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| **POLICY TITLE:** | **Consent to Treatment or Treatment Requiring a Second Opinion Under Section 58 or 58A** |
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| **Policy Owner:** | Kim Forrester, Head of Mental Health Act and Mental Capacity Act Operations |
| **Ratified by:** | Sharde Hurd, Priory Lawyer |
| **Responsible Signatory:** | Colin Quick, Chief Quality Officer |
| **Outcome:** | This policy:<br>• Aims to provide guidance on the rules governing the provision of medical treatment for patients subject to relevant section to the Mental Health Act 1983 (MHA).<br>• Aims to provide guidance to ensure that the provision of medical treatment and the administration of medicines are given in compliance with the MHA. |
| **Cross Reference:** | H22 Management of Medication in the Community Homes<br>H24 Off Licensed Prescribing and Unlicensed Medication<br>H62 Healthcare Records<br>OP05 Mental Capacity<br>MHA68 Electronic Communication of Statutory Forms under the Mental Health Act |

**EQUALITY AND DIVERSITY STATEMENT**

Priory is committed to the fair treatment of all in line with the Equality Act 2010. An equality impact assessment has been completed on this policy to ensure that it can be implemented consistently regardless of any protected characteristics (age, disability, gender identity and expression, marriage or civil partnership, pregnancy or maternity, race, religion or beliefs, sex, sexual orientation), and all will be treated with dignity and respect.

In order to ensure that this policy is relevant and up to date, comments and suggestions for additions or amendments are sought from users of this document. To contribute towards the process of review, email LegalandComplianceHelpdesk@priorygroup.com

# CONSENT TO TREATMENT OR TREATMENT REQUIRING A SECOND OPINION UNDER SECTION 58 OR 58A

## 1 INTRODUCTION

1.1 This policy provides guidance on medical treatment for mental disorder under the Act and especially medical treatment given without the patient's consent, it should be read in conjunction with chapters 23, 24 and 25 of the English and Welsh Codes of Practice and chapter 23 of the MHA Reference Guide.

1.2 The Act defines medical treatment for mental disorder as medical treatment for the purpose of alleviating or preventing a worsening of a mental disorder or one or more of its symptoms or manifestations. Medical treatment includes nursing, psychological intervention and specialist mental health rehabilitation, rehabilitation and care.

1.3 Section 58 of the Act applies to patients detained under a section of the Mental Health Act 1983 (MHA) which authorises treatment for mental disorder under Part IV of that Act' (see para 23.2 figure 68 of MHA Reference Guide).

1.4 Patients who have been given medication for mental disorder under the authority of the Act (with or without their consent) for a period of three months become subject to the requirements of Section 58 which must be complied with in order for treatment to continue. The three-month rule period starts from the first time medication for a mental disorder is administered (by any means) during any period of continued detention.

1.5 All treatment should be appropriate to the patient's mental health condition and take into account any advance decisions/wishes or feelings expressed in advance of treatment and where practicable based on a strong evidence base.

1.6 Further advice on the provision of medical treatment under the Act and the regulations pertaining to the use of Section 58 can be found in chapters 23, 24 and 25 of the English and Welsh Codes of Practice as well as chapter 23 of the MHA Reference Guide.

1.7 **N.B.** Electro convulsive Therapy (ECT) and medication administered as part of ECT is covered by Section 58A. Advice on the use of ECT can also be found in the above references.

1.8 Any clinician authorising or administering treatment without consent must comply with the Human Rights Act (HRA) 1998. Compulsory treatment will always engage the HRA and will only be compatible if the requirements of the Act and adherence to good clinical practice have been applied. If you have any concerns about applying this policy, then you must seek advice immediately from your manager.

1.9 In applying this policy, you must take all reasonable steps to ensure the voice and views of the patient are central to your decision making and any action taken relating to the administration of medication. This may require you to identify additional information needed or seeking support to help a patient understand their treatment plan or the authorisations in place that may mean you can provide treatment without their consent. The wishes and feelings of the patient must be recorded and considered by the team whenever treatment and medication are reviewed.

