Advance statements

What is an advance statement?

01 Sections 275 and 276 of the Act enable a patient to make an advance statement. This is a written statement setting out how they would wish to be treated, or wish not to be treated, for mental disorder should their ability to make decisions about treatment for their mental disorder become significantly impaired as a result of their mental disorder. The duty to have regard to an advance statement is one aspect of the duty on doctors and other persons discharging functions under the Act as set out in section 1. These functions include having regard to the past and present wishes and feelings of the patient which are relevant to the discharge of the function. The advance statement is not the only means of ascertaining the patient's past and present wishes and feelings, and other relevant sources of information should be taken into account when decisions are being made about care and treatment (whether an advance statement exists or not). A valid and up-to-date advance statement will, however, likely be an important indicator of the patient's wishes and feelings.

The making and withdrawal of an advance statement

02 Section 275 of the Act sets out how a patient may make or withdraw an advance statement. In terms of section 275(2), an advance statement requires to be in writing, subscribed (that is, signed) by the patient making it and such subscription must be witnessed by a prescribed person. Furthermore, the patient making the advance statement must, at the time of making the statement, have the capacity to properly intend the wishes specified in it. The witness must certify in writing on the advance statement that in their opinion the patient making the statement has such capacity.

03 An advance statement may be withdrawn by the patient who made it. A withdrawal of an advance statement must comply with section 275(3) of the Act. Firstly, at the time of making the withdrawal, the patient must have the capacity to properly intend the withdrawal. Secondly, the withdrawal must comply with all the requirements set out in section 275(2), namely it must be in writing, subscribed (signed) by the patient making it and witnessed by a prescribed person. The witness must certify in writing that the patient has the necessary capacity to intend withdrawing the advance statement.

04 Where a patient indicates that they wish to withdraw an advance statement, it would be best practice to halt decision-making about care and treatment until the patient has either withdrawn the advance statement (and possibly made another), or indicated that they are content to continue with their current statement.

The effect of an advance statement

05 Section 276(3) of the Act provides that where any person is giving medical treatment authorised by this Act or the 1995 Act, that person is to have regard to any advance

statement which complies with the Act, made by the patient and not withdrawn. They must do this where they are satisfied that the patient's current decision-making ability is significantly impaired by reason of their mental disorder. There is an additional responsibility for any designated medical practitioner making decisions under section 276(4) to have regard to the wishes expressed in an advance statement.

06 In terms of section 276(1) of the Act, in making a decision in respect of a patient who has made and not withdrawn an advance statement, and where the Tribunal is satisfied as regards certain matters, the Tribunal must have regard to the wishes specified in the statement. The matters which the Tribunal requires to be satisfied about are that the advance statement complies with the requirements of the Act and that, because of their mental disorder, the ability of the patient who made the advance statement is significantly impaired.

07 Any person discharging functions under the Act (which will include those persons giving medical treatment authorised by the Act) shall have regard to the past and present wishes specified by the patient. Moreover, a responsible medical officer must, in terms of section 242(5)(a)(iv) of the Act, have regard to an advance statement, where one has been made and not withdrawn. To fulfil both these requirements, it would be best practice for the person giving medical treatment to undertake the following checks to ascertain whether the patient has made and not withdrawn an advance statement, in order to view a copy of that statement.

Locating an advance statement

08 Section 276A of the 2003 Act requires that if a Health Board receives a copy of an advance statement, it must be placed with medical records. Where a copy is stored in the patient's records, it would be best practice for the advance statement to be prominently labelled to ensure it can be located quickly.

09 If there is no advance statement in the patient's medical records, the person giving medical treatment should ask the patient if they have an advance statement, ask where it is stored, for example with the patient's GP, and explain that they wish to see it before making their decision regarding medical treatment.

10 Where the patient is not in hospital, the person giving medical treatment should contact the patient's general practitioner to ascertain whether they have a copy in the patient's medical records. If the general practitioner holds a copy of the advance statement, the person giving medical treatment should request a copy. The general practitioner should treat this request in the same manner as a request for any other of the patient's medical records.

11 When trying to locate a patient's advance statement it would be reasonable to ask the patient's named person and/or the carer if they know of the existence and location of any advance statement. Unless impracticable, it would be best practice to contact the Commission to ascertain if a record of an advance statement has been made in respect of the patient and where the advance statement is recorded as being located.

What is included in an advance statement?

