RadcliffesLeBrasseur

BRIEFING

Number 6

# Advance Directives II – Form and Content

CARE HOMES

In our last Care Homes Briefing Note[1] we summarised the law relating to advance directives (sometimes also known as advance statements or living wills).

Queries are often raised about two specific issues relating to advance directives, namely their effect on psychiatric care, and the formal content of directives.

## Making an Advance Directive

Although oral statements are equally valid if supported by appropriate evidence, there are advantages to recording one's general views and firm decisions in writing. Advance directives should be understood as an aid to, rather than a substitute for, open dialogue between patients and health professionals.

Written statements should use clear and unambiguous language. They should be signed by the individual and a witness. Model forms are available but clear statements in any format command respect.

Patients have a legitimate expectation of being provided with information in an accessible form to allow them to make informed choices. Health professionals should ensure that the foreseeable options and implications are adequately explained, admit to uncertainty when this is the case and make reasonable efforts to discover if there is more specialised information available to pass on to the patient. An open attitude on the part of health professionals and a willingness to discuss the advantages and disadvantages of certain options can do much to establish trust and mutual understanding.

Admittance to hospital, with its associated anxieties, is not generally a good time to raise the subject of anticipatory choice. Exceptions arise when the impetus for discussion comes from the patient or when sensitive advance discussion of cardio-pulmonary resuscitation would be appropriate.

Advance directives should not be made under pressure. Professionals consulted at the drafting stage should take reasonable steps to ensure patients' decisions are not made under duress. Directives may evolve in stages over a period of time and discussion. It is inadvisable to conclude refusals or complicated directives in one discussion without further review. Patients should be reminded about the desirability of reviewing their directive on a regular basis, although a directive made long in advance is not automatically invalidated.[2]

[1] Care Homes Briefing No. 5
[2] Advance statements about medical treatment:BMA 1995

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### Content of advance directives

Advance directives may express preferences between treatment options, or may list an individual's values as a basis for others to reach appropriate decisions – for example, where clinicians are acting in the best interests of the patient as the patient no longer has the necessary mental capacity to make a choice. They may cover a range of matters, including general views and specific points. They can be binding specific refusals of treatment, although they cannot authorise or refuse in advance any procedure which a patient could not authorise or refuse contemporaneously. Nor can they authorise unlawful procedures or insist upon inappropriate or futile treatment.

### Advance directives and mental health

Advance directives are based on the common law, not legislation. Therefore, where there is any conflict with existing statute law, advance directives are superseded by any such existing statute.

Accordingly, the terms of the Mental Health Act should take precedence and prevail over advance directives when it comes to treatment for mental disorder ( as opposed to treatment for physical disorder).

Although any adult patient with the necessary mental capacity (even one who is compulsorily detained under the Mental Health Act) can make a legally binding advance directive, this should not apply to treatment under the mental health legislation. Section 63 in particular enables the RMO to treat a patient for his or her classified mental disorder without the patient's consent. The fact that there is an advance directive relating to the patient's preferences with regard to psychiatric treatment is irrelevant to the authority to treat given by section 63.


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***FUTURE TOPICS FOR OUR CARE HOMES BRIEFINGS***

If there are specific topics you would like us to address in our future Care Homes Briefings, please let us know by sending an email to andrew.parsons@rlb-law.com

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