## 2 THE FIRST THREE MONTHS OF TREATMENT NOT REQUIRING CONSENT OR SECOND OPINION

2.1 Even though Section 63 of the Act allows treatment to be given without consent during the first three months, the approved clinician in charge of the treatment should assess the patient's capacity and ensure that attempts to seek the patient's valid consent, prior to any medication being given, are made. The patient's consent or refusal should be recorded on **MHA Form: 11** in the patient's Health Record. If consent is not forthcoming or withdrawn during this period, the

approved clinician in charge of the treatment must consider whether to proceed in the absence of consent or to give alternative treatment or no further treatment.

2.2 The three-month period starts on the occasion where medication for mental disorder was first administered by any means during a period of detention. This however does not include detention under Sections 5(2) and 5(4), 35, 4(4)(a), 22 (Part IV of the MHA does not apply to patients who have remained in custody, by a court, for six months or more).

2.3 The medication does not necessarily have to have been administered continuously throughout the three-month period. The definition of this period is not affected by any change in Section, transfer between hospitals under different managers, the renewal of the patient's detention, leave of absence or change in or discontinuance of the treatment.

2.4 A new period will only begin if there is a break in the patient's liability for detention. Detention should never be allowed to expire as a means of enabling a fresh three-month period to start.

## 3 MEDICATION AFTER THREE MONTHS FOR TREATMENT REQUIRING CONSENT OR SECOND OPINION

3.1 A system is in place to remind the clinician in charge of the medication and the patient at least four weeks prior to the expiry of the three-month period. This will be done by the person responsible for administration of the MHA for the hospital where the patient is located. Before the three-month period ends the approved clinician in charge of the treatment should seek the patient's consent to continuing medication. If the patient asks about the medication they should be given a comprehensive answer outlining benefits to treatment, any risks and side effects. A patient information leaflet can be printed from the pharmacy provider's website for their further information. A record of the discussion with the patient and their capacity to consent must be made by the approved clinician in the patient's Health Record.

3.2 If the patient consents, the approved clinician in charge of the treatment will complete Form T2/CO2 and they must state the drug category and code as given by the National Formulary (BNF); the number of drugs in each category; the route by which it is given; indicate all drugs proposed including medication given "as required" (PRN) and specify for each whether they are within or above BNF limits.

3.3 The form should state whether clozapine is included or not.

3.4 The original Form T2/CO2 must be kept with the original detention papers held by the MHA Administrator and copies kept in the Health Record and with the medicine card in the clinical area. Where ePrescribe/eWorks is in use, the MHA office will also need to upload the T2/CO2.

3.5 All copies must be cancelled by drawing a line through the form if the patient's consent is withdrawn.

3.6 If the patient's consent is not forthcoming the approved clinician in charge of the treatment must comply with Section 58(3)(b) and request a Second Opinion Appointed Doctor (SOAD) in order to continue treatment. See para 25.45 – 25-71 of the English Code of Practice and paragraphs 25.46 – 25.74 of the Welsh Code of Practice. For urgent treatment, Section 62 may apply see English Code of Practice paragraph 25.37 – 25.42 and Welsh Code of Practice paragraphs 25.33 – 25.38

3.7 The approved clinician in charge of the treatment must be satisfied that consent remains valid. It is advisable to seek a second opinion under Section 58(3)(a) or 58(3)(b), if there is any doubt about consent or if the patient's wishes fluctuate.

## 4 NURSES AND THE ADMINISTRATION OF MEDICATION

4.1 Where a nurse administers prescribed medication to a patient who is detained under the MHA 1983 and subject to the provisions of Part 4, the nurse should ensure that they are legally entitled to do so and that all legal requirements have been met.

