

Number 5

Advance Directives

Advance Directives are decisions made whilst a person has the necessary mental capacity to do so which are intended to give effect to wishes as to how that person shall be treated or cared for if they subsequently lose capacity to make a treatment choice themselves in the future.

The Government has been reluctant to bring forward legislation on the issue of Advance Directives. However, the current law – which recognises Advance Directives - has been restated:

It is a general principle of law and medical practice that all adults have the right to consent to or refuse medical treatment. Advance statements are a means for patients to exercise that right by anticipating a time when they may lose the capacity to make or communicate a decision.

An advance statement contains a person's instructions as to which medical treatment that person would or would not be prepared to accept if he or she should subsequently lose the capacity to decide for himself or herself. An advance statement can request specific treatments. However, it is an important principle that health professionals are not legally bound to provide that treatment if it conflicts with their professional judgment about the most appropriate treatment to give to a patient just as they would not be bound to give a treatment to a patient with capacity. Nevertheless, the health professional may take the person's wishes into account when deciding on a course of action.

Advance statements are sometimes concerned with the refusal of life sustaining procedures in the event of a terminal illness. They have nothing to do with euthanasia or suicide. They cannot authorise a doctor to do anything which is illegal or which a person with capacity could not request a doctor to do.

Nor can they ask for treatment which is clinically inappropriate. Advance statements are simply a method whereby a person can exercise his or her right to accept or reject medical treatment. Euthanasia is and will remain illegal.

Adults with capacity have the right to refuse or withdraw their consent to medical treatment. Such a decision does not either have to be reasonable or to be justified to anyone apart from the individual who is making the decision. It follows that adults can define, in advance, which medical procedures they will or will not consent to at a time when that individual has become incapable of making or communicating that decision. The courts have approved this principle and have determined that certain forms of advance statement already have full effect at common law. The judgments in *Re T*¹, together with those in *Airedale NHS Trust v Bland*² in both the Court of Appeal and the House of Lords, indicate that an advance refusal of treatment which is "clearly established" and "applicable in all the circumstances" is as effective as the decision of a capable adult. The case of *Re C*³ provided further clarification. In that case, the High Court held that a refusal of treatment by a patient who had

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1 Re T (Adult: Refusal of Treatment) [1992] WLR 782
2 Airedale NHS Trust v Bland [1993] AC 78
3 Re C (Adult Refusal of Treatment) [1994] 1 WLR 290

capacity to make that refusal was binding on his doctors for the present and the future until it was revoked.

Given the division of opinion which exists on this complex subject and given the flexibility inherent in developing case law, the Government believes that it would not be appropriate to legislate at the present time, and thus fix the statutory position once and for all. The Government is satisfied that the guidance contained in case law, together with the Code of Practice Advance Statements about Medical Treatment published by the British Medical Association, provides sufficient clarity and flexibility to enable validity and applicability for advance statements to be decided on a case by case basis. However, the Government has said that it intends to continue to keep the subject under consideration in the light of future medical and legal developments.⁴

Advance Directives should be kept with GP and other primary care records and their existence made known to the care team. Their status and importance is of relevance to all primary care professionals.

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Registered Care Homes – Council Tax – registered care homes

The Office of the Deputy Prime Minister has moved to relieve the Council tax burden on older and disabled people living in care homes.

Local Government Minister, Nick Raynsford, has announced the Government's intention to change legislation to ensure that all registered care homes in England are assessed for council tax as a single residence, even where they provide self-contained units for independent living.

The proposals would see one council tax bill issued to the care home, with the owner responsible for paying.

The move will ensure that individual residents who are at least able to pay will not be asked to pay a separate council tax bill for their accommodation.

Overall, it is envisaged that the council tax burden on a care home with self-contained units will be lower as a result of this change because the single bill for the owner will be less than the total of the bills for individual units.

For more information on Care Home Law contact Andrew Parsons at RadcliffesLeBrasseur on 020 7227 7282, or email: andrew.parsons@rlb-law.com.

Out of office emergency advice available 24hrs on 07802 506 306.

Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.

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⁴ "Making Decisions" The Government's proposals for making decisions on behalf of mentally incapacitated adults.