

28 Jun 07

'LIVING WILLS' UNDER THE MENTAL CAPACITY ACT 2005

Refs:

- A. The Mental Capacity Act 2005 ('the Act')
<http://www.opsi.gov.uk/acts/acts2005/20050009.htm>.
- B. Summary of the Act
<http://www.dca.gov.uk/legal-policy/mental-capacity/mca-summary.pdf>
- C. The associated Code of Practice
<http://www.dca.gov.uk/legal-policy/mental-capacity/mca-cp.pdf>

1. From 1 Oct 07 the Act enables people to plan ahead for a time when they may lack capacity. Where an advance decision concerns treatment that is necessary to sustain life, the decision must be in writing, signed and witnessed. In addition, there must be an express statement that the decision stands "even if life is at risk" which must also be in writing, signed and witnessed. See the next page for a Q & A sheet. It also allows people to create a lasting power of attorney that permits another person to make medical and welfare decisions on behalf of the patient.

2. The Act states that every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise. From this it follows that:

a. As a GP you should always assume that a person who has made an advance decision had the capacity to make it, unless you have reasonable grounds to doubt it. If you are not satisfied that the person had capacity at the time they made the advance decision, or if there are doubts about its existence, validity or applicability, you can treat the person without fear of liability. You should, as a matter of good practice, record your decisions and the reasons for them.

b. In cases where the patient now lacks capacity but has made a valid and applicable advance decision to refuse treatment which you as a GP cannot, for reasons of conscience, comply with, arrangements should be made for the management of the patient's care to be transferred to another healthcare professional. If this is impossible to agree locally the Court can order it to take place.

3. A criminal offence – The Act also introduces a new criminal offence of ill treatment or neglect of a person who lacks capacity. A person found guilty of such an offence may be liable to imprisonment for a term of up to five years. The new criminal offence came into effect in April 2007.

4. Independent Mental Capacity Advocate (IMCA) – The Act also makes possible the appointment of an IMCA to support a person who lacks capacity but has no one to speak for them, such as family or friends. They will only be involved where decisions are being made about serious medical treatment or a change in the person's accommodation where it is provided by the National Health Service or a local authority.

EXCLUDED DECISIONS

5. Some types of decisions can never be made by another person on behalf of another person who lacks capacity and the Act does not change this. This is because these decisions or actions are either so personal to the individual or because other laws govern them. These include decisions such as marriage or civil partnership, divorce, sexual relationships and voting. They also include decisions about treatment for mental disorder where someone is being detained and treated under Part 4 (Consent to Treatment) of the Mental Health Act which allows the person to be treated without their consent.

MENTAL CAPACITY ACT 2005: AN APPROACH TO AN ADVANCE DECISIONS

DOES IT EXIST? IS IT VALID? DOES IT APPLY NOW?

Check - Is the advance decision still valid?

Events that would make an advance decision invalid include those where:

- a. The person withdrew the decision while they still had capacity to do so.
- b. After making the advance decision, the person made a Lasting Power of Attorney (LPA) giving an attorney authority to make treatment decisions that are the same as those covered by the advance decision.
- c. The person has done something that clearly goes against the advance decision which suggests that they have changed their mind.

Check Validity of Format. Does the advance decision deal with life-sustaining treatment, including artificial nutrition and hydration?

a. Yes? The patient must have been over 18 when the decision was made. It must be **in writing**, not necessarily the patient's but **the patient must sign it**, or if the patient is unable to sign he must direct someone to sign on his behalf in his presence. The signature (and if necessary the direction by the patient to a third party to sign for him) must be **witnessed** and the witness must sign also. **It must include a clear specific written statement that the decision is to apply to the specific treatment even if life is at risk.** If this statement is made at a different time or in a different document it must be separately signed and witnessed.

b. No? Then it helps if it was in writing but verbal statements are enough. Again, the patient must have been over 18 at the time of the decision.

c. Written Advance Decisions: In all written advance decisions it is helpful to include the following information:

(1) Full details of the person making the advance decision, including date of birth, home address and any distinguishing features (in case healthcare professionals need to identify an unconscious person, for example).

(2) The name and address of the person's GP and whether they have a copy of the document.

(3) A statement that the document should be used if the person ever lacks capacity to make treatment decisions.

(4) A clear statement of the decision, the treatment to be refused and the circumstances in which the decision will apply.

(5) The date the document was written (or reviewed).

d. Verbal Advance Decisions. There is no set format for verbal advance decisions. This is because they will vary depending on a person's wishes and situation. Healthcare professionals will need to consider whether a verbal advance decision exists and whether it is valid and applicable. Where possible, healthcare professionals should record a verbal advance decision to refuse treatment in a person's healthcare record. This will produce a written record that could prevent confusion about the decision in the future. The record should include:

(1) A note that the decision should apply if the person lacks capacity to make treatment decisions in the future.

(2) A clear note of the decision, the treatment to be refused and the circumstances in which the decision will apply.

(3) Details of someone who was present when the oral advance decision was recorded and the role in which they were present (for example, healthcare professional or family member), and

(4) Whether they heard the decision, took part in it or are just aware that it exists.

What can the patient decide in advance?

Under the Act any advance decision to refuse treatment:

- a. Must state, in everyday or medical language, precisely what treatment is to be refused – a statement giving a general desire not to be treated is usually not enough.
- b. May set out the circumstances when the refusal should apply – it is helpful to include as much detail as possible.
- c. Will only apply at a time when the person lacks capacity to consent to or refuse the specific treatment.

Can an advance decision refuse all actions?

- a. An advance decision cannot refuse actions that are needed to keep a person comfortable (sometimes called basic or essential care). Examples include warmth, shelter, actions to keep a person clean and the offer of food and water by mouth. Section 5 of the Act allows healthcare professionals to carry out these actions in the best interests of a person who lacks capacity to consent.
- b. An advance decision refusing all treatment in any situation (for example, where a person explains that their decision is based on their religion or personal beliefs) may be valid and applicable.

What do I do if the circumstances make it unlikely that the patient considered them when making their decision?

If the document does not anticipate a change in circumstance, (e.g. a woman may want to state in the advance decision whether or not it should still apply if she later becomes pregnant) healthcare professionals may decide that it is not applicable if those particular circumstances arise.

Whose responsibility is it to bring the advance decision to doctors' attention?

If an advance decision is recorded on a patient's healthcare records, it is confidential. Some patients will tell others about their advance decision (for example, they might tell healthcare professionals, friends or family). Others will not. People who do not ask for their advance decision to be recorded on their healthcare record will need to think about where it should be kept and how they are going to let people know about their decision as it is their responsibility. Some people carry a card or wear a bracelet saying where the recorded decision is to be found.