4.2 Nurses should refer to the current treatment certificate prior to administering medication to check that all prescribed medication is listed on the current treatment certificate and the prescribed dose does not exceed the dose stated on the treatment certificate.

4.3 The administration of medicine not covered by a valid treatment certificate (T2/CO2 or T3/CO3 or Section 62) may constitute an assault and, therefore, a civil wrong and/or a criminal offence.

## 5 WITHDRAWAL OF CONSENT

5.1 A patient being treated in accordance with Section 58(3)(a) may withdraw consent at any time. New consent or implementing Section 58(3)(a) procedures are required before treatment can be carried out or reinstated. If a patient withdraws consent they will receive a full explanation, which will also be entered in the patient's Health Record of:

(a) The likely consequences of not receiving treatment.
(b) That a second opinion under part IV or the Act may or will be sought, if applicable in the absence of the patient's consent.
(c) The approved clinician's power to begin or continue urgent treatment under Section 62 until a second opinion has been obtained if applicable.

5.2 All consent forms that have become invalid due to the patient withdrawing consent must be clearly marked as cancelled and a line drawn through them.

## 6 PROCEDURE FOR SECOND OPINIONS

6.1 The role of the SOAD is to provide an additional safeguard of the patient's rights. When the SOAD interviews the patient, they must determine if the patient is capable of giving valid consent. If the patient is not capable or does not give consent, the SOAD has to decide if the treatment proposed by the approved clinician is treatment that is appropriate.

6.2 The SOAD acts as an individual and must reach their own decision as to whether the proposed treatment is appropriate treatment for the patient's mental disorder. In reaching this judgement the SOAD will consider not only the therapeutic efficacy of the treatment but also, where a capable patient is withholding consent, the reason(s) for withholding should be considered. The SOAD must carefully record in the patient's Health Record how they formulated their decision and the decision made.

6.3 The SOAD should seek professional opinion about the patient's disorder and problems, the appropriateness of various forms of treatment including that proposed and the patient's likely response to different types of treatment. The SOAD should take into account any previous experience of comparable treatment of a similar episode or disorder. The SOAD will give due consideration to the opinion, knowledge and experience and skill of those consulted.

6.4 For more information on SOADs see the MHA Reference Guide Chapter 23.

6.5 Ensure appropriate professionals, including persons other than a medical practitioner or nurse professionally concerned with the patient's care, are available when a SOAD visits Best practice is to inform the Professionals that have been included by the RC in the SOAD request so that they are aware that the SOAD will be trying to contact them.

## 7 ARRANGING & PREPARING FOR THE SOAD

7.1 It is the responsibility of the clinician in charge of the treatment to ensure that a SOAD is requested by completing the online form provided by the Care Quality Commission (CQC)/Health Inspectorate Wales (HIW) ensuring all applicable sections of the form are completed to avoid delays in the CQC/HIW processing the request. This form provides the treatment plan for the SOAD to assess. The CQC/HIW aims to arrange for a visit within two working days of the request when ECT is proposed, and for medication within five working days. The clinician is responsible for informing the patient of the proposed visit of the SOAD and the reasons for the visit.

7.2 The contact person named on the form is responsible for informing all parties of the date and time the SOAD will visit.

7.3 The treatment plan for the patient and notes of any relevant MDT discussions must be available to the SOAD before or at the time of the visit.

7.4 The Nurse in Charge and the approved clinician are responsible for ensuring that the following are available to meet and or consult with the SOAD:
(a) The patient.
(b) The patient's approved clinician.
(c) A nurse who must be qualified and professionally concerned with the patient's care.
(d) Another professional who has direct knowledge of the patient and who is not a nurse or doctor, e.g. social worker, occupational therapist, psychologist, psychotherapist or pharmacist.
(e) Any other relevant persons who are neither the Responsible Clinician (RC) nor the person in charge of the treatment in question.

7.5 The following documentation must be available:
(a) The patient's original detention documents or copies of them. (The original should be available if the SOAD requests them).
(b) The patients complete Health Record including past response to similar treatment.

