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Healthcare Briefing

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Countdown to the Mental Capacity Act 2 – 'Best interests checklist'

As we stated in the first of our "Countdown Briefings" to the implementation of the Mental Capacity Act 2005, everyone involved in healthcare will now have to be aware of the provisions of that legislation. This is particularly so in the context of the new approach to "best interests" which will impact upon a wide range of people from consultants with responsibility for treating patients to close relatives and carers of patients who lack capacity.

The Act departs from the common law approach whereby the determination of the "best interests" of an incapacitated patient rested on the judgment of the clinicians treating the patient. The Act takes some steps towards the introduction of greater safeguards for incapacitated patients by providing for a "best interests checklist".

One of the central principles established by the Act is that any act done or decision made for and on behalf of a person who lacks capacity must be done, or made, in his best interests. A person who undertakes a task or makes a decision on behalf of an incapacitated person will have complied with the law if he/she reasonably believes that what they are doing is in the patient's best interests.

The 'Best Interests Checklist'

Any person who is in the position of having to make a decision or undertake an act on behalf of an incapacitated person must consider the following points in deciding what steps should be taken on behalf of that person:

- Is the person likely at some time in the future to have capacity in relation to the matter in question, such as a treatment decision?
- If so, when is that likely to be? In some situations this will be impossible to determine, but in others where, for example, the patient has temporarily lost consciousness as a result of the administration of anaesthetic, an accurate prediction is more likely to be able to be made.
- The person for whom the decision is to be made should be encouraged to be involved and participate as fully as possible in any decision or act done for him; this might involve using visual or other aids.
- Where the decision raises issues of life sustaining treatment, the person making the decision, in considering whether the treatment is in the best interests of the person concerned, must not be motivated by a desire to bring about that person's death.
- Consideration must be given as far as reasonably ascertainable to the person's past and present wishes and feelings, and the beliefs, values and any other

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factors that would be likely to be taken into account if the person had capacity. Healthcare professionals are therefore now going to be required to make enquiries of relatives, carers and friends of the patient.

- Any written statements made while the patient had capacity must also be taken into account.

- So far as is practicable and appropriate, the following individuals must be consulted:

  (a) anyone named by the incapacitated person as someone to be consulted

  (b) anyone engaged in caring for the person or interested in his welfare

  (c) any donee of a Lasting Power of Attorney relevant to the matter in question

  (d) any deputy appointed for the person by the court

For more information on the Mental Capacity Act 2005, please contact the following:

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