12 An advance statement may contain details setting out how the patient would wish to be treated for mental disorder should they become mentally disordered and their capacity to make decisions regarding medical treatment become significantly impaired. In the statement, the patient may also refuse particular treatments or categories of treatment for mental disorder.

13 The advance statement might include a list of medical treatments which the patient has tried and have found to be beneficial, and a corresponding list of treatments they have found to be unhelpful. An advance statement might also contain information concerning early changes in symptoms, thinking and behaviour. This information might facilitate interventions aimed at preventing the need for treatment under compulsion. An advance statement cannot require that a service or medical treatment must be made available to the patient.

14 Only advance statements drawn up by patients in accordance with the provisions of the Act will be considered as valid advance statements in accordance with the terms of the Act.

15 It is important that the information in the advance statement is clear and reflects the patient's wishes, whatever language or form of communication is used. It would be best practice for any person discharging functions under the Act to offer assistance in contacting the relevant service where the patient appears to require interpretation and translation assistance.

16 An advance statement may also contain or have attached a personal statement, which is not part of the advance statement under the Act, but which can provide useful information, particularly if a patient is being admittedly suddenly to hospital. Information in a personal statement may include:

- who to contact if the patient becomes unwell and is admitted to hospital
- arrangements for looking after the patient's home or pets
- information about the patient's physical, dietary, communication or spiritual needs.

17 Inclusion of a personal statement or information that does not relate to treatment wishes does not invalidate an advance statement. It would be best practice to discuss with the

patient if there are any additional persons that they would wish to give a copy of the personal statement, such as their MHO or GP.

Supporting and promoting advance statements

18 Section 276C sets out that Health Boards must publicise support that it offers for making or withdrawing an advance statement and for sending the documentation to the Health Board. The Health Board must also provide information to the Commission about how it is complying with this duty.

19 As a minimum, Health Boards should ensure that Mental Welfare Commission and other guidance is easily accessible to all patients and that care teams are aware of the resources available and are able to signpost patients to such resources. There should also be guidance on any specific processes at the Health Board for lodging or withdrawing an advance statement and what will happen to the statement once it has been lodged or withdrawn. It is also expected that there is a designated member or members of staff whose role is to monitor how the duty is being fulfilled and promoting guidance and best practice to relevant staff.

20 Best practice would include that the designated member(s) of staff also have a role in monitoring the update of advance statements among patients in the Health Board and any practicable actions to ensure that good quality advance statements are being made. For the Health Board, best practice would also include supporting relevant care staff, including Community Psychiatric Nurses, so that they can provide guidance and assistance to patients in producing an advance statement. It would also include clear signposting to third sector and other sources of support, such as independent advocacy organisations or service user group and peer support groups who are able to provide assistance. Health Boards who wish to increase the quality and uptake of advance statements could consider how best to involve service user group and peer support groups in doing this.

21 As already set out in this guidance, advance statements are an important safeguard and right under the 2003 Act, and can play a crucial role in realising the Section 1 principles and protecting the patient's rights. Practitioners can play an important role in increasing the uptake and quality of advance statements, beyond the Health Board duties at section 276C of the Act.

22 It is best practice to have an on-going dialogue with individual patients about their representation needs as suits the individual, and as far as is practicable. Where a patient does not have an advance statement, it may be helpful for their Community Psychiatric Nurse to discuss this with them or, if appropriate, for a discussion with the patient and those that support them as part of discharge from hospital. The duty to promote support available should not just be regarded as applying only to patients in

hospital or as applying only when a patient is admitted. Discharge planning and community settings will be as important times to make patients aware of the support available to make an advance statement and the duty to promote support also applies at this time.

23 Patients who have an advance statement should also be supported to keep their advance statement under review, and update it as is suitable for their circumstances. The duty to promote support does not just extend to those who do not have an advance statement but also to those who may need support in revising or improving their advance statement. As well as community settings, care planning meetings may be a helpful time for discussing existing advance statements to look how the statement could be improved.

Preparation of an advance statement

24 The preparation of an advance statement provides the patient drawing up the statement with an opportunity to discuss their care and treatment with their care team, their MHO and perhaps their named person, carer(s) and independent advocate. It provides those consulted with an opportunity to give information about the process and effect of an advance statement, which may empower the patient to participate in care and treatment decisions. Whether or not a written, formally witnessed advance statement is produced, it is considered that such a dialogue would be in line with the principles of the Act and should be encouraged, where relevant and appropriate, as an ongoing part of the patient's care and treatment.

