

Consent

What you have a right to expect

TAKING BLOOD SPECIMENS

FROM THOSE INVOLVED IN ROAD TRAFFIC ACCIDENTS TO TEST FOR LEVELS OF ALCOHOL OR DRUGS

The Police Reform Act 2002 contains new powers concerning taking blood specimens from those involved in road traffic accidents to test for levels of alcohol or drugs. The new powers come in to force on 1 October 2002. NHS Trusts should ensure that medical staff who may be responsible for the care of those involved in road traffic accidents, in particular Accident & Emergency department medical staff, are aware of the new provisions. The following guidance covers the implications for NHS staff, but is not a comprehensive guide to the new Act.

1. Under current legislation, it is a legal requirement to obtain consent from the person concerned to obtain a sample of blood to test alcohol or drug levels. Therefore, when a person lacked capacity to consent a sample could not be obtained. On occasion, this has raised concerns that possible offenders have escaped prosecution for very serious offences, such as causing death by careless driving whilst under the influence of drink or drugs because appropriate supporting evidence has not been available. Equally, if suspicion of such an offence has arisen (for example, in the minds of the family of either the patient or the victim) it is not possible for the person to prove their innocence.

2. The Police Reform Act 2002 (Commencement No. 1) Order 2002, which comes in to force on 1 October 2002, introduces new arrangements for obtaining blood specimens from persons unable to consent who have been involved in road traffic accidents. The aim is to introduce equity to the situations of those who are and are not capable of giving consent in respect of blood tests. At the same time, the provisions ensure respect for the doctor-patient relationship and that the legal entitlement of medical practitioners to obtain specimens is clear.

3. The new powers concern the circumstances surrounding a road traffic accident in which a police constable is currently empowered to require a person to provide a blood sample for testing. If the person is in hospital as a patient, the requirement cannot be made if the practitioner in immediate charge of the case objects that it would be prejudicial to the patient's proper care and treatment. Otherwise, a person from whom the constable requires the blood sample (such as a patient) and who without reasonable excuse refuses consent, commits an offence.

4. The new provisions address the situation where it appears to the constable that the person is, for a medical reason (not for example because he cannot understand English) incapable of giving a valid consent. This will normally be because the person is unconscious. In that situation, the constable may now request that a blood specimen be taken. The request will normally be made to a police surgeon, unless it is not reasonably practicable to make the request to a police surgeon, or for the police surgeon to take the sample. In that exceptional situation, the constable may request a medical practitioner who does not have any other responsibility for the clinical care of the patient to take a blood sample for analysis.

5. Complying with the request is not a legal requirement. The new provision makes it lawful for the practitioner to take the specimen and provide it to the constable if s/he thinks fit. The clinical care of the patient always takes priority. If the person is in hospital as a patient, the medical practitioner in immediate charge of the patient's care must be notified of the proposal to take the specimen. As under the existing provisions, if s/he considers that the provision of a specimen would be prejudicial to the proper care and treatment of the patient, then s/he can object to the request and it will not be carried out. Such objections will not result in future prejudice to the patient.

6. If the medical practitioner in charge of the patient's care does not object, then the medical practitioner to whom the request has been made is legally empowered - but not legally required - to take the blood specimen if s/he considers it fit to do so. Again, if the medical practitioner does not consider it appropriate to take the specimen, there will be no subsequent detriment to the patient. Only the medical practitioner to whom the request has been made can take the specimen - the task cannot be delegated.

7. The Act does not limit the factors the medical practitioner can take in to account in deciding whether or not to take a sample. Such factors might include professional ethics. For example, the Act empowers the practitioner to take a sample when the person appears to a police constable to be incapacitated for medical reasons. However, if in the practitioner's judgement the person has capacity, and is refusing to consent, s/he might consider it inappropriate to take a sample but inform the constable that in the practitioner's opinion the person had capacity¹. Other factors might relate to professional judgement, for example, that taking the sample would be prejudicial to the care and treatment of the person.

8. In summary:

- In the vast majority of cases, a constable will continue under the current, long-standing, provision to ask a person to provide a specimen:
 - if the person refuses, the constable will not ask a medical practitioner to take a specimen;
 - if the person consents then the constable will ask a practitioner to take a specimen and it will be lawful for the practitioner to do so. It will remain, as at present, for the practitioner to decide whether or not it would be appropriate to comply with the request.
- If, in the judgement of the constable the person cannot give a valid consent, for example because he is unconscious, delirious or unable to speak or otherwise indicate his intention, the constable will invoke the new provision. As under the existing provision, it will be lawful for the practitioner approached to take a specimen but for him/her to decide whether or not it would be appropriate to comply with the request.

9. Separate guidance is being provided to the police service on the Act.

10. If the medical practitioner considers it appropriate to take the specimen, the police constable will provide a kit to be used for this purpose. This is the standard kit that the police currently supply for the taking of specimens. The specimen taken should be given immediately to the police constable.

11. The police will keep in touch with the hospital to ascertain the person's progress. As soon as it is possible to do so without prejudicing the care and treatment of the patient, the police will want to inform the person that the specimen was taken, and a constable will require him or her to give permission for the specimen to be analysed. The constable must warn the person that failure without reasonable excuse to give permission for analysis may render the patient liable to prosecution. This process may need careful handling, especially if the patient, though competent, is still recovering from injury. Again, the practitioner in immediate charge of the patient's care must be notified of the intention to provide this information and require permission for analysis, and as in paragraph 5 above may object if s/he considers that to do so would be prejudicial to the proper care and treatment of the patient.

12. If the practitioner in charge of the patient's care has made an objection, then assuming the patient retains capacity, the police constable can repeat the request at a later stage until it becomes possible to require permission for analysis and warn of the consequences of refusal without prejudicing the care of the patient. The police will want to seek consent to analysis as soon as possible both in the interests of justice and because specimens cannot be kept indefinitely without deterioration.

13. The Department of Health is aware that professional bodies are preparing more detailed guidance on the new provisions. While detailed interpretation of the law would be a matter for the courts, any queries relating to the law (not to professional issues) can be directed to the Home Office [Contact: Mr Al Lama, Property and Road Crime Reduction Unit, Home Office, Clive House, Petty France, London SW1H 9HD, tel: 020 7271 8243; fax 020 7271 8202; email al.lama@homeoffice.gsi.gov.uk].

Department of Health,
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¹ The Department of Health has published guidance on the legal requirements concerning consent and capacity. See Reference Guide to consent for examination or treatment (2001), available at www.doh.gov.uk/consent