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**POLICY FOR ADVANCE DIRECTIVES REGARDING
TREATMENT AND CARE**

AREA: Trust Wide

POLICY SPONSOR: Nurse Exec

IMPLEMENTED October 2004

DUE FOR REVIEW: October 2007

	Date Approved
APPROVED BY: Nurse Advisory Committee	Sept. 2004
Joint Governance Team	August 2004
Clinical Governance Board Sub-Committee	Sept. 2004
Older People's Governance Team	Sept. 2004
Adult Governance Team	Sept. 2004
Children's Governance Team	Sept. 2004

DISSEMINATED TO: Joint Governance Team
 Clinical Governance Manager
 Professional Leads
 Older People's Governance Team
 Adult Governance Team
 Learning Disabilities Governance Team
 Children's Governance Team
 Intranet Officer

Added to Intranet by: _____ **Date Added:** _____

Directorate:

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POLICY FOR ADVANCE DIRECTIVES REGARDING TREATMENT AND CARE

This policy is informed by both the Human Rights Act, 1998, Article 8 and by the proposed Mental Capacity Bill, published 17th June 2004, due to become law in 2007.

1. INTRODUCTION

- 1.1 This policy replaces the Policy/Guidelines for Advance Statements (Living Wills) about Treatment and Care dated June 2000.
- 1.2 It is a general principal of law and medical practice that all mentally competent individuals have the right to consent to or refuse medical treatment. Advance Directives are a means for individuals to exercise that right by anticipating a time when they may lose their capacity to make or communicate a decision.
- 1.3 Dorset HealthCare NHS Trust has stated in its Equality & Diversity Statement that it will provide '*effective treatment that meets the needs of service users in a way that respects their preferences*'. It is accepted by the Trust that these preferences may include an Advance Directive about treatment and care.
- 1.4 In April 1995 the British Medical Association (BMA) published guidance in the form of a code of practice which provides advice to health professionals on Advance Directives. In 2003 the BMA also published a Consent Toolkit which deals with Advance Directives.
- 1.5 The Mental Capacity Bill (published 17th June 2004, due to become law in 2007), as currently drafted, will not lead to substantial changes in the law relating to advance directives.
- 1.6 The legality of Advance Directives is backed by case law including the case of Re T (1992) 4 All ER 649. In 1992, the Appeal Court indicated that when an informed and competent individual has made an anticipatory choice which is "clearly established and applicable in the circumstances" doctors would be bound by it. This view was confirmed by later cases (Airedale NHS Trust v Bland (1993) 1 All ER 859 and Re C (1994) 1 All ER 819). In these cases, discussion revolved around the legally binding nature of an informed refusal of specific treatment(s).
- 1.7 This case law also supports the position of an individual detained under a section of the Mental Health Act 1983, who can make an Advance Directive as long as he is mentally capable.
- 1.8 It is important to note that if an individual is detained under a section of the Mental Health Act, 1983, to which the provisions of Part IV (Consent to Treatment) apply, this overrules any Advance Directive which they might have made pertaining to the treatment of their mental disorder.

- 1.9 The Advance Directives, which are discussed in this document, are also known under the title of Living Wills.
- 1.10 In this policy, for reasons of brevity, the term 'individual' has been used to mean the patient, service user or client and the masculine pronoun has been used throughout the text however the feminine applies equally.
- 1.11 This policy has been informed by legal advice from two sources.

2. POLICY OBJECTIVE

- 2.1 The objective of this policy is to state Dorset HealthCare NHS Trust's position on Advance Directives and the procedures and training put in place to ensure effective assessment and, if required, implementation of such a Directive .
- 2.2 This policy defines Advance Directives; the legality of these Directives and how to assess their validity.
- 2.3 This policy contains guidelines for determining the capacity of an individual writing or requesting the implementation of an Advance Directive .
- 2.4 This policy provides guidance for staff who are presented with an Advance Directive or asked to help write or implement one.
- 2.5 This policy also details the procedure in case of dispute in the implementation of an Advanced Directive.