7.6 To avoid delays in planning SOADs visits, the following may also be needed;
(a) Additional information to be shared if they plan to complete the assessment remotely
(b) Access to be arranged to interpreter services
(c) Information about planned or possible periods of Section 17 leave
(d) Alternative contact details for the approved clinician, second consultees or the MHA office in the event of any issues

## 8 VISIT BY THE SOAD

8.1 During the visit the SOAD will:
(a) In the case of treatment under Section 58 satisfy themselves that the patient's detention papers are in order.
(b) Interview the patient in private if possible. Others may attend if the patient and SOAD agree or if the Doctor may be at risk from the patient. (If required the hospital will arrange for an independent qualified interpreter).
(c) Discuss the case with the patient's clinician in charge of treatment face to face or on the telephone in exceptional circumstances.
(d) Consult with two other persons professionally concerned with the patient's care as statutorily required.

8.2 The SOAD should, where appropriate, consult a wider range of persons professionally concerned with the patient's care other than those required by the Act; with the patient's consent, the patient's nearest relative, family, carer or advocates.

## ~~9~~ SOAD CONSULTATION

9.1 During the consultation:
(a) The SOAD will consult with a qualified nurse
and
(b) Another professional person involved in the patient's care.

9.2 Anyone who the SOAD consults must consider if they are sufficiently professionally concerned with the patient's care. If not they should make this known to the clinician and SOAD in good time.

9.3 Both consultees may expect a private discussion with the SOAD (in exceptional circumstances on the phone) and to be listened to with consideration.

9.4 The consultees should consider:
(a) The proposed treatment and the patient's ability to consent to it.
(b) Other treatment options.
(c) The formulation of the decision to treat.
(d) The facts of the case, progress and attitudes of relatives.
(e) The implications of imposing treatment on a non-consenting patient and the reasons for the patient refusing treatment.
(f) Any other matters relating to the patient's care.

9.5 Consultees should make an entry into the patient's Health Record of their consultation with the SOAD.

## 10 REACHING A DECISION

10.1 The SOAD may not be able to reach a decision at the first visit. In this case, the patient should be informed of the delay. When a decision has been reached it is the responsibility of the clinician in charge of the treatment to inform the patient of the SOAD's decision and the reason for that decision.

10.1.1 If the patient consents to treatment, then the SOAD should issue a Form T2/CO2. Otherwise, treatment should be authorised using the Form T3/CO3.

10.1.2 A patient may consent to some medication but not to all their prescribed treatment. In these circumstances, the SOAD should issue a Form T2/CO2 together with a Form T3/CO3. These Forms should be cross-referenced as being interdependent. If the patient's consent changes both treatment forms will become invalid and need replacing.

10.1.3 If a patient with a Form T3/CO3 subsequently consents to further treatment, the approved clinician can use a Form T2/CO2 to authorise this treatment in addition to the Form T3/CO3.

10.1.4 This should only be done in exceptional circumstances after the RC has carefully considered the benefits and risks of adding the new treatment and documented this in the clinical notes. Both treatment forms should be annotated to show that they should be used together, to avoid confusion.

10.2 Only when the Form T3/CO3 has been signed by the SOAD may treatment be given without the patient's consent, except as provided for in Section 62.

10.3 The SOAD may require a review report (CQC form Review of Treatment/HIW Report 1 Form) to be sent to the CQC/HIW at a date earlier than the next date for review under Section 61.

10.4 Every attempt should be made by the SOAD and the clinician in charge of the treatment to reach agreement. If the SOAD cannot agree with the clinician then the clinician should be informed by the SOAD personally as soon as possible, of the reasons given. A disagreement should not prejudice the interest of the patient. Non-agreement should be recorded in the patient's Health Record including the rationale by the clinician in charge of the treatment who will continue to have responsibility for the patient's management.

