



## Treatment in best interests (Form 4)

### Form for patients aged 16 years and over who may lack the capacity to consent to examination or treatment

You must **use this form if you have reason to doubt the patient's capacity** to consent to the proposed procedure or treatment. This doubt may arise due to a diagnosis (e.g. dementia) or something in the patient's behaviour (e.g. confusion). Additional information should be recorded in the notes.

Each part of the form (A-H) has an equivalent Guidance Note to guide you through each part of the process.

#### A. Decision maker / person completing this form

Wherever possible this form should be completed by the decision maker (**the health professional responsible for carrying out the procedure**). If necessary another member of the team with appropriate expertise **or** a referring clinician may complete sections A-G. However, **the final decision** as to whether the proposed medical treatment is in the patient's best interests **must be made by the decision maker** and documented by them in Section H.

Decision maker's name:

**Details of person** (with appropriate expertise) **completing sections A-G:**

Name (PRINT):

Job title:

Professional registration number (e.g. GMC, NMC, GDC, HCPC, etc):

#### B. Patient details (or pre-printed label)

Patient's full name

Date of birth

Male

Female

NHS number (or other identifier)

#### C. Details of the decision that needs to be made

To decide whether or not it is in the patient's best interests to have: *(insert procedure / treatment)*

in order to treat / diagnose: *(insert diagnosis / problem)*

Information to be discussed as part of the capacity assessment: *(What the treatment involves; benefits & risks relevant to this patient; type of anaesthetic; extra procedures that may become necessary; consequences of not having the treatment etc.)*

#### D. Practical help and support

Before you can conclude that a patient lacks capacity you **must** do everything you can to help and support them to make the decision for themselves. Support may come in the form of:

- assistance with communication (e.g. use of simple language and repetition / communication device / hearing aid / sign language / interpreter / help from a family member, advocate or speech & language therapist etc).
- practical help (e.g. 'Easy Read' information leaflet / photographs or drawings / assess at time of day when more alert / assess in a place where they are more at ease / allow them more time to make the decision etc).

Please detail the support provided / methods used **or**, if it is impractical to provide support, explain why:

## E. Assessment of the patient's capacity

### DIAGNOSTIC TEST

E1. Please provide evidence of the impairment of, or disturbance in, the functioning of the patient's mind or brain that has given you reason to doubt their capacity to make this decision.

Nature of the impairment or disturbance (e.g. dementia / learning disability / delirium / confusion etc):

How the impairment or disturbance is presenting itself (e.g. short term memory loss / not orientated to time, place or person / cognitive assessment score raises concerns etc):

### FUNCTIONAL TEST

You only need to demonstrate an inability in ONE of sections E2-E5 for the patient to be assessed as lacking capacity to make this decision.

E2. Please provide evidence below to explain why you feel the patient **is / is not able to understand** the information you provide about the nature of the proposed procedure (including key risks and benefits):

*If you have demonstrated an inability to understand the information, go to E6.*

E3. Please provide evidence below to explain why you feel the patient **is / is not able to retain** the information for long enough to make the decision:

*If you have demonstrated an inability to retain the information, go to E6.*

E4. Please provide evidence below to explain why you feel the patient **is / is not able to use or weigh** the information to make a decision:

*If you have demonstrated an inability to use or weigh the information, go to E6.*

E5. If you feel the patient may otherwise have capacity, but is **not able to communicate their decision** in any way you must provide evidence below:

*If you have demonstrated an inability to communicate the decision, go to E6.*

### OUTCOME OF THE CAPACITY ASSESSMENT

E6. I have assessed the patient's capacity to make this decision and I believe, on the balance of probabilities and given the evidence above, that this patient: *CHOOSE ONE OPTION*

has the mental capacity to make the decision about the proposed procedure or treatment (*The decision maker should complete Section H. The patient's consent should be obtained and documented in the usual way.*)

lacks the mental capacity to make the decision about the proposed procedure or treatment (*move on to the next question.*)