25 Individual patients may wish to work with a peer group or other service user group, or with their independent advocate to produce an advance statement, but they may also approach a member of their care team, including their RMO or CPN for support or assistance in preparing an advance statement. The practitioner can provide advice on the practical implications of the wishes set out in the advance statement and provide advice on what information will be helpful to the care team to help them take actions in line with the expressed wishes, as far as possible.

26 An advance statement cannot require that a service or medical treatment must be made available to the patient. Where a medical practitioner is assisting the patient to produce a list of preferred treatments to be included in an advance statement, it would be best practice to ensure that the patient making the statement is aware that clinical practice in the future might mean some medicines may be unavailable or less appropriate and substitutions might need to be used. Where care or treatments requested in an advance statement are not available, it would be best practice to record that the patient has an unmet need. Best practice guidelines should also be followed with respect to informing a patient of the possible benefits, risks and side-effects of receiving, or rejecting, each treatment.

27 Where a medical practitioner is assisting the patient to produce a list of treatments they would, or would not, wish to receive in future, it would be best practice to ensure the patient understands the relevant safeguards provided in Part 16 of the Act for treatments for mental disorder. If the patient understands such safeguards, they will be better able to make an informed decision about which treatments they do or do not wish to have in the future.

28 It would be best practice for any person(s) assisting in the drafting of the advance statement to emphasise the importance of the patient being content that their advance statement reflects their wishes before having it witnessed. It would also be best practice to explain the process by which someone giving medical treatment under the Act must have regard for the advance statement under section 276(3); the process by which a health professional might act against the wishes of the advance statement; and the actions to be taken in such circumstances. The Act provides at section 276(8) a list of people who must be informed of such a decision to act against the wishes set out in the advance statement.

29 There will be no prescribed form for an advance statement, although it must accord with the requirements of the Act. However it is considered that it would be of use, and best practice, if the advance statement contained the name and address of the patient, the witness, and the patient's GP, and details of any named person, carer, guardian and welfare attorney.

Witnessing an advance statement

30 To be valid, the Act requires that an advance statement must be signed by the patient and witnessed by a prescribed person. The witness must sign the statement and certify in writing that in their opinion the patient making the statement has the capacity to properly intend the wishes specified in it.

31 The prescribed person witnessing the advance statement need not have been involved in the drafting of the advance statement. The role of the witness is to certify that in their opinion the patient has capacity to understand and intend the statement about the treatments mentioned. The witness has no power to edit, endorse or veto the contents of the advance statement, only to assess the patient's capacity to intend the wishes recorded in it. Where the prescribed person cannot certify that the patient has capacity to intend the wishes in the advance statement, the prescribed person may decline to act as witness. It would be best practice then for the witness, if the patient so requests, to assist the patient to identify another prescribed person to act as witness.

32 A prescribed person acting as witness should not attempt to dissuade the patient from making an advance statement. However, if a witness is being asked to witness frequent changes to a statement, he or she may wish to suggest the patient seek assistance. It is

important that the patient is content that their advance statement reflects their wishes before seeking a witness.

33 It would be best practice for the witness to check that the statement has been signed by the person making it before witnessing it. In witnessing the patient's signature on the advance statement, the witness must sign the document and must certify in writing on the document that, in their opinion, the patient making the statement has the capacity to intend the contents of the statement. As a matter of practice it is important that the statement includes the date it was witnessed to avoid ambiguity.

34 If the patient is making a personal statement about matters other than treatment for mental disorder in addition to an advance statement, the personal statement does not require to be witnessed. However, such a statement (which may include personal preferences, for example whom to contact about care of dependants or pets, or what their employer is to be told, if the patient is taken into hospital) should also be in writing and dated to avoid ambiguity about the patient's intentions. A personal statement may be attached to the patient's advance statement in their records but it will not have the same effect in law.

35 It would be helpful for the patient making the advance statement to identify, possibly in a separate document, a list of the people who will hold a copy of the advance statement and the personal statement described in the preceding paragraph, where one has been made. For example, a copy may be given to the witness, the patient's named person, carer, relatives, solicitor, independent advocate, MHO, or GP. If given to the RMO (if any) or other person employed by the Health Board, it must be placed in their medical records. It would be best practice for the witness to ensure that the patient is clear that it will be stored with medical records, and certain information sent to the Commission, if given to the Health Board. If the advance statement is later withdrawn, any person holding a copy will need to be notified.

