

**Policy for Advance Decisions (Living Wills / Advanced Refusal of Treatment)
Incorporating the Mental Capacity Act 2005**

Effective: December 2007

Review: December 2011

1. Introduction

- 1.1 This document provides information and guidance on dealing with patients who wish to use or to make a Living Will (Advance Decision) whilst they are under the care of Newcastle upon Tyne Hospitals NHS Foundation Trust or have an appropriate document in their possession.
- 1.2 The Mental Capacity Act (MCA) puts Advance Decisions on a statutory footing from October 2007. The MCA sets out what is required for an Advance Decision to be valid and applicable and introduces new safeguards. The MCA introduces particular conditions for Advance Decisions that deal with the refusal of life-sustaining treatment, namely that they must be written, signed and witnessed and include a statement that the decision applies even if the person's life is at risk.
- 1.3 Some people will have made Advance Decisions that were valid under existing common law but will not be under the MCA.
- 1.4 People with decision making capacity can consider revising / remaking their Advance Decision so that it meets the requirements of the MCA, particularly if it deals with life-sustaining treatment. Some people will, however, have lost capacity at the time the MCA came into force and so do not have this option. This means the Act has effectively disadvantaged those who have refused life-sustaining treatment and have lost capacity before it comes into force.
- 1.5 The Transitional Order (2007) recently laid in Parliament includes arrangements for limited transitional protection for some existing Advance Decisions to ensure a smooth transition from the current to the new arrangements. The aim of the transitional provisions is to protect a person who has made a well thought out and detailed Advance Decision refusing life-sustaining treatment before the MCA comes into force but has since lost capacity. Someone in this position would have had a reasonable expectation that this decision would be acted upon at the time that they made it.

2. Definition: what is an Advance Decision?

- 2.1 An Advance Decision is commonly termed 'Living Will' and for the purposes of this document the term 'Advance Decision' will be used.
- 2.2 The MCA allows Advance Decisions to be legally binding provided they fulfill the requirements that it is valid and applicable to the particular treatment in question.

3. Requirements for an Advance Decision

- 3.1 The document must be valid i.e. it must not have been withdrawn or overridden by the making of a Lasting Power of Attorney document.
- 3.2 The patient must not act in a way that is inconsistent with the Advance Decision e.g. asks for food although the document states that no sustenance should be given.
- 3.3 It must be applicable to the treatment in question. It should clearly refer to the treatment in question and it should explain which circumstances the refusal refers to. If there have been changes in circumstances which there are reasonable grounds for believing would have affected a person's Advance Decision when they made it, then it may not be applicable.
- 3.4 Where patients are detained under the Mental Health Act they can be given a treatment that they have previously refused by Advance Decision. When proposing treatment for patients detained under the Mental Health Act legal advice should be sought through the Trust's Legal Services Department when they have an Advance Decision.
- 3.5 Individuals cannot make an Advance Decision for treatment they want, only for those treatments they do not want.
- 3.6 Individuals cannot make an Advance Decision to ask for their life to be ended.
- 3.7 Where the Advance Decision is to refuse life sustaining treatment it must:
 - 3.7.1 be in writing, which included being written on the person's behalf or recorded in their medical notes
 - 3.7.2 be signed by the maker in the presence of a witness who must also sign the document. It can also be signed on the maker's behalf at their direction if they are unable to sign for themselves
 - 3.7.3 be verified by a specific statement made by the maker, either included in the document or a separate statement, which states that the advance decision is to apply to the specified treatment even if life is at risk. If there is a separate statement this must also be signed and witnessed.

4. Responsibilities

- 4.1 The admitting nurse has the responsibility for ascertaining whether the patient has an Advance Decision during the completion of the admission documentation.
- 4.2 Where the patient is not admitted for in-patient stay, the person completing the initial documentation is responsible for ensuring that that the information is fully completed.
- 4.3 A clinician will not be held liable if s/he can prove that s/he acted in the patient's Best Interests and has taken all reasonable steps to find out if an Advance Decision exists. If the clinician has a reasonable belief that an Advance Decision exists and that it is valid and applicable s/he may be held to be legally liable if acting in contravention of the Advance Decision.

4.4 Where there is a major difference of opinion relating to Advance Decision legal advice must be sought. The matter may be referred to the Court of Protection.

5. Patients requesting to make an Advanced Decision

5.1 It is preferable for patients to make an Advance Decision prior to admission to hospital and the opportunity to make an Advance Decision should not be actively offered to patients in contact with the Trust. This is on the grounds that patients might feel that undue pressure is being brought to bear on them if the Advance Decision is actively promoted, breaching the principle of non-maleficence and potentially undermining the patient's trust in their hospital carers. It is recognised, however, that there may be circumstances when a patient wishes to make or amend an Advance Decision whilst in hospital for treatment.

5.2 If a patient, whilst under the care of Newcastle upon Tyne Hospitals NHS Foundation Trust, asks a member of staff if they can make a Advance Decision, the patient should be advised to seek independent advice / counselling and preferably advised to seek legal help from a solicitor. Discussion about Advance Decision must be approached in a sensitive manner.

5.3 Medical staff must be notified of the patient's request and an appropriate entry must be made in the patient's clinical record.

5.4 If the patient does not have a solicitor, they should be advised that the hospital can contact a solicitor to assist in drawing up an Advance Decision. The patient should also be advised that legal fees for this will be charged to them. Where assistance is needed in contacting a solicitor, authorisation should be obtained from the Patient Services Director or Senior Manager on-call.

5.5 It is the patient's responsibility to draft an Advance Decision, and it is recommended that this be done with medical advice and counselling as part of a continuing doctor / patient dialogue, even though patients have a legal right to decline specific treatment, including life-prolonging treatment. Whilst the document needs to be drawn up by the patient with the advice of their doctor, the legal format is important and so the patient should also seek the advice of a solicitor.

5.6 Should it be necessary for a Trust employee to witness an Advance Decision, this role should be undertaken by a Consultant who is not directly involved in the care of the patient, or by a Senior Manager.

6. Guidelines for producing an Advance Decision

6.2 Detailed records should be kept by staff of all discussions concerning a patient's wish to make an Advance Decision.

6.3 The physical and mental capacity of the patient at the time the Advance Decision is made should be recorded by a suitably medically qualified person so that there is positive evidence of the patient's capacity at the time.

6.4 Opportunity should then be provided for the patient to discuss the Advance Decision in detail with their clinician. This should begin with a general discussion about the

patient's values and beliefs before particular decisions are made. It may be necessary for discussions about the Advance Decision to take place over several meetings and also to involve other family members or carers at the patient's request. Where the patient does not wish to involve family or carers, this wish should be respected and staff should ensure that the patient's autonomy is safeguarded. All consultant medical staff should, in principle, be prepared to respond to a patient's request for discussion of an Advance Decision, referring to other colleagues as necessary where the discussion falls outside their current competence.

- 6.5 The Advance Decision should be drafted in clearly understandable language and should be witnessed by independent persons. The form attached to this policy should be completed in all instances (Appendix 1). Explanation of the form should always be available for the patient prior to its completion.
- 6.6 Care must be taken to ensure that the patient is not subjected to influence from persons who have a conflict of interest and who may stand to benefit from the patient's death. Views of relatives can be taken into account but must not be allowed to overrule the patient's stated wishes and the patient's best interests.
- 6.7 Where there are cases of difficulty, a declaration may be obtained from the Court of Protection as to whether the Advance Decision should be followed. It is essential that legal advice be obtained in cases of difficulty.
- 6.8 No person has a legal right to accept or decline treatment on behalf of another adult unless a formal Lasting Power of Attorney (Welfare) has been completed and registered with the Office of the Public Guardian. This is a document in which the patient appoints another person to consent to or refuse treatment on behalf of the patient.
- 6.9 At such time as a decision has to be made as to whether to comply with the wishes of the patient as expressed in an Advance Decision, it is essential that a relevant health professional determines whether the patient's clinical circumstances are significantly different from those envisaged when the Advance Decision was signed. Steps must be taken to ensure that the patient has not changed his/her mind between making the Advance Decision and the decision by health professionals to act upon it. This is particularly important where there has been significant change in the patient's medical condition or circumstances, or a long time has elapsed since making the Advance Decision; also where there has been any important medical development relevant to the patient's condition or treatment.
- 6.10 All discussions about an Advance Decision should be clearly, contemporaneously and accurately recorded in the patient's clinical notes.

7. Monitoring

- 7.1 This policy will be reviewed every 3 years by the Manager – Clinical Governance and Risk. Monitoring will take place on a three yearly basis. A prospective Audit of patient records who are admitted with an Advance Decision will be audited against this policy to ensure compliance with best practice.

Author: Clinical Governance and Risk Manager

ADVANCE DECISION FORM

To my family, my GP, my Health and Welfare Attorney (where applicable) and all other persons concerned, this Advance Decision has been made by me, entirely without influence from any other person whether they might stand to gain from my death or otherwise.

Full name in capitals:
Address:
Date of Birth:

I declare that if at any time

- I am unable to participate effectively in decisions about my medical care and
- two independent doctors (one a consultant) are of the opinion that I am unlikely to recover from illness or impairment
- and the gravity of my condition/suffering is such that treatment seems to be causing distress beyond any possible benefit,

then in those circumstances my directions are as follows:

- that I am not subjected to any medical intervention or treatment aimed at prolonging or sustaining my life such as those in Detailed instruction below, even if this means my life is at risk. This does not necessarily mean withdrawal of life enhancing medication as I would not want the withdrawal of any treatment which may reduce distress, or provide pain relief, or may adversely affect my quality of life
- that any distressing symptoms, including any caused by inability to eat, drink or simply receive nutrition, are to be fully controlled by appropriate analgesic or other treatment, even though that treatment may shorten my life.

Detailed instruction

Please insert your personal requests here in relation to the types of medical intervention you would find unacceptable (for example, artificial resuscitation and/or an artificial feeding tube inserted through the stomach wall). Continue on a separate sheet if necessary.

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These problems may arise through a dementia related illness (which may or may not have been formally diagnosed) or any other condition of comparable gravity.

I consent to anything proposed to be done or omitted in compliance with the directions expressed above and I absolve my medical attendants from any civil liability arising out of such acts or omissions, provided that they take due care in exercising their responsibility.

I reserve the right to revoke this decision at any time, but unless I do so it should be taken to represent my continuing directions.

My health and welfare attorney is/are (cross out if not applicable):

Name:
Address:
Telephone:

My General Practitioner is:

Name:
Address:
Telephone:

Before signing this form I discussed these matters with my Consultant.

Signed:

Dated:

THIS DOCUMENT REMAINS EFFECTIVE UNTIL I MAKE CLEAR THAT MY WISHES HAVE CHANGED

Witness statement

I testify that the maker of this advance decision signed it in my presence and made it clear to me that he/she understood what it meant. I do not know of any pressure being brought on him/her to make such an advance decision and I believe it was made by his/her own wish. So far as I am aware I do not stand to gain from his/her death.

In the presence of:

Signature

Name (print)

Occupation

Address

.....

.....

Date:

Signature

Name (print)

Occupation

Address

.....

.....

Date: