

# Members Treating Incapable Patients

# G U I D E L I N E S

## BACKGROUND

On March 29, 1996, the government proclaimed Bill 19, the **Advocacy, Consent and Substitute Decisions Law Amendment Act**. The new law repeals the **Advocacy Act**, amends the **Substitute Decisions Act** and replaces the **Consent to Treatment Act** with the new **Health Care Consent Act**.

Unlike the **Consent to Treatment Act** the new **Health Care Consent Act** does not contain statutory requirements for rights notification in the case of a patient being found incapable. Instead, section 17 of the Act requires practitioners to follow guidelines established by the College regarding the information that should be provided to patients about the consequences of findings of incapacity to consent to treatment as follows:

*17. A health practitioner shall, in the circumstances and manner specified in guidelines established by the governing body of the health practitioner's profession, provide to persons found by the health practitioner to be incapable with respect to treatment such information about the consequences of the finding as is specified in the guidelines.*

## INCAPACITY

Under section 4(1) of the Act:

*a person is considered capable with respect to treatment, admission to a care facility or a person assistance service if the person is able to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service, as the case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.*

"incapable" means mentally incapable, and  
"incapacity" has a corresponding meaning.

## EMERGENCY TREATMENT

Under section 25(2) of the Act "emergency" treatment:

may be administered without consent to a person who is incapable with respect to treatment, if, in the opinion of the health practitioner proposing the treatment,

- there is an emergency; and
- the delay required to obtain a consent or refusal on the person's behalf will prolong the suffering that the person is apparently experiencing or will put the person at risk of sustaining serious bodily harm.



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## GUIDELINES

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The following guidelines have been developed by the College to assist members in their discussion with persons deemed incapable in situations where the emergency treatment provisions of the Act do not apply.

1. If the member considers the patient incapable they should inform the patient of the finding of incapacity if:
  - a. the patient is old enough and sufficiently aware to understand the information; or
  - b. the patient objects to the treatment when it is proposed; or
  - c. the patient objects to the substitute decision maker.
2. In informing the patient the practitioner must include:
  - i. the fact that the member thinks the patient is not capable of making a decision to consent or refuse consent to treatment;
  - ii. that an identified substitute decision maker will be responsible for making the decision about the treatment on the patient's behalf;
  - iii. asking the patient if they have a power of attorney or guardian and telling them who will make the decision on their behalf;
  - iv. that if the patient objects to the incapacity finding he or she may appeal to the Consent and Capacity Board\*;
  - v. that if the patient objects to the substitute decision maker another person can be appointed by the Consent and Capacity Board\*\*;
3. The member should assist the patient in exercising their rights by contacting appropriate personnel in a health care facility, the patient's lawyer, Legal Aid, Public Guardian and Trustee or agency who can provide further information to the patient (see **Appendix 1**).
4. The member should involve the incapable patient, to the extent possible, in discussions with the substitute decision maker.
5. Information should be communicated in a manner that the patient is best able to understand (for example, using an interpreter).
6. Informing the patient verbally is acceptable, but the discussion should be documented in the patient record.

\* This does not apply to a person who has:  
- an appointed guardian with the authority to give or refuse consent, or  
- an attorney for personal care, if the power of attorney contains a provision waiving the person's right to apply for the review and the provision is effective under subsection 50(1) of the **Substitute Decisions Act, 1992** (section 32(2) **HCCA**).

\*\* This does not apply if the incapable person has a guardian of the person who has authority to give or refuse consent or an attorney for personal care under a power of attorney conferring that authority.



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# G U I D E L I N E S

## APPENDIX 1

RESOURCE CENTRES THAT MAY BE CONTACTED IN THE EVENT THAT A PRACTITIONER HAS TO INFORM A PERSON THAT THEY ARE INCAPABLE.

### **ACE**

Advocacy Centre for the Elderly  
2 Carlton Street - Suite 701  
Toronto ON M5B 1J3  
(416) 598-2656

### **ARCH**

A Legal Resource Centre for Persons with Disabilities  
(416) 482-8255

### **Consent and Capacity Board**

(416) 327-0542

### **Legal Aid**

(416) 598-0200 (general inquiry)

### **Public Guardian and Trustee**

1-800-366-0335  
(416) 314-2800

