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COMMENTARY

Advance statements: the view from Scotland†

COMMENTARY ON … ADVANCE STATEMENTS IN ADULT MENTAL HEALTH

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†See pp. 448–456, this issue.

SUMMARY

Advance statements in Scotland have a specific legal meaning and come into effect when someone is subject to the Mental Health (Care and Treatment) (Scotland) Act 2003. This Act requires a person being compulsorily treated to have significantly impaired decision-making ability in respect of medical decisions. The advance statement is intended to cover treatment wishes – both refusal and acceptance of treatment. In addition, a personal statement can be made which covers wider issues. There is evidence that in many statements these are being combined, raising questions about what is meant by treatment. Issues of revoking advance statements are also considered.

DECLARATION OF INTEREST

J. M. A. was appointed advisor to the Scottish Parliament Health and Community Care Committee to take the new Mental Health Bill through Parliament. She has received grants from the Nuffield Foundation to research advance statements.

Jankovic *et al* (2010, this issue) discuss the role of advance statements in England and Wales as introduced in the Mental Capacity Act 2005. My article comments on their views from the different legal position in Scotland. This requires some description of the position of advance statements as introduced in the Mental Health (Care and Treatment) (Scotland) Act 2003.

Scotland is unusual, and possibly progressive, in having advance statements for mental health embedded in its mental health legislation and not as part of a more generic capacity legislation or introduced as an independent piece of legislation (Atkinson 2006). The Mental Health (Care and Treatment) Act also requires a person to have significantly impaired ability to make medical decisions before they become subject to the Act. The review of the mental health act in Scotland has to be seen in the context of pre-existing capacity legislation, the Adults with Incapacity (Scotland) Act 2000, which does not deal with advance directives or advance decisions (Patrick 2006; Atkinson 2007). These remain a matter for common law in Scotland.

Advance statement in Scotland

In Scotland, advance statement has a precise legal meaning (Box 1) which is not the same as defined in Jankovic *et al*'s article. When introduced, it was clear that the intention was that 'treatment' should cover clinical treatment but not wider aspects of management or stay in hospital. To accommodate these, the personal statement was introduced, although this did not have the same legal standing as the advance statement. It should be noted that, unlike Jankovic *et al*'s assumption about advance statements, this does not allow for the appointment of a proxy or surrogate decision maker. The way for this to be done in Scotland is through the Adults with Incapacity (Scotland) Act. The Mental Health (Care and Treatment) Act requires the mental health tribunal (which makes decisions about compulsory treatment) to 'have regard to the wishes specified in the statement' (Section 18, para. 276).

The advance statement clearly covers both refusals and requests for treatment, and as neither is legally binding they can be overridden by a

BOX 1 Definition of advance statement in Scottish legislation

An 'advance statement' is a statement … specifying –

(a) the ways the person making it wishes to be treated for mental disorder;

(b) the ways the person wishes not to be so treated,

in the event of the person's becoming mentally disordered and the person's ability to make decisions about the matters referred to in paragraphs (a) and (b) above being, because of that, significantly impaired.

(Mental Health (Care and Treatment) (Scotland) Act 2003, Section 18, para. 275)

BOX 2 Overriding an advance statement

If an advance statement is overridden by a mental health tribunal, the reasons have to be given in writing to:

- the person who made the statement
- the person's 'named person' (nominated by the person to replace next of kin)
- the person's welfare attorney
- the person's guardian
- the Mental Welfare Commission for Scotland.

In addition, a copy has to be placed in the individual's medical records.

mental health tribunal. In such cases, the duties of the tribunal are laid out as to who has to be notified (Box 2).

