

Number 76

Who should the SOAD Consult?

Section 58 of the Mental Health Act 1983 provides that certain forms of treatment shall not be given to a patient unless either (1) the patient consents and an independent medical practitioner appointed by the Mental Health Act Commission (known as the “Second Opinion Appointed Doctor” (SOAD)) or the RMO has certified that the patient is capable of giving his consent or (2) the SOAD has certified that the patient should receive the treatment even though he has not consented to it. Section 57 requires the patient to consent and the SOAD to approve certain treatment¹.

Where the SOAD proposes to certify that treatment should be given even though the patient is not competent to consent or, being competent, has not consented to the treatment, he is required to complete form 37 or 39 (as appropriate). Before completing that certificate he is required by the Act to consult two other persons who “have been professionally concerned with the patient’s medical treatment”; of those persons one is required to be a nurse and the other must not be a nurse nor a registered medical practitioner (the “statutory consultee”).

The requirement that such a person has been professionally concerned with the patient’s medical treatment has been interpreted as meaning that that person will have had some direct knowledge of the person’s history and condition and be in a position to comment on the issues referred to in paragraph 16.34 of the Code, which refers to the role of the “statutory consultees”. These issues include the implications of imposing treatment upon a non-consenting patient and are as follows:

- The proposed treatment and the patient’s ability to consent to it;
- Other treatment options;
- The way in which the decision to treat was arrived at;
- The facts of the case, progress, attitude of relatives, etc;
- The implications of imposing treatment upon a non consenting patient and the reasons for the patient’s refusal of treatment;
- Any other matter relating to the patient’s care on which the consultee wishes to comment.

The Mental Health Act Commission has recognised the problems of finding an appropriate person to act as a “statutory consultee” and has expressed “grave doubts” about some of the people requested to undertake this role. The Commission has suggested that “the appointed doctor should endeavour to meet with somebody whose qualifications, experience and knowledge of the patient should enable them to make an effective contribution to the work of the multi-disciplinary team”. Given the reference in the Act to such a person being “professionally concerned”, such a person should hold a recognised qualification that is relevant to the “medical treatment” of the patient; this is likely to include occupational therapists, psychologists and pharmacists along with other similar health professionals.

¹ Currently psychosurgery and surgical implants of hormones for the purpose of reducing male sex drive

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The issue of the criteria that a “statutory consultee” must meet arose in a judicial review challenge in the case of R (on the application of W) –v- Feggetter and another² in which the patient challenged the role of the person who had undertaken the duties of the consultee on grounds that she had insufficient knowledge of the patient in her professional capacity. The consultee was an art therapist who had attended the patient’s consultant ward rounds, although the patient had never engaged in any therapy. She had not attended the ward rounds in the preceding six months although she had been kept informed through discussions with art therapy colleagues and the patient’s RMO concerning his mental state and treatment regime. The hospital treating the patient relied on the words used in Section 58(4) that the SOAD should consult “two other persons *who have been professionally concerned with the patient’s medical treatment*”; accordingly, it was not necessary for such a consultee to continue to be concerned with the treatment, provided they had been concerned in the past.

The Court refused the patient’s application for judicial review on the grounds that it was not unreasonable for the person in question to have been asked to act as a consultee. The therapist was held to have fulfilled the requirements set out in the Act as being the person who has been professionally concerned with the patient’s medical treatment given the non-availability of any person with current involvement in the patient’s treatment.

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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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² November 2000, unreported

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