36 Regulations made under section 275 of the Act (The Mental Health (Advance Statements) (Prescribed Class of Persons) (Scotland) (No.2) Regulations 2004 (SSI No. 429)) provide that any of the following persons may act as a witness:

- a clinical psychologist entered on the British Psychological Society's register of chartered psychologists;
- a medical practitioner;
- an occupational therapist registered with the Health Professions Council;
- a person employed in the provision of (or in managing the provision of) a care service;
- a registered nurse;
- a social worker; and
- a solicitor.

Witnessing an advance statement: risk of future conflict of duty

37 A prescribed person acting as a witness may feel that there is a perceived risk of future conflict of duty if they witness an advance statement which they might, at some future time, have to override in order to provide care and treatment appropriate to the patient's needs. For example, a health professional witnessing an advance statement might subsequently be involved in authorising or administering treatment which conflicts with the wishes specified in a statement. This may be of particular concern for medical practitioners in rural or remote locations who may be not only the preferred witness (or only witness available) but also the person called upon to administer treatment measures compulsorily.

38 In such circumstances, it would be best practice for the prescribed person asked to witness it to discuss with the patient making the statement any potential risk of conflict of interest and to confirm with that patient that they still wish them to act as a witness. The prescribed person may decline to act as witness if, in their opinion, the risk of future conflict of duty is high. In declining to witness the advance statement the prescribed person may wish to help the patient making the statement to identify another prescribed person who is further removed from the risk of conflict, or another person independent of the care and treatment process, such as a solicitor, who could be asked to witness it.

Storing and accessing an advance statement

39 To ensure that the advance statement can be considered at any future date, the patient making the advance statement will wish to make sure that other people are aware of its existence, for example the patient may wish to share it with their GP, RMO, Community Psychiatric Nurse or MHO.

40 Where the advance statement is shared with the Health Board, it must be placed with the patient's medical records. When a patient transfers to or from another service, it would be best practice that the advance statement is included in any medical records that move with the patient. Administrators may wish to use a checklist to ensure that the statement is valid before adding it to medical records.

41 Where an advance statement is lodged in a patient's medical records, it should be treated as a medical record in terms of patient confidentiality. Best practice protocols for storing, retrieving, sharing, access by the patient, and destroying a patient record should be used when handling the advance statement.

42 The Health Board must also send certain information to the Commission about the existence of the advance statement. This includes information for identifying that an individual patient has an advance statement (such as their name and address), the date of the statement and the location of where the statement is kept.

43 A range of persons can access the Commission register, to establish whether an individual patient has an advance statement. These are:

- the patient.
- With respect to the patient's treatment any individual acting on the patient's behalf. This would include the patient's solicitor, named person, guardian and welfare attorney.
- for the purposes of making decisions or taking steps with respect to the treatment of the person for mental disorder – a mental health officer dealing with the person's case, the person's responsible medical officer, or the relevant health board responsible for the person's treatment.

Withdrawal of an advance statement

44 The process by which an advance statement may be withdrawn is similar to that for making one. The withdrawal may be witnessed by one of the same prescribed persons who can witness an advance statement. A witness should not attempt to dissuade the patient from withdrawing an advance statement.

45 After observing the patient sign that they are withdrawing their advance statement, the witness must certify that in their opinion the patient has the capacity of properly intending their wishes. They should also sign the statement. As a matter of practice it would also be helpful to date the statement.

46 The patient withdrawing the advance statement should ensure that all those who were given a copy or made aware of the existence of their advance statement are made aware of its withdrawal. These people should receive written notification from the patient that the advance statement has now been withdrawn. Notification that the advance statement has been withdrawn should also be given by the patient to their general practitioner, or, where the patient is in hospital, to the hospital managers. Notification that the advance statement has been withdrawn should also be given to the witness, the patient's named person, carer, relatives, solicitor, independent advocate, and MHO where any of these received a copy of the advance statement. It should be noted that the withdrawal is only valid where it complies with section 275(3). Therefore these people should not rely on being notified about the withdrawal in this way and to protect themselves they should see the withdrawal before relying on the fact of its withdrawal.

47 It is imperative that those involved with the care and treatment of the patient are made aware of the withdrawal of any advance statement. The patient withdrawing the advance statement may ask a member of their multi-disciplinary team to help them deal with these notifications, and where such a request is made, it would be best practice for the relevant professional to give such assistance as is appropriate in the circumstances.

48 As with an advance statement, if a Health Board receives notification that an advance statement has been withdrawn, this should be stored with the patient's medical records and the Commission must be informed.

