

Number 52

Guidance for Healthcare Professionals

Caring for Those Lacking Capacity

The Lord Chancellor's Department has recently published a consultation paper seeking comments on various leaflets providing guidance in respect of adults who, due to incapacity, may need support to make decisions. The leaflets include a guide for healthcare professionals who are involved in the care and treatment of such patients.

The guide for healthcare professionals provides an aide memoir in respect of the law on capacity and the treatment of patients who are not competent to consent to treatment and provides some practical advice in supporting patients in the decision making process and in ascertaining whether they are competent to consent.

The guide raises the following points:

- Before providing an opinion on whether a person is capable of making a decision, including a treatment decision (and also to make a Will), the professional should check that all efforts have been made to help and support the person to maximise their potential to make their own decisions.
- Consideration must be given to the way that patients are given information; different approaches can be taken in respect of different patients, for example, people with memory problems caused by dementia may be able to use techniques to help them remember. It might also be helpful for a patient to have assistance from an independent advocate.
- Other members of the broader healthcare team, for example occupational therapists, might be able to contribute in assisting the patient to communicate or be able to suggest alternative methods or techniques to convey information.
- The issue of who should assess capacity is addressed. Whilst many people can be assessed by their General Practitioner, it may be more appropriate to request an assessment from a specialist practitioner, for example a psychiatrist or geriatrician, who has expertise in the patient's particular medical condition.
- With reference to the legal test for capacity, it is suggested that doctors assessing capacity must address the following questions:
 1. Does the person have all the information or a sufficient amount of information needed to make the decision?
 2. Could the information be explained or presented in a way that is easier for the person to understand?

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3. Are there particular times of the day when the person's understanding is better or particular places where they might feel more at ease? Can the decision be postponed until the circumstances better suit the ability of the person to make the decision?
 4. Can anyone help or support the person to make choices or express a view, such as another family member or, if appropriate, an independent advocate?
- The guide also addresses the circumstances of where a patient is unable to make a treatment decision and what considerations healthcare professionals need to take into account in reaching decisions about proposed medical treatment and/or care of the patient. The guide lists factors which should be taken into account in assessing a patient's "best interests" and stresses the need first to take steps to consult the patient and attempt to seek their views.
 - Where the patient's views cannot be ascertained, it is suggested that the views of people close to the patient should be sought, even though such individuals do not have legal rights in the context of giving consent. Other members of the healthcare team should also be consulted, including the patient's GP if appropriate and other relevant expert professionals, in order to make a clinical judgment about the effectiveness of the proposed treatment and the likelihood and extent of any improvement in the patient's condition if the treatment is provided.
 - The guide also encourages healthcare professionals to address whether the purpose for which any action or decision is required can be as effectively achieved in a manner less restrictive of the person's freedom of action and stresses the need to explore all other possible options or alternatives to the proposed treatment.
 - The patient's religious, cultural, or other non medical views which might have implications for the patient's wishes should also be taken into account in determining whether and, if so, what treatment should be given.

Although the guide is presently only at the consultation stage, if it receives Government endorsement it is anticipated that it will be used as a source of reference by the Courts in considering issues of mental capacity and consent.

Other leaflets produced by the Lord Chancellor's Department for consultation include a guide for social care professionals and a guide for people wishing to plan for future incapacity.

For more information on the consultation on guidance for mentally incapacitated adults and those who make decisions on their behalf and on the legal issues surrounding capacity and consent generally, contact RadcliffesLeBrasseur.

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New Mental Health Act

There have been numerous queries as to the progress of the much publicised new Mental Health Act. The latest information that we have is that the Department of Health are currently working on drafting and that the Bill will be ready to be included in the next Queen's speech if Ministers decide there is parliamentary time available. If there is, it is expected to be passed in approximately six months and thereafter drafting and consultation on a new Code of Practice will take place with the Act and Code coming into force not before December 2004.

For more information on Mental Health 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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