Government guidance on COVID 19 testing circumvents human rights for people who lack mental capacity

Friday 5 June, 2020

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POhWER, the Independent National Advocacy Charity, has raised questions related to the confusing guidance issued by the government on testing people who lack mental capacity this past week. The new guidance circumvents human rights protections on invasive procedures and how they are performed set out in the Mental Capacity Act.

Founded in Stevenage, Hertfordshire and now also operating in East of England, London, the South coast, East and West Midlands and parts of the South West, POhWER provides specialist free advice, empowerment support and advocacy to people with a very broad range of needs. Its users include people with dementia and mental capacity issues, mental ill health, people living in care homes, people with disabilities, and people needing support while pursuing complaints about their NHS care or treatment.

In theory, a COVID 19 swab test procedure should be considered an invasive procedure requiring consent. A clinician referral to a specialist advocate known as an Independent Mental Capacity Advocate qualified to make representation on behalf of the client informs the 'best interest decision' considering their mental capacity and vulnerable status. The Mental Capacity Act 2005 introduced the role of the independent mental capacity advocate (IMCA). IMCAs are a legal safeguard for people who lack the capacity to make specific important decisions: including making decisions about where they live and about serious medical treatment options. IMCAs are mainly instructed to represent people where there is no one independent of services, such as a family member or friend, who is able to represent the person

The new government guidance sets out an alternative process which leaves many untrained professionals working in institutionalised environments such as Mental Health institutions, Care Homes, Prisons, in a difficult position as to how to interpret each person's mental capacity without the support of an IMCA who cannot provide consent without the involvement of a GP. This raises significant human rights issues as vulnerable people lacking mental capacity could be confused or alarmed by a COVID 19 test and end up being physically restrained against their will by a care worker. We recognise COVID testing is not foreseen to be a one-off event as vulnerable people living in an institution will need to be tested regularly.

Helen Moulinos, Chief Executive of POhWER, said:

"People who are living with mental health in institutions and care homes entered this pandemic living in a marginalised part of our society. There have been visible no provisions for mental capacity during the pandemic"

"When someone lacks mental capacity the consent for an invasive procedure such as COVID 19 test should be required. Implied consent is questionable and subjective"

"The government has been overly focused on the prevention of virus transmission and left human rights low on the priority list. We are uncomfortable with this guidance and are asking the government to reconsider this easement which is there to protect the human rights of those lacking mental capacity. "

"These COVID testing decisions need to be included within considerations of individual care plans, should be made by qualified and trained professionals. We are reaching out to our colleagues across social care to offer our assistance to help navigate the confusing guidance."

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Lyz Hawkes, Deputy Chief Executive for POhWER, said:

“The review of this government guidance undertaken by Human Rights Advocate Dan Anderson raises significant concerns due to a lack of a robust framework and guidance to support Care Home staff to uphold the Human Rights of vulnerable individuals.”

“A robust best interest decision making process that is there to protect the most vulnerable can be seen to have been by passed and undermined in this latest government guidance. “

“Greater clarity and the clear use of the underpinning principles of the Mental Capacity Act is essential for the protection of the vulnerable in our society. “

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