Essex Partnership University
NHS Foundation Trust

Consent to Examination or Treatment Procedural Guidance

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KEY CHANGES FROM PREVIOUS VERSION	Paragraph 4.1.7 and 4.1.11 and updated references
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CONSULTATION GROUPS:	Former CG&Q Sub Committee members (SEPT) NEP Governance
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SUMMARY

This document identifies roles and responsibilities with regard to obtaining and documenting Consent to Examination or Treatment in line with Trust policy (CLP16) across the Trust. The Policy refers to the DOH; Reference guide to consent for examination or treatment, second edition 2009.

The Trust monitors the implementation of and compliance with this policy in the following ways;

Consent is integral to all trust policies and will be monitored in conjunction with Audits of record keeping.

Services	Applicable	Comments
Trustwide	✓	
Essex MH&LD		
CHS		

The Director responsible for monitoring and reviewing this Procedural Guidance is The Executive Nurse

ESSEX PARTNERSHIP UNIVERSITY NHS FOUNDATION TRUST

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CONSENT TO EXAMINATION OR TREATMENT PROCEDURAL GUIDANCE

1.0 INTRODUCTION

1.1 Why Consent Is Crucial

Patients have a fundamental legal and ethical right to determine what happens to their own bodies. Valid consent to treatment is therefore absolutely central in all forms of healthcare, from providing personal care to undertaking major surgery. Seeking consent is also a matter of common courtesy between health professionals and patients.

1.2 This Guidance relates to the Trust Policy on Consent to Examination or Treatment (CLP16)

The Department of Health has issued a range of guidance documents on Consent, (see *Appendix B Reference guide to consent for examination or treatment 2009* and *Guidance on consent*), and these should be consulted for details of the law and good practice requirements on consent. This guideline sets out the standards and responsibilities for consent in this Trust. The aim of which is to ensure that health professionals are able to comply with current guidance. While this document is primarily concerned with healthcare, social care colleagues should also be aware of their obligations to obtain consent before providing certain forms of social care, such as those that involve touching the patient or client.

2.0 DUTIES

2.1 The Chief Executive is responsible for:

- ensuring that the principles of this Guideline, and other associated policies are implemented across the organisation

2.2 The Executive Director of Corporate Governance will ensure:

- This Guidance and Policy are embedded into clinical practice as well as best practice framework and in ensuring these are updated regularly;
- Ensure that, once approved, the guideline and policy are communicated to all staff via Trust Communication Processes
- Guideline and Policy is updated in line with new legislation or DOH guidance
- any identification and implementation of training and educational needs arising from any relevant documentation are adhered to
- That any clinical risk issues are addressed with the relevant line manager

2.3 Trust Directors are responsible for:

- Ensuring that all revisions to this guideline and policy and as well as local protocols are distributed to all relevant staff.
- the procedures and principles detailed within this Guidance are followed, to meet with all relevant guidance.

2.4 Operational leads and service managers will ensure:

- Procedures are in place to ensure Consent can be obtained in line with the guidance.
- Ensure robust systems and processes are in place that can support the accurate and retrievable recording of consent
- that all incidents relating to consent are recorded using the DATIX (web) on-line incident reporting system
- staff receive appropriate and correct training as per Trust policy
- managers and service leads will make their staff aware of the consent to examination or treatment Policy and associated guidance and they adherence to it, and monitor its use.

2.5 All Trust staff undertaking clinical procedures or treatment will recognise that:

- The health professional carrying out the procedure is ultimately responsible for ensuring that the patient is genuinely consenting to the treatment/ procedure as it is they who will be held responsible in law if this is challenged later. It is the duty of the professional to inform their managers of any concerns
- Where oral or non-verbal consent is being sought at the point the procedure will be carried out, this will be done by the health professional responsible. However, team work is a crucial part of the way the NHS operates, and where written consent is being sought it may be appropriate for other members of the team to participate in the process of seeking consent.
- The clinician providing the treatment or investigation is responsible for ensuring that the person has given valid consent before treatment begins, although the consultant responsible for the person's care will remain ultimately responsible for the quality of medical care provided. The task of seeking consent may be delegated to another person, as long as they are suitably trained and qualified and with sufficient knowledge of the proposed investigation or treatment
- It is a healthcare professional's own responsibility to ensure that when they require colleagues to seek consent on their behalf they are confident that the colleague is competent
- It is the responsibility of all staff to work within their own competence and not to agree to perform tasks which exceed that competence
- If you feel pressurised to seek consent when you do not feel competent to do so you must contact your line manager immediately for advice.

3.0 DEFINITIONS

3.1 This organisation acknowledges that there are many areas concerning consent, and that different forms of consent may be appropriate, dependent upon the patient.

3.2 **'Consent'** is a patient's agreement for a health professional to provide care. Patients may indicate consent in the following formats:

- Written Consent
- Verbal Consent
- Implied Consent (e.g. by presenting their arm for their pulse to be taken*)*

3.3 For the consent to be valid, the patient must:

- be competent to take the particular decision
- have received sufficient information about treatment options, consequences and risks to take it; and
- not be acting under duress or the influence of others

The context of consent can take many different forms, ranging from the active request by a patient for a particular treatment (which may or may not be appropriate or available) to the passive acceptance of a health professional's advice. In some cases, the health professional will suggest a particular form of treatment or investigation and after discussion the patient may agree to accept it. In others, there may be a number of ways of treating a condition and the health professional will help the patient to decide between them. Some patients, especially those with chronic conditions, become very well informed about their illness and may actively request particular treatments. In many cases, 'seeking consent' is better described as 'joint decision-making' i.e. the patient and health professional need to come to an agreement on the best way forward, based on the patient's values and preferences and the health professional's clinical knowledge.