Date capacity assessment undertaken:

## CAN THE DECISION WAIT?

E7. Before continuing, please consider if the patient is likely to regain capacity for this decision at some time in the future (e.g. because of treatment for delirium / regaining consciousness etc): *CHOOSE ONE OPTION*

- Patient not likely to regain capacity
- Patient likely to regain capacity and the procedure/treatment **can wait** (*The decision maker should complete Section H and communicate the decision to wait to relevant colleagues*)
- Patient likely to regain capacity but the procedure/treatment **cannot wait** because:

## F. Other forms of authority for the decision

You must make a reasonable effort to find out if there is another form of authority that makes the decision for you. Please indicate if you are aware of any of the following: *TICK RELEVANT BOXES*

- There is a valid and applicable **advance decision which refuses treatment** for this particular condition / diagnosis (*If so, you cannot proceed with the treatment or that part of it that has been refused. If it is in writing, file a copy in the notes. If it is verbal, make a detailed record in the notes. You must still complete & sign Section H*).
- I have seen and read the registered document for **Lasting Power of Attorney for Health and Welfare**. I am satisfied the attorney has the authority to make this decision. I have explained the relevant clinical information to help them decide (*File a copy in notes. The attorney becomes the decision maker. They must make a decision in the patient's best interests and complete the section below. You must still complete & sign Section H*).
- I have seen and read the court order appointing a **personal welfare deputy**. I am satisfied the deputy has the authority to make this decision. I have explained the relevant clinical information to help them decide (*File a copy in notes. The deputy becomes the decision maker [except for life sustaining treatment decisions]. They must make a decision in the patient's best interests and complete the section below. You must still complete & sign Section H*).
- I have not been made aware of any of the above.

If there is an Attorney or Deputy, what **Patient Information Leaflet** have they been given to help with their decision?

### Datganiad yr Atwrnai / Dirprwy

Rwyf wedi cael fy awdurdodi i wneud penderfyniadau am y driniaeth dan sylw o dan Atwrneiaeth Arhosol\* / fel Dirprwy a Benodwyd gan y Llys\* (*\*dilëwch fel y bo'n briodol*). Rwyf wedi ystyried yr amgylchiadau perthnasol yng nghyswllt y penderfyniad dan sylw:

### Statement of Attorney / Deputy

I have been authorised to make decisions about the procedure in question under a Lasting Power of Attorney\* / as a Court Appointed Deputy\* (*\*delete as appropriate*). I have considered the following in making a best interests decision:

### Ystyriaethau / Considerations:

Yn fy marn i, mae'r driniaeth a ddisgrifiwyd yn Adran C (*TICIWCH UN BLWCH*):

er budd pennaf y claf ac rwy'n cydsynio i'r driniaeth ar ran y claf.

**ddim** er budd pennaf y claf ac **nid wyf** yn cydsynio i'r driniaeth.

I believe the procedure described in Section C (*TICK ONE BOX*):

is in the patient's best interests and I consent on behalf of the patient to it being undertaken.

is **not** in the patient's best interests and I do **not** consent to it.

Enw (LLYTHRENNAU BRAS) / Name (PRINT):

Cyfeiriad / Address:

Llofnod yr Atwrnai/Dirprwy / Signature of Attorney/Deputy:

Dyddiad / Date:

If an attorney or deputy has signed above, you do not need to complete Section G. You must complete and sign Section H.

## G. Working out what is in the patient's best interests

### ALTERNATIVES

G1. Are there any less restrictive alternatives to the proposed treatment? (e.g. watchful waiting/no treatment; a non-surgical alternative; a procedure where benefits outweigh burdens; treatment that avoids use of post-operative restraint.)

- YES** – \_\_\_\_\_ (insert procedure / treatment) is a less restrictive alternative that will be considered when making a decision about what is in the patient's best interests.
- NO** – There are no reasonable less restrictive alternatives.

### WISHES, FEELINGS AND LIKELY VIEWS

You are required to consider, as part of your decision making, any **verbal, non-verbal or written wishes, feelings, beliefs and values** that the patient is expressing or has previously expressed, or **any other factors** that the patient would have considered if they were able to do so.

G2. **Information from the patient:** Where possible, you must do all you can to encourage and improve the patient's participation in the process **and** support them to express their wishes and feelings (verbally or non-verbally), even though they cannot make the decision for themselves. *CHOOSE ONE OPTION*

- The patient is not able to express verbal or non-verbal wishes and feelings and no written advance statement of these is available.
- With support, the patient has expressed the following verbal/non-verbal/written wishes and feelings:

G3. **Consultation with those close to the patient:** Where possible and appropriate, you are required to consult with anyone interested in the patient's welfare or anyone named by them as a person to be consulted. This may include relatives, friends or carers. They may be able to tell you something about the patient that informs your decision.

I have spoken to \_\_\_\_\_ (insert name/s),  
\_\_\_\_\_ (insert relationship/s), and **they have provided** the following information to help me better understand the patient's likely wishes and feelings and best interests:

### G4. Referral to an Independent Mental Capacity Advocate (IMCA)

*SELECT ONE* of the statements below to indicate whether or not an IMCA referral is required:

- I have consulted** with someone close to the patient (other than paid carers) and recorded their views in G3, therefore an IMCA referral is not required.
- There is no-one to consult but the decision is **urgent** (significant risk to mortality or morbidity) and treatment cannot be delayed in order to make an IMCA referral.
- There is no-one to consult but the decision **does not relate to the provision of serious medical treatment\***, so an IMCA referral is not required.

(\*treatment with serious consequences [e.g. major surgery; serious or prolonged pain, distress or side effects; impact on future life choices] or where the decision about choice of treatment / benefits and burdens of treatment is finely balanced).

- None** of the above statements apply to my patient; therefore **I am making an IMCA referral.**

Record the representations about the patient's wishes and feelings and other relevant information made by the IMCA during the consultation (*File their report in the notes*):

**DISAGREEMENTS**

G5. Did any disagreements arise (either with the patient or those close to the patient) during the consultation? *CHOOSE ONE OPTION*

**YES** – record what these are, how you are taking them into account and what steps you are taking to address them (NB: If the decision is disputed you must seek legal advice).

**NO**

**H. Best interests decision and signature of decision maker**

This section **must be completed by the decision maker** (the person responsible for carrying out the procedure even if Sections A-G have been completed by someone else. If you select the final tick box then you **MUST** record your decision and the reasons for it in the spaces provided.

As the person responsible for carrying out the procedure I confirm that: *(COMPLETE ONE OPTION AND SIGN BELOW)*

I am satisfied the patient **has capacity** to make this decision (Section E6). *(Obtain consent in the usual way).*

**OR**

The patient is **likely to regain capacity** to make this decision and the procedure can wait (Section E7).

**OR**

I am satisfied that the patient lacks capacity to make this decision and there is an **attorney or deputy** with lawful authority to make this decision on their behalf. They have completed and signed Section F.

**OR**

I am satisfied that the patient lacks capacity to make this decision and there is a valid and applicable **advance decision** refusing treatment for this particular condition or diagnosis (Section F), therefore the procedure cannot go ahead.

**OR**

I am satisfied that the patient **lacks capacity** to make this decision (Section E6).

Relevant people have been consulted about the patient’s best interests and this information is documented in Section G.

I have carefully assessed the information I have found out about the patient and their present and past wishes and feelings and used it in my decision making, along with clinical factors. The decision that I have made in the patient’s best interests is as follows:

I confirm that, in my view as the decision maker *(insert original or alternative procedure or ‘no treatment’)*:

is in the best interests of this patient because:

*(Insert summary of reasons for coming to this decision, illustrating how you have taken the information in Section G and relevant clinical factors into account. If your decision is contrary to the patient’s wishes and feelings or you disagree with the representations made by the IMCA, you must give your reasons. If the patient or someone close to them is strongly objecting [G5], you must seek legal advice):*

Decision maker’s signature: \_\_\_\_\_ Date: \_\_\_\_\_

Name (PRINT): \_\_\_\_\_ Job title: \_\_\_\_\_

Professional registration number (e.g. GMC, NMC, GDC, HCPC, etc) \_\_\_\_\_

## Guidance notes for health professionals (to be read in conjunction with Consent Policy)

This form should be used where it would be usual to seek written consent, but you have reason to doubt that a patient (aged 16 years or over) has capacity to give or withhold consent to treatment.

### A. Decision maker / person completing this form (Ch 5. MCA Code of Practice)

Where the decision involves provision of medical treatment, the health professional responsible for carrying out the particular procedure or treatment is referred to as 'the decision maker'. It is the decision maker's responsibility to work out what would be in the best interests of the person who lacks capacity and document their decision on this form. Another clinician with appropriate expertise (i.e. which enables them to competently complete the required assessments), or a referring clinician, may complete sections A-G, but the person carrying out the procedure must be satisfied with the outcome of the capacity assessment and must make the best interests decision and document this in Section H.

### C. Details of the decision that needs to be made (Ch 2 & 5. MCA Code of Practice)

Capacity is decision specific. You need to be clear about the decision that is to be made so that you can assess the patient's capacity to make that decision. The procedure or treatment documented in this section won't necessarily be that which is undertaken - the best interest's decision-making process may lead you to conclude that a different approach is required (see Section G).

The person assessing capacity should consider the information that needs to be discussed as part of the capacity assessment so that they can provide that information to the patient and assess whether or not the patient can understand, retain, use and weigh that information in coming to a decision. The information should include the reasonably foreseeable consequences of deciding one way or the other or of failing to make a decision.

### D. Practical help and support (Ch 3. MCA Code of Practice)

The patient cannot be treated as unable to make the decision themselves unless all practicable steps have been taken to help them do so without success. Such steps might include the following:

- use simple language and communicate in an appropriate way - explore different forms of communication including non-verbal methods such as objects, photographs or drawings;
- tailor information to the patient's abilities – don't give more detail than the patient needs, break it down into smaller points that are easy to understand, repeat the information several times;
- get help from someone who could help with communication e.g. a family member, support worker, speech and language therapist, advocate, interpreter or someone who uses sign language;
- consider whether there are particular times of day when the patient is more alert and their understanding is better, or if they need more time to make the decision;
- consider whether you can assess capacity in a place where the patient is more at ease.

If the patient cannot make the decision with help and support, they can still be involved in some way. They may have views on matters affecting the decision, and on what outcome they would like. It is important to ensure that any barriers to such participation are addressed.

### E. Assessment of the patient's capacity (Ch 4. MCA Code of Practice)

#### DIAGNOSTIC TEST

Before an assessment of capacity can be undertaken, there must be a reason to doubt the patient's ability to make the decision in question. The reason to doubt may stem from a diagnosis (e.g. head injury, dementia, learning disability, delirium etc) or something in the patient's behaviour (e.g. apparent confusion / responses that don't appear to make sense etc).

The diagnostic component of the capacity assessment requires you to demonstrate that the patient has an 'impairment or disturbance in the functioning of the mind or brain'. The impairment can be temporary or permanent. You need to provide some evidence of how the disturbance or impairment is manifesting itself e.g. their short term memory has been affected / they are not orientated to time, place or person / their cognitive assessment score raises concerns etc.

#### FUNCTIONAL TEST

You need to provide evidence that the 'impairment or disturbance in the functioning of the mind or brain' described in the diagnostic test renders the patient unable to make the decision in question.

A person lacks capacity to make a decision if they cannot do **one or more** of the following:

1. **Understand** the information relevant to the decision i.e. nature of the decision, reason why the decision is needed, likely effects of deciding one way or another or of making no decision. It can be difficult to assess understanding. An ability to repeat information does not necessarily prove someone has understood it. Instead, assess whether their responses are appropriate in terms of content and relate to the context of the information provided.