Content of advance statements in Scotland

Although there might be advantages in separating clinical treatment from other care and management issues, it can also cause confusion. There is evidence in Scotland that the majority (55%) of people are combining the treatment aspects of the advance statement with the wider issues that should be in a separate personal statement (Reilly 2010). The format of some of these statements suggests that this is being promoted as the preferred option by some agencies. This can lead to confusion when notification has to be given of the overriding of an advance statement where parts are complied with and parts not, and it allows statistics to be used to suggest that more treatment decisions are being overridden than may be the case. In Scotland, as other jurisdictions, few people refuse all treatment but 96% refuse at least one specific treatment, and 45% name a specific medication they are prepared to take (Reilly 2010). Although guidelines from the Scottish Executive (2005) suggest that it would be helpful to give reasons why a treatment is being refused, such as not wanting medication that causes weight gain, many statements do not give this information. In other cases, the level or seriousness of the objection might be called into question, such as refusing an injection 'because it hurts'.

A serious issue could arise if the advance statement and personal statement are combined (since at present it is only the advance statement that has to be formally considered by the tribunal). The relates to the definition of 'treatment' and whether it extends beyond what is provided by the clinical team. If someone says that meditating helps them to manage their agitation and stay calm, can this be classed as treatment? What then if they need to light candles and burn incense to achieve their meditative state, in contravention of safety requirements on the ward?

Revoking an advance statement

If advance refusals of treatment are accepted in physical illness it can be argued that it is discriminatory to not allow the same in mental illness. There is no space to debate this here, but issues to be taken into account are whether the risk is to other people or only to the person themselves and the cost of continued care of the person if they remain ill (Atkinson 2007). There have been several cases in North America in which people have spent years not being treated, either as a result of an advance directive or of being found capable of refusing treatment. Both Hargrave in Vermont (Appelbaum 2004) and Sevels in Ontario (Ambrosini 2007) had advance statements. Hargrave successfully brought a class action to stop advance refusals of psychotropic medication being overturned. Having refused treatment, Mr Sevels spent 404 days in seclusion. Also in Ontario, Starson was found by the Supreme Court to be competent to refuse treatment and spent a number of years in hospital but not receiving treatment (Gray 2009).

Should a person be able to revoke their advance statement when they are ill? In Scotland, this is possible only if the person has capacity (or the ability to make medical decisions), in which case they would not be subject to the Mental Health (Care and Treatment) Act (since lack of ability to make medical decisions is necessary for someone to be subject to the Act). Where the law allows for the compulsory treatment of people with capacity, it might be argued that capacity and not 'illness' is the issue. If an incapacitous person can revoke an advance statement made when capacitous, it could be asked what is the point of the advance statement at all? In practice, it is likely that a person who has refused treatment in an advance statement but now agrees will be listened to, whereas someone who has agreed to treatment when capacitous and now refuses will not.

The purpose of advance statements

Despite the twin aims of promoting both autonomy and communication, one has to take precedence. In the first case, the statement will be made independently (or with an independent person); in the second, it will be made with a member of the treating team. The latter may more closely resemble a joint (crisis) or treatment plan, and where these are in evidence and work well the need for an advance statement may be limited.

Advantages and disadvantages of advance statements in Scotland

Advantages and disadvantages depend on the person's relationship to the advance statement. Staff and patients may have very different views and experiences.

It is likely that most people will agree that an advantage of the Scottish system is that advance statements are embedded within the Mental Health (Care and Treatment) Act. This means not only that anyone with a mental illness who may be subject to the Act can make one, but also that information about this option should be routinely given. The mental health tribunal has to give regard to any advance statement made, so, in theory at least, there should be no question of a statement being overlooked.

A positive aspect of advance statements in Scotland is that they allow the person both to refuse certain treatments and to specify interventions they would welcome or accept.

A potential disadvantage is the confusion that exists between what should be in an advance statement and what in a personal statement.

Most other aspects depend on perspective. Thus, the fact that advance statements can be overturned by a tribunal is generally seen as a disadvantage by patients, who question their relevance if they do not have to be followed, but is seen as an advantage by clinicians, who retain the ability to impose their choice of treatment in certain circumstances.

Advance statements have to be witnessed by one of a proscribed set of people. This has advantages in that the statement is 'validated', although it is not clear whether the witness is attesting to capacity, but it can be a disadvantage to individuals who have access to only a limited number of such people or who do not want to approach someone.

Having said this, the introduction of advance statements in Scotland was a brave attempt to put them at the core of mental health legislation. Their comparatively low use should not distract from this, nor from their potential.

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