Making decisions or authorising treatment which conflicts with those wishes

49 Where any person discharging functions under the Act makes a decision or authorises treatment which conflicts with the wishes specified in the advance statement, the Act requires certain procedures to take place (see section 276(7) and (8)). The Tribunal, the person having functions under the Act, or the designated medical practitioner, as the case may be, who makes a treatment decision or authorises or gives treatment in conflict with the advance statement, must comply with requirements set out in section 276(8) of the Act. This includes a situation where treatments or decisions which might have been authorised, given or made are not, with the consequence that there is a conflict with the wishes expressed in the advance statement.

50 The requirements of section 276(8) of the Act are that those persons record in writing the circumstances in which the measures or treatment or decision were authorised, given or made, or not authorised, given or made. They must also record the reasons why the measures were taken or this treatment was given or decision was made. The Act also requires that a copy of this record is sent to:

- the patient who has made the advance statement;
- the patient's named person;
- any guardian or welfare attorney of the patient; and
- the Mental Welfare Commission.

51 A copy of this record must also be placed in the patient's medical records. The Mental Welfare Commission advises that it is good practice to write this record in the form of a letter of explanation to the patient, copied to others as above.

52 A competently made advance statement would be a strong indication of a patient's wishes about medical treatment but should not be considered in isolation. An advance statement cannot bind a medical practitioner or member of the care team to do anything illegal or unethical, nor can it bind a medical practitioner or member of the care team to provide, arrange or withhold specific services, medicines or treatments. A decision to act in agreement or in conflict with an advance statement should not be made on the basis of the costs involved. Where care or treatments requested in an advance statement are not available and it is considered the patient could benefit from these, it would be best practice to record that the patient has an unmet need.

Having regard to an advance statement: additional requirements for designated medical practitioners

53 Before making a decision under sections 236(2)(c), 239(1)(c) or 241(1)(c) of the Act, a designated medical practitioner should undertake checks to ascertain whether the patient for whom treatment is being considered has made and not withdrawn an advance statement, and to view a copy of that statement. The designated medical practitioner is required to do this in order to comply with the statutory requirement at section 276(4) to have regard to the wishes specified in such a statement.

54 The designated medical practitioner should ask the patient if they have an advance statement, ask where it is stored and explain that they wish to see it before making their decision. If the patient says they do have an advance statement, but is unable to or does not provide the designated medical practitioner with the advance statement or the name of any person holding a copy of it (for example because they are unable to do so through illness), it would be best practice for the designated medical practitioner to check the patient's hospital notes for a copy of the statement or for a reference to a statement.

55 Where the hospital notes do not contain an advance statement, it would be best practice for the designated medical practitioner to consider contacting the patient's general practitioner to ascertain whether they have a copy in the patient's medical records or to ask someone from the Health Board to contact the Commission to see if an advance statement has been registered for the patient. The named person and/or the carer may know of the existence and location of any advance statement, and it would be reasonable to contact them to check.

56 A decision under sections 236(2)(c), 239(1)(c) or 241(1)(c) of the Act can only be made after these steps have been taken. Furthermore, under section 1(3)(a) of the Act, the designated medical practitioner must also have regard to the patient's past and present wishes and feelings (which may be expressed in a form other than an advance statement). Under sections 1(3)(b) and 1(9) the designated medical practitioner must have regard to the views of the patient's named person, any carer of the patient, any guardian of the patient, and any welfare attorney of the patient, unless it is unreasonable or impracticable to do so.

Acting in conflict with an advance statement

57 In terms of section 276(5) of the Act, the Tribunal must consider an advance statement (or a withdrawal of an advance statement) to be valid unless the contrary appears. If the Tribunal has considered an advance statement as valid, it should be presumed to be valid by any person giving treatment authorised by a decision of that Tribunal. Similarly, if medical treatment is being given otherwise than by virtue of a decision of a Tribunal, then the person giving that treatment must consider a statement (or its withdrawal) to be valid unless the contrary appears.

58 As mentioned above, where the Tribunal or a person giving medical treatment under the Act or a designated medical practitioner makes a decision which conflicts with the advance statement, section 276(8) of the Act requires that they record this in writing stating how the treatment conflicted with the patient's requests, and the reasons why this treatment decision was made. They must send a copy of this record to the patient, the named person, any guardian or welfare attorney and to the Mental Welfare Commission. This record must also be placed in the patient's medical records. Mental Welfare Commission advises that it is good practice to write this record in the form of a letter of explanation to the patient, copied to others as above.