3. ADVANCED DIRECTIVES

- 3.1 DEFINITION: an Advance Directive is a mechanism whereby competent people give instructions about what is to be done if they should subsequently lose the capacity to decide or to communicate. An advance directive is a power which is confined to refusing medical treatment: it cannot be used to require a medical practitioner to carry out a positive act that is contrary to his or her clinical judgment.
- 3.2 There are no formal requirements for an advance directive. An advance directive can be oral or in writing.
- 3.3 The individual's refusal of specific treatments must be respected but does not imply or justify abandonment of the individual. Healthcare professionals should offer such medical care and pain relief as would appear acceptable to the individual and appropriate to the circumstances. An Advance Directive refusing basic care measures should not be followed as the effects caused by the lack of basic care may lead to potentially serious harm to others, such as spread of infection. (BMA Code of Practice, para 2.3 & 5, 1995)

- 3.4 Questions of treatment should always be discussed with the relatives of a mentally incapacitated person, but their relationship does not give legal authority to make decisions on the individual's behalf.
- 3.5 In the case of a young person under the age of 18, even if they are considered competent, Advance Directives should be taken into account wherever possible but are not legally-binding. An Advance Directive of a young person may be overridden by a person or body with parental responsibility for them. The Children Act 1989 emphasises that the views of minors should be sought and taken into account in matters which touch on their welfare. Where appropriate, they should be encouraged to take decisions jointly with those with whom they have a close relationship, especially parents.
- 3.6 If any member of staff objects to following the instruction in an advance Directive, they should make this known to their manager immediately and be prepared to hand the care of the individual over to another carer. Advice and support can be secured from the nurse/medical director and lead professional heads.

4. VALIDITY OF AN ADVANCE DIRECTIVE

- 4.1 The treating doctor must be satisfied that the individual was mentally capable at the time when he made it known that he would not consent to the treatment in question.
- 4.2 The circumstances in which the Advance Directive was made should be investigated to ensure that the Advance Directive still represents the wishes of the individual and that the individual was aware of all the relevant information available at the timing of writing the Advance Directive
- 4.3 When assessing the validity of an Advance Decision, it may be necessary to consider changes in circumstances, which could have affected an individual's decision to apply the Advance Directive had he known about them i.e. advances in medical science.
- 4.4 An Advance Directive, whether oral or in writing, may be revoked either orally or in writing at any time by the individual.
- 4.5 The burden of proof is on those who seek to establish the existence and continuing validity of an Advance Directive.
- 4.6 An Advance Directive will be ineffective if at the time when it was made the individual either did not appreciate the implications of refusing treatment or was subject to undue influence.

5. ASSESSING CAPACITY

- 5.1 Who should assess capacity depends on the decision to be made. Where consent to medical treatment or examination is required, the Consultant responsible for the individual's care should decide whether the individual has capacity to consent or to refuse consent.
- 5.2 The 'common law' test of capacity should be applied, which was set out in the case of *Re C (Adult Refusal of Treatment)* [1994] 1 WLR 290. An individual has capacity to consent / refuse medical treatment if he can:
- comprehend and retain treatment information
 - believe it **AND**
 - weigh it up to arrive at a choice
- 5.3 Those involved in assessing capacity need to be satisfied that everything possible has been done to help and support the person to participate to the fullest extent in the process involved in making this particular decision.
- 5.4 The person carrying out the assessment should ask themselves the following questions:
- Could the information be explained or presented in a way that is easier for the person to understand?
 - Can the decision be put off until the circumstances are right for the person concerned?
 - Can anyone else help or support the person to make choices or express a view, such as another family member or, if appropriate, an independent advocate.
- 5.5 When assessing capacity it is important to consider that:
- some people may at times be quite capable of making their own decisions and running their own lives, but have a mental health problem or other condition which affects their capacity and abilities during acute phases.
 - there may also be temporary factors which affect someone's ability to make decisions, such as the effect of medication or distress caused by bereavement or a sudden shock.
 - physical factors may be present which may make people appear to lack mental capacity when in fact the problem is an inability to communicate their decisions.
- 5.6 In the absence of clear guidance from the individual, doctors must make treatment decisions with a view to the individual's best interests. Knowledge of the individual's views and values, either through a document or a nominated proxy, and those of their relatives are likely to be instrumental in clarifying the individual's best interests.
- 5.7 In serious or complex cases, involving difficult issues about the future health and well being or even life of the individual, the issue of capacity should be addressed by an independent psychiatrist approved under Section 12 of the

Mental Health Act 1983. An application to Court is indicated only in the unusual situation where doubt as to mental capacity remains.

6. GUIDANCE FOR STAFF

- 6.1 If presented with an Advance Directive for inclusion in an individual's notes:
- I. Satisfy oneself of the capacity of the individual at the time of writing the Advance Directive.
 - II. Assure the validity of the Advance Directive as per section 4
 - III. If valid, store with individual's file: the Advance Directive should be held in the individual's Integrated Record file in the Legal Documentation section. The Patient Alert sheet within the Integrated Record should be labeled as per Appendix A. If not valid, include details of refused Advance Directive and reasons for refusal on individual's file .
 - IV. If valid, inform the individual's clinical team that an individual has an Advance Directive on their file. This needs to be communicated to all members of that individual's clinical team so that they are aware of its existence in the event that it may need to be implemented.
 - V. If valid, inform the relatives of the existence of the Advance Directive: unless stated explicitly within the Advance Directive , the relatives and/or carers of the individual should be notified of the existence of the Advance Directive.
- 6.2 If asked to implement an Advance Directive:
- I. Determine the validity of the Advance Directive as per Section 4.
 - II. If the Advance Directive pertains to treatment for a psychiatric disorder, determine the status of individual under the Mental Health Act. If an individual is detained under a section of the Mental Health Act, 1983, to which the provisions of Part IV (Consent to Treatment) apply, this overrules any Advance Directive which they might have made pertaining to the treatment of their mental disorder.
 - III. If not overruled by the Mental Health Act, 1983, follow the instructions outlined in the Advance Directive .
- 6.3 If asked to help draft an Advance Directive
- I. Strongly recommend, in the first instance, that the individual seek legal advice and that they discuss this with their family and next of kin.
 - II. If this is not an option for the individual, a Consultant should determine the capacity of the individual to request an Advance Directive.

- III. Assure the validity of the Advance Directive which the individual is proposing as per section 4.
- IV. If valid, store with individual's file. The Advance Directive should be held in the individual's Integrated Record file, which should be labeled as per Appendix A.

6.4 If disagreements occur about the implementation of an Advance Directive

- I. If there is a disagreement between health professionals or between health professionals and people close to the individual, the senior clinician must consider all available evidence of the individual's wishes.
- II. Every effort must be made to seek agreement through case conferences, discussions, etc.
- III. If there is doubt the decision should be resolved in favour of the preservation of life.

7. TRAINING FOR STAFF ON ADVANCE DIRECTIVES

- 7.1 This policy will be launched through workshops designed to illustrate the various situations which staff may find themselves in. The workshops will use a presentation of the policy and group exercises to teach staff the procedures to be used when faced with an Advance Directive. A workbook, which will be used during the workshops, will also be available as a stand-alone training tool for any staff who are unable to attend the training workshops.

8. REFERENCES

Advance Statements – BMA Views, May 1995
(www.bma.org.uk/ap.nsf/content/advancestatements)

BMA Code of Practice, British Medical Association, May 1995

Consent Toolkit. British Medical Association, February 2003

Making Decisions: Leaflet 3. Helping People who have Difficult Making Decisions for Themselves: a guide for social care professionals, Department for Constitutional Affairs.

Mental Capacity Bill, June 2004,
(www.publications.parliament.co.uk/pa/cm200304/cmbills/120/04120.i-vi.html)

Shellens, T., Jones, R., *Mental Health Capacity Bill*, Health & Social Care Matters – Client Bulletin, Morgan Cole, July 2004

APPENDIX A: Advance Directive Labels

Advance Directive labels should be attached to the Patients Alert sheet. The Advance Directive itself should be stored in the Legal Documentation Section in the Integrated Health Folder.

The labels, an example of which can be found below, will be printed in colour for visibility and produced centrally so contact your Health Records Manager for supplies.

