Consent to Medical and Dental Treatment

If you are a "mentally incapacitated person" or his / her carer / family member or appointed guardian, you need to read this leaflet.

There is a law dealing with medical and dental treatment of "mentally incapacitated" persons - Part IVC of the Mental Health Ordinance (Cap. 136) ("Part IVC").

A "mentally incapacitated person" is an adult of or over 18 with a mental illness, dementia, mental handicap or a disability of mind such as an acquired brain injury due to an accident or stroke. This leaflet discusses both medical and dental treatment, but for the sake of space we will usually discuss medical treatment.

Ability to understand treatment

Anyone who has reached the age of 18 years is treated in law as an adult who can make decisions on his/her personal, medical or financial affairs, unless there is medical evidence that he/she lacks the ability to make these decisions. In some cases a mentally incapacitated person may have the ability to understand the general nature and effect of treatment. The treating doctor will assess whether he/she understands the benefits and risks of the proposed treatment, and the consequences of not receiving it. For example, he/she may be able to consent to treating a bleeding finger, but not be able to consent to major surgery. If he/she is able to consent, the doctor will not use the power under Part IVC to give treatment without his/her consent, as the adult can give his/her own consent. This leaflet is only for those mentally incapacitated persons who do not have the ability to consent to treatment or to refuse treatment.

Treatment

Part IVC empowers the doctor or dentist to provide urgent or non-urgent medical or dental treatment to a mentally incapacitated adult without his/her consent, if the person concerned does not understand the nature and effect of the proposed treatment, and provided that the treatment is necessary and in his/her best interests. That means the treatment will save the life of the person concerned, prevent damage or deterioration, or bring about an improvement, to his/her physical or mental health and well being.

Usually a treatment is urgent if it is to save the life or prevent serious harm to the person concerned. Non-urgent treatment is all other treatment but it can include surgery for conditions like cancer. Before giving non-urgent medical treatment, the doctor must have taken all reasonably practicable steps to ascertain whether a guardian has been appointed. The Hospital Authority has procedures for the doctor to find out the contact details of the guardian from the Guardianship Board.

If there is, or appears to be, no guardian appointed, or the guardian has not been given the power to consent to treatment, the doctor can go ahead with the treatment without the consent of the person concerned. In fact, the vast majority of mentally incapacitated persons are not under guardianship. If a guardian has been appointed, then the guardian can consent if he/she has been given the power to consent to treatment.

Guardianship

A relative, social worker or doctor can apply for a guardianship order where it is necessary in the interests of the welfare of a person concerned, who is limited or unable to make personal care or financial decisions. An application can also be made where an order would facilitate treatment for a person concerned who is legally regarded as mentally incapable of consenting to treatment.

The guardianship order can give the "appointed" guardian the legal power to make important personal decisions in the interests of the person concerned. These decisions can include consenting to treatment if the person concerned does not understand the general nature and effect of the proposed treatment. The "appointed" guardian can be a person (e.g. a family member, carer) whom the Guardianship Board assesses to be suitable, or the Director of Social Welfare.
Why a guardianship order may be necessary?

If the doctor is willing to give treatment to the person concerned, without his/her consent, or with a consent form signed by the family member, then there is no need to obtain a guardianship order.

However, as an example, a guardianship application may be resulted if the doctor recommends treatment of the person concerned but is reluctant to go ahead without his/her consent, or with only the family member signing the consent form. This is an undesirable situation as the doctor can rely on powers under Part IV.C. You can first approach the Medical Social Worker in the hospital or specialist clinic, who can assist you in communicating with the doctor on the issues of consent to treatment, and who can also assist you in applying for guardianship. You can also approach the Secretariat of the Guardianship Board for assistance.

A guardianship application may also be appropriate where a family member/carer or the person concerned objects to the proposed treatment recommended by the doctor and the doctor is reluctant to proceed because of the objection. Or the family members may disagree with each other about the treatment. Alternatively, a social worker or doctor may apply for a guardianship order if they think that the treatment is in the concerned person’s best interests, despite objections from that person, or the family. The Board can abridge the time for the processing and hearing of the application if the treatment is required to be given within a short time. For further details, please refer to the leaflet on "Application procedure for a Guardianship Order" and the "Flow Chart for Urgent Guardianship Hearing".

Scope of appointed guardian’s powers

The Guardianship Board may make an order appointing a guardian with the power to consent to treatment. The Board does not actually order the treatment to take place, whether or not there has been an objection to treatment. If a doctor decides that certain treatment is not in the concerned person’s best interests, then neither the Board nor the guardian can force the doctor to give that treatment. The guardian’s power to consent extends to any particular treatment, if it is in the best interests of the person concerned and it is necessary and he/she does not understand its general nature and effect. The appointed guardian is entitled to obtain information from the doctor on the conditions that necessitate the treatment, its benefits, risks, the reasons for recommending it, any alternatives and the consequences of refusing treatment.

The appointed guardian can consent to all medical treatment, except special treatment and organ donation from the person concerned. Special treatment is treatment of an irreversible or controversial nature, such as sterilization.

Guardian’s duties

The appointed guardian should ensure that he/she has sufficient information about the proposed treatment before agreeing that it can proceed. The guardian must promote the interests of the welfare of the mentally incapacitated adult and respect his/her views and wishes, but they can be overridden if it is in his/her best interests. In particular, the guardian must ensure that he/she is not deprived of treatment because he/she lacks the capacity to consent. The guardian must also ensure that the treatment is carried out in his/her best interests.

The guardian should ensure that the person concerned and the carer have his/her emergency contact details to facilitate consent being given to treatment. If the guardian has difficulties in determining whether to consent to a particular medical treatment or not, he can apply to the Guardianship Board for directions. For information on how to apply for directions, please refer to the leaflet "Application Procedure for Directions of Guardianship".

For more information, contact the Guardianship Board:
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Important notes: The information in this leaflet is for general guidance only and does not purport to be legal advice given by the Guardianship Board.