ICM treatment, may not take specific account of the person with a disability. How can they be applied to treatment plans, in a way that is appropriate and consistent?

## CONSIDERATIONS:

### Equalities Act 2010 and the European Convention on Human Rights

The definition of a disability is broad & treatment decisions will require consideration of:

- **process** – e.g. communication support for the person; and
- **outcome** – what additional steps are needed to ensure, as far as possible, that the person with a disability is able to access critical care equitably?

Discrimination can arise not only where a person is treated differently, because they have a disability, but also as a result of policies that appear 'neutral', but in fact affect disabled individuals as a group. Any policy which may give rise to different outcomes for disabled people is only lawful, if it represents a proportionate way of achieving a legitimate aim.

### What steps should I take?

- Ensure your decision-making processes are consistent, to avoid discrimination.
- Treatment decisions need to involve consultation with the disabled person, wherever possible. Doctors must try to find out what matters to patients, so that they can share relevant information about the benefits and harms of proposed options and reasonable alternatives, including the option to take no action (GMC 2020 guidance on consent).
- When creating policies/guidance, regarding clinical treatments that use screening tools not validated for the patient population you wish to use them for, consider whether the policy/guidance may lead to unlawful discrimination against disabled individuals.
- Discrimination is more likely to arise where decisions are taken about access to treatments on the basis of judgments about quality of life, as opposed to survivability.
- DNACPR decisions must involve the individual who has capacity, unless doing so would cause physical or psychological harm.

### What particular steps should be taken if a patient lacks capacity?

- Treatment decisions must be of overall benefit for the patient and made in accordance with the requirements of **Part 5, S47 of the Adults with Incapacity (Scotland) Act 2000**.
- For DNACPR decisions: relatives/relevant others must be informed without delay where practicable and appropriate. However, these individuals cannot refuse treatment, on behalf of the patient. CPR should only be offered if there is a clear expectation, that its aim can be achieved.
- If the patient is a vulnerable adult, e.g. has mental illness, learning disabilities or dementia, the involvement of a medical practitioner appointed by the **Mental Welfare Commission**, may be required.
- Decision making in complex/difficult pandemic related cases, should involve Board level Ethics Committees, who if necessary, should escalate to the Scottish National Ethical Advice and Support Group, which reports to Scotland's CMO.
- Disabled persons at risk of losing mental capacity, should be encouraged to develop advance care plans that make their wishes clear, to assist in future medical decisions. These plans must be informed, current, made without undue influence from others and clearly apply to the current clinical circumstance. However, Advance Decisions for the Refusal of Treatment, do not hold formal statutory weight, under the Adults with Incapacity Act.

## GUIDING PRINCIPLES:

- A person has a disability if there is mental or physical impairment (the cause of which does not need to be known) and the impairment has a substantial and long-term effect on the person's ability to carry out normal day to day activities.
- Decision making is an ongoing process focused on "meaningful dialogue".
- Follow the 7 steps of the GMC guidance "Consent: patients and doctors making decisions together", Nov 2020

## KNOW THE LAW:

- Adults with Incapacity (Scotland) Act 2000
- Equalities Act 2010
- Human Rights Act 1998
- European Convention on Human Rights (ECHR)
- Scottish Commission for Human Rights Act 2006
- R (Tracey) v Cambridge University Hospitals NHS Foundation Trust & Ors [2014] EWCA Civ 822.

## FURTHER READING:

- DNACPR Integrated Adult Policy: Decision Making & Communication. The Scottish Government, August 2016.
- UN Convention on the Rights of Persons with Disabilities.
- COVID-19 guidance: ethical advice and support framework July 2020, Scottish Government.