10.5 The SOAD's opinion is their responsibility and cannot be appealed against to the CQC/HIW.

10.6 If the patient's situation changes then the clinician can contact the CQC/HIW and request a further SOAD.

10.7 SOADS must provide written reasons in support of their decision to approve specific treatments for patients. SOADs no not have to give an exhaustive explanation, but should provide their reasons for what they consider to be the substantive points on which they made their clinical

judgement. These reasons can be recorded on the certificate itself when it is given, or can be provided to the clinician in charge of the treatment separately as soon as possible afterwards (see para 25.63 CoP).

10.8 When giving reasons, SOADs need to indicate whether, in their view, disclosure of the reasons to the patient would likely to cause serious harm to the patient's physical or mental health or that of any other person. The RC should take into account this view when deciding whether or not to disclose the reasons to the patient. The expectation is that in the overwhelming majority of cases the patient should be able to see the SOADs reasons. (See English Code of Practice paragraph 25.65 /Welsh Code of Practice paragraph 25.66).

10.9 It is the personal responsibility of the clinician in charge of the treatment to communicate the results of the SOAD visit to the patient. (English Code of Practice paragraph 25.66 /Welsh Code of Practice paragraph 25.69).

10.10 The original Form T3/CO3 must be kept with the original detention papers held by the MHA Administrator and copies kept in the Health Record and with the medicine card in the clinical area. Where ePrescribe/eWorks is in use, the MHA office will also need to upload the T3/CO3.

## 11 REVIEW OF TREATMENT

11.1 All treatments, regardless of whether Section 61 applies to them, should be regularly reviewed and included in the treatment plan.

11.2 All treatments must be reviewed when detention is renewed under Section 20.

11.3 Form T2/CO2 should always be completed by the approved clinician in charge of the treatment or SOAD and it is good practice for them to be reviewed at regular intervals. When reviews are carried out and it is found that conditions are not satisfied, a new Form T2/CO2 should be completed if appropriate.

11.4 A new Form T2/CO2 should also be completed when:
(a) There is a change in treatment plan which differs from that which is already recorded.
(b) If consent is re-established following it having been withdrawn.
(c) When a CTO has been revoked.
(d) When there is a permanent change of an approved clinician.
(e) When the patient's detention is renewed (or annually whichever is the earlier).
(f) If there is a change in the hospital where the patient is detained.

11.5 If the patient no longer consents and treatment is considered to be necessary, a second opinion must be sought.

11.6 Copies of Form T3/CO3 and a completed CQC/HOW Section 61 Review of Treatment form must be sent to the CQC/HIW when:
(a) The patient's detention is renewed (or for restricted patients when it would be renewed if not restricted) under Section 20.
(b) The Approved Clinician (AC) completes a T2/CO2 which replaces following a T3/CO3.
(c) If the SOAD has requested one.

11.7 The AC should ensure a copy is given to the patient.

11.8 Treatment may continue unless the CQC/HIW gives notice of withdrawal of Form T3/CO3 - Certificate of Second Opinion. If notice is given a further certificate will be required before treatment can be given; except for urgent treatment under Section 62.

11.9 Section 62(1) may override the provision of Section 58 where the treatment in question is immediately necessary to save the patient's life, is a treatment which is not irreversible, but which is immediately necessary to prevent a serious deterioration, or is a treatment which is neither irreversible or hazardous but is immediately necessary to alleviate serious suffering by the patient

or to prevent the patient from behaving violently or being a danger to himself or others and represents the minimum of interference necessary to do so. (English Code of Practice paragraph 25.65 /Welsh Code of Practice paragraph 25.33-25.34).