3.4 Under English law, no one is able to give consent to the examination or treatment of an adult who lacks the capacity to give consent for themselves, unless they have been authorised to do so under a Lasting Power of Attorney or they have the authority to make treatment decisions as a court appointed deputy. Guidance with reference to the *Mental Capacity Act 2005* and *Deprivation of Liberty* will need to be considered.

3.4.1 However, treatment may be given if it is in their best interests, as long as it has not been refused in advance in a valid and applicable advance decision. For further details on advance decisions see the Department of Health's *Reference guide to consent for examination or treatment 2009 (chapter 1, paragraph 19)*.

4.0 PRINCIPLES

4.1.1 A competent adult patient has a fundamental right to give or withhold consent to examination, investigation or treatment and respect for this autonomy must be a key principle of this consent policy. In law, any examination, treatment or investigation carried out without consent may amount to battery, which could result in an action for damages or even criminal proceedings. Failure to obtain informed consent is also taken very seriously by professional registration bodies. For more information please refer to Reference Guide to Consent for Examination or Treatment - 2nd Edition, Department of Health (2009).

4.1.2 In the light of this, the giving of informed consent by patients has become a very important issue. The ever increasing range of complex new treatments and procedures which can be used for the benefit of patients must be properly explained in order to gain informed consent, and there is an increasing tendency for patients to resort to litigation if they feel that everything is not as it should be with regard to their treatment and care.

4.1.3 The principal exception is treatment provided under the Mental Health Act 1983 as amended by Mental Health Act 2007. This authorises assessment of individuals, their admission to hospital or reception into guardianship and, if necessary, treatment for mental disorder.

4.1.4 Apart from such compulsory treatment, it is unlawful and unethical to treat a person who is capable of understanding and willing to know, without first explaining the nature of the procedure, its purpose and implications and obtaining that person's agreement. Some people consent to treatment while choosing not to be told full details of their diagnosis or treatment. Their uninformed consent is nevertheless valid as long as they had the option of receiving more information.

4.1.5 Consent is also usually given by patients on the understanding that confidentiality will be upheld by all healthcare professionals involved in their care.

4.1.6 Patients must be told that they can withdraw their consent to treatment at any time and they should be provided with a clear explanation of the likely consequences

4.1.7 Consent is considered valid for the duration of the examination or treatment, unless withdrawn by the patient.

4.1.8 Patients should be invited to ask questions about the treatment which should be answered fully, frankly and truthfully. Any restrictions on information should be justifiable and clearly documented.

4.1.9 Students / learners are in placement throughout the Trust. To enable learning opportunities students will be required to observe or participate in patient care or treatment as part of their learning and development.

4.1.10 Patients must be informed of any intention to involve students / learners in their care and treatment and to obtain consent accordingly. Patients must be informed that they have a right to decline having a student / learner observe or participate in the delivery of care

4.1.11 Completed and signed documentation evidencing consent must be scanned into the Electronic Patient Record and a hard copy retained in the paper record where held even in "paper free" or "paper light" environments hard copies will be needed to evidence signature

4.2 Children & Young People

4.2.1 The legal position concerning consent and refusal of treatment by those under differs from that of adults.

4.2.2 Under section 8 the Family Law Reform Act 1969 individuals aged 16 or 17 are presumed to be capable of consenting to their own medical treatment and any ancillary procedures i.e. anaesthetic. As with adults consent will be valid only if it is given voluntarily by an appropriately informed young person capable of consenting. However, the refusal of a competent young person (16-17) may in certain circumstances be overridden by either person with parental responsibility or a court (for more information please refer to Reference Guide to Consent For examination or treatment 2nd edition Department of Health 2009).

4.2.3 Children under 16 - Gillick Competence

Children who have sufficient understanding and intelligence to enable them to understand what is involved in proposed treatment/intervention are also deemed to have the capacity to consent/refuse. This is sometimes described as being 'Gillick competent'. A child of under 16 may be Gillick competent to consent to medical treatment, research, donation or any other activity that requires consent. (For more information please refer to Reference Guide to Consent for Examination or Treatment 2nd edition Department of Health 2009).

4.3 Person without Capacity to give consent

4.3.1 The Mental Capacity Act 2005 defines a person who lacks capacity, as a person who is unable to make a particular decision for themselves at a time it needs to be made or take a particular action at a time it needs to be taken, because of an impairment of or disturbance in the functioning of their mind or brain. This Policy and any associated guidance should to be read together with Mental Capacity Act 2005 code of practice at www.gov.uk.

4.3.2 Where an adult patient does not have the capacity to give or withhold consent to a significant intervention, the guidance from the Mental Capacity Act must be followed, and this fact should be documented along with the assessment of the patient's capacity, why the health professional believes the treatment to be in the patient's best interests, and the involvement of people close to the patient. Standard consent forms should never be used for adult patients unable to consent for themselves.

4.4 Persons detained under the Mental Health Act

4.4.1 The Mental Health Act 1983 as amended by Mental Health Act 2007 sets out the requirements for obtaining consent for detained patients in certain circumstances. The Revised Mental Health Act code of practice deals with the medical treatment (Chapters 23 and 24). This section of the code relates to medical treatment and second opinions.

4.4.2 This Policy should be read in conjunction with the MHA 1983 as amended by the Mental Health Act 2007 and the Revised Mental Health Act code of Practice to ensure that appropriate consent is sought for detained patients under the Act.

5.0 MONITORING OF IMPLEMENTