

TAKE-HOME NOTES:

Advance statements and the law in Scotland

Dr Stephen Anderson, with Dr Liz Hare, Dr Donald Lyons and Dr Helen Cash

One of the principles of the Mental Health (Care and Treatment) (Scotland) Act 2003 is that of participation – service users should be fully involved in their assessment, care and treatment, and their past and present wishes should be taken into account. The Act has a number of provisions, including advance statements, named persons and access to independent advocacy, which aim to improve service user participation.

However, since the implementation of the Act the uptake of advance statements has been lower than expected. Following a review, the new Mental Health (Scotland) Act 2015 makes further provisions to increase the uptake and impact of advance statements.

Background, definitions and legal aspects

- Advance statements are a provision of the Mental Health (Care and Treatment) (Scotland) Act 2003 (the 2003 Act) aimed at increasing service user participation in their care and treatment.
- An advance statement is a written statement, made when the person is well, which states how the person would like to be treated, or not be treated, in the future if they become unwell and are treated under the Act.
- The Mental Health Tribunal for Scotland or anyone giving medical treatment must have regard to the advance statement if the person becomes unwell and their decision-making ability about treatment is significantly impaired by mental disorder.
- The emphasis should be on aspects of treatment over which you would usually have some choice. It is helpful to give reasons why the person wants or does not want the treatment.
- An advance statement must be made in writing and must be signed by the person making it. Regulations state that they must be witnessed by a person of the 'prescribed class', who should discuss the statement with the person making it and must sign to state that the person has capacity to properly intend the wishes detailed in the statement.

Uptake and use of advance statements

- Following implementation of the 2003 Act, the uptake and use of advance statements was lower than expected. There are many reasons for this, including a lack of awareness and understanding, and a 'what's the point?' attitude due to the fact that advance statements can be overridden.
- To increase awareness and uptake in your own service, consider having a discussion with patients following an episode of illness about writing an advance statement. Information about advance statements could also be made available in mental health service and general practice waiting areas.
- Section 26 of the Mental Health (Scotland) Act 2015 introduced some important new requirements regarding advance statements, including the requirement for health boards to place advance statements or a document withdrawing an advance statement with the person's medical records.

Overriding advance statements

- If a decision is made to override an advance statement, the person responsible for the treatment must record in writing the circumstances of the override and supply the person, the named person, the Commission and any welfare attorney or guardian with a copy of the record, and place a copy in the case notes.

- It is good practice for a responsible medical officer (RMO) or a designated medical practitioner (DMP) to write a letter to the patient detailing the circumstances of the decision. Any record should justify the decision with reference to the principles of the Act.
- When the Mental Welfare Commission receives notification of an advance statement override, it will:
 - review the advance statement and relevant documentation
 - check that the explanation given to the patient is adequate and that the override appears to be necessary
 - contact the Mental Health Tribunal for Scotland, or the person making the override if further information is required
 - check that all relevant parties have been notified of the override
 - write to the patient to say that the override has been reviewed, and to inform them of any action taken.

Advance statements in other jurisdictions

- The term 'advance statement' means different things in different legislatures around the world, but the general principle is the need to take into account the person's past wishes and the fact that, if a treatment can be refused when the person has capacity, there should be a mechanism for them to refuse in advance of a time when they lose capacity.
- In England and Wales, advance statements are general statements about a person's wishes for care to be used if they become incapable of making or communicating their decisions. They are not legally binding but should be taken into account as evidence of the person's past wishes.
- Advance decisions to refuse treatment (ADRTs) are legally binding if they meet the requirements of the Mental Capacity Act 2005. There are several differences between advance statements in Scotland and ADRTs in England and Wales, in terms of the legal requirements and the way they are processed.
- If moving to work within a different jurisdiction it would be helpful to review guidance on advance statements, advance decisions, advance directives, etc. in your area and not to assume that this will be the same as the system you are familiar with.

Further reading

Mental Welfare Commission for Scotland (2017) *Good Practice Guide: Advance Statement Guidance: My Views, My Treatment*. Mental Welfare Commission for Scotland. [[PDF](#)]

Scottish Government (2005) Chapter 6: Patient Representation. In: *Mental Health (Care and Treatment) (Scotland) Act 2003: Code of Practice Volume 1*. Scottish Government. [[website](#)]

Scottish Government (2009) Chapter 2: Advance statements. In: *Limited Review of the Mental Health (Care and Treatment) (Scotland) Act 2003: Report*. Scottish Government. [[website](#)]

Scottish Government (2018) ADV1: Receipt of an Advance Statement or a Document Withdrawing an Advance Statement. [[PDF](#)]

Scottish Parliament (2003) *Mental Health (Care and Treatment) (Scotland) Act 2003*. The Stationery Office Limited. [[PDF](#)]

Williams L, Rigby J (2016) *Advance decisions in psychiatry: England and Wales*. CPD Online. [[website](#)]