## 12 SECTION 58A ELECTRO-CONVULSIVE THERAPY (ECT) AND MEDICATION ADMINISTERED AS PART OF ECT

12.1 ECT treatment given under Section 58A may only be given to a detained patient **aged 18** or over if the patient has consented to the treatment and the approved clinician responsible for it, or a SOAD, has certified that the patient is capable of understanding the nature, purpose and likely effects of the treatment and has consented to it (Form T4/CO4)
**OR**
A SOAD has certified in writing that the patient is not capable of understanding the nature, purpose and likely effects of the treatment, but that it is appropriate for the treatment to be given, and giving the treatment would not conflict with an advance decision or a decision made by a deputy or by the Court of Protection in accordance with the Mental Capacity Act 2005 (Form T6/CO6).

12.2 Section 58A treatment may be given to a person **under 18** if the child or young person has consented to the treatment **AND** a SOAD has certified that the child or young person is capable of understanding the nature, purpose and likely effects of the treatment and it is appropriate that the treatment is given (Form T5/CO5)

**OR**

A SOAD has certified in writing (Form T6/CO6) that the child or young person is not capable of understanding the nature, purpose and likely effects of the treatment; but it is appropriate that for the treatment to be given; and if the patient is 16 or 17 years old then giving the treatment would not conflict with any decision made by a deputy or by the Court of Protection in accordance with the Mental Capacity Act 2005.

12.3 Urgent Treatment under Section 62(1)(A) may override the provisions of Section 58A where the treatment is immediately necessary to save the patient's life or is immediately necessary to prevent a serious deterioration to the patient's condition.

## 13 SECTION 62 URGENT TREATMENT

13.1 Where the certificates are not available for any treatment that is 'immediately necessary' then Section 62 may apply. Section 62 may only be used if the urgent treatment is:

- Immediately necessary to save the patient's life; or
- (if not being irreversible) is immediately necessary to prevent a serious deterioration of his condition; or
- (not being irreversible or hazardous) immediately necessary to alleviate serious suffering by the patient; or
- (if not being irreversible or hazardous) is the minimum interference necessary to prevent the patient from behaving violently or being a danger to himself or to others.

Only the first two points of the definition can be used for the administration of ECT.

13.2 Section 62 may be used while waiting for an authorisation from a SOAD, provided we can evidence that the SOAD has been requested.

13.3 Section 62(2) also specifically allows for the circumstance where a patient who previously consented to treatment withdraws their consent. In this situation, the clinician would need to consider if ceasing the treatment would 'cause serious suffering'. If this is met then Section 62 can be used to continue treatment and an immediate request for a SOAD should be made.

13.4 The use of Section 62 must be recorded on carenotes and a Form 06 must be completed. This will also need to be uploaded into ePrescribe/eWorks by the MHA office.

13.5 Section 62 should be reviewed a minimum of weekly, with corresponding records in health records to explain the review and views of the clinician. This must be done by the approved clinician (likely to be the Responsible Clinician) in charge of the patient's treatment.

13.6 Urgent treatment can be authorised or reviewed by telephone, with carenotes and the form being updated as soon as possible following.

13.7 The use of Section 62 will be monitored to ensure we are not using them inappropriately or excessively. This will include reviews of proposed treatment, why it was felt to be immediately necessary to give the treatment, steps taken to avoid the use of urgent treatment and support for the patient, and the length of time it was given and frequency of reviews.

## 14 REFERENCES

14.1 **Legislation**

Mental Health Act 1983
Mental Capacity Act 2005
DH (2015) Mental Health Act 1983: Code of Practice
DH (2015) Reference Guide to the Mental Health Act 1983
Welsh Assembly Government (2016) Mental Health Act 1983 Code of Practice for Wales Review

## 15 ASSOCIATED FORMS:

15.1 **MHA Form: 06 -** Section 62(1) Urgent Treatment and Reviews of Continuation of treatment Form
**MHA form: 11** - Record of Capacity and Consent to Treatment Interview

Standard MHA Forms (England) are available from:
http://www.mentalhealthlaw.co.uk/Statutory Forms
Standard MHA Forms (Wales) are available from:
https://nccu.nhs.wales/mhs/mha/prescribed-forms/co-forms/