2. **Retain** that information long enough to make the decision. People who can only retain information for a short while must not automatically be assumed to lack capacity. Don't expect the patient to repeat everything you have said, word for word. Tell them the key things that are pertinent to the decision and check later on in the conversation whether or not they have retained them.
3. **Use or weigh** the information in coming to a decision. Some people can't incorporate the information you provide into their thinking. For example, if the patient doesn't believe or won't accept the risks associated with having no treatment then they are not 'weighing up' that factor and taking it into account when making a decision.
4. **Communicate** their decision (verbally or non-verbally). The patient will fail this part of the test if they cannot communicate their decision in any way (e.g. unconscious / 'locked-in syndrome') **or** if they are unable to communicate their decision consistently or reliably (e.g. due to severe expressive dysphasia). Sometimes a patient can only say 'yes' or 'no' or give a thumbs sign for example. In these circumstances it is important to appraise the reliability of their response through use of closed questions before assuming they are communicating a decision. Those who cannot communicate their decision should be treated as if they are unable to make the decision.

If you conclude that the patient **has capacity** (e.g. someone with dementia may not yet have lost capacity to make the decision), then this section of the form can also be used to evidence this.

### OUTCOME OF THE ASSESSMENT

If you cannot demonstrate that the patient lacks capacity to make the decision in question, then you must assume capacity.

### CAN THE DECISION WAIT?

If there is a chance that the patient will regain capacity to make the decision, or if they have fluctuating capacity, then you should consider if it is possible to delay the decision if it is not urgent. If it is safe to wait until the patient regains capacity (e.g. due to treatment of the infection which is causing a delirium / regaining consciousness etc), then you should do so.

### F. Other forms of authority for the decision (*Ch 6, 7 & 8. MCA Code of Practice*)

If someone has been assessed as lacking capacity, then before making a decision in their best interests, you must make a reasonable effort to find out if there are other forms of authority that make the decision.

**Advance Decision to Refuse Treatment:** An advance decision enables a person aged 18 years and over, while still capable, to refuse specified medical treatment at a time in the future when they lack the capacity to consent to or to refuse that treatment. The advance decision must be valid and applicable – if it is, it has the same effect as a decision that is made by a person with capacity and you must follow it. If the advance decision concerns the refusal of life-sustaining treatment, it must be in writing, signed and witnessed and state clearly that the decision applies even if the patient's life is at risk. If you have doubts about its validity or applicability, seek legal advice.

**Lasting Power of Attorney for Health and Welfare:** Once a person (18 or over) loses capacity, this type of LPA allows the attorney to make health and care decisions that are as valid as those made by the person themselves. You must provide the attorney with relevant clinical information to help them make their decision. An attorney must make decisions in the person's best interests. An attorney cannot consent to treatment that the patient has refused in an advance decision, unless they have been given authority to do so. You **must** see a copy of the LPA document before allowing the attorney to make decisions. You need to check:

- that it is for health and care decisions (i.e. Health & Welfare **not** Property & Finances);
- that it has been registered with the Office of the Public Guardian;
- whether it specifies any limits to the attorney's authority (e.g. life sustaining treatment decisions);
- where there is more than one attorney, whether they make decisions jointly or separately.

**Deputy of the Court of Protection:** If a personal welfare deputy has been appointed to make treatment decisions on behalf of a person who lacks capacity, then it is the deputy rather than the health professional who makes the decision in the patient's best interests. You must provide them with relevant clinical information to help them make their decision. Deputies cannot make decisions about life sustaining treatment – these must be referred to the Court of Protection. You **must** see the Court Order which makes the person a deputy. You need to check:

- that it is a Personal Welfare Deputyship (not Property & Financial Affairs);
- what decision making powers it gives the deputy.

If you think an attorney or deputy is making inappropriate decisions that are not in the best interests of the patient, seek legal advice. They can be removed by the Court of Protection.

## G. Working out what is in the patient's best interests (Ch 5. MCA Code of Practice)

### ALTERNATIVES

The Mental Capacity Act (2005) requires you to consider whether the treatment or diagnosis can be as effectively achieved in a way that is 'less restrictive of the person's rights and freedom to act'. This means that during the best interest's decision making process you need to give due consideration to any reasonable less restrictive alternatives to the proposed procedure or treatment e.g. watchful waiting or no treatment; a non-surgical alternative; an alternative procedure where the benefits outweigh the burdens to a greater extent than with the proposed procedure; treatment that avoids the use of restraint in post-operative care.

### WISHES, FEELINGS AND LIKELY VIEWS

'Best interests' is not just about what is clinically best for the patient, although this is important. When trying to work out what is in someone's best interests you are required to take into account any wishes, feelings, beliefs and values that the patient is expressing or has previously expressed, or any other factors that the patient would have considered if they were able to do so. These may be expressed verbally, non-verbally or in writing. You need to think about how these views or beliefs may have shaped the patient's decision if they still had capacity, so that you can incorporate them into your thinking and make a decision that is in the patient's best interests.

### Information from the patient

Do whatever you can to permit and encourage the patient to take part in making the decision. With appropriate support many patients who lack capacity to make the decision will still be able to express their wishes and feelings, even if it is at a very basic level (e.g. through their behaviour or emotional responses). Some patients (e.g. those who are unconscious, or have a profound learning disability or a severe dementia) will not be able to participate in the decision making process, but may have previously put their wishes and feelings in writing.

### Consultation with those close to the patient

If it is practical and appropriate, you must consult anyone interested in the patient's welfare (spouse/partner, family, friends or carers). They don't need to be a 'next of kin' – just people who know the patient and are able to comment on the patient and their wishes and feelings and likely views. They cannot consent on behalf of the patient - the final decision about the most appropriate medical treatment is yours as the decision maker.

This consultation is intended to help you learn more about the patient and reach a view as to what the patient would have wanted if they had capacity to make the decision themselves. You should do your best to find out about:

- any past or present wishes and feelings the patient has expressed;
- beliefs and values that would have influenced their decision if they still had capacity, and
- any other factors that the patient would have considered if they were able to do so.

Those consulted may also have views about what would be in the patient's best interests. All the information you gather will help to ensure that the decision you make is in the patient's best interests.

How much information you can gather will depend on circumstances and the time available. However, even in an emergency there may still be an opportunity to try to communicate with the patient or their family, friends or carers.

### Independent Mental Capacity Advocate (IMCA)

There is no need to instruct an IMCA if urgent treatment is required (e.g. where delay would present a risk to mortality or morbidity). In all other cases, an IMCA must be instructed and consulted if the patient requires serious medical treatment and there is no-one (other than paid staff) appropriate or available to consult about their wishes, feelings, beliefs and values. IMCAs have the right to examine and take copies of the patient's medical record. The IMCA is **NOT** the decision maker; they are there to support the patient and represent them in discussions about their best interests. The decision maker must demonstrate how they have taken the information provided by the IMCA into account when working out if the proposed treatment is in the patient's best interests, or provide reasons for discounting the information provided.

### DISAGREEMENTS

If you have made every effort to resolve significant differences of opinion with the patient or those close to the patient, but they still exist, you need to seek legal advice.

## H. Best interests decision and signature of decision maker

This section must be completed by the person responsible for carrying out the procedure. It is your responsibility as the decision maker to work out what treatment, if any, would be in the patient's best interests. Use this section to clearly describe the decision you have made and the reason that you believe treatment is, or is not, in the patient's best interests. This should be more than just a clinical justification.

For further information on the law on consent, see the MCA Code of Practice ([https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/497253/Mental-capacity-act-code-of-practice.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf)) and the Welsh Government's *Reference guide to consent for examination or treatment* (<http://www.wales.nhs.uk/governance-emanual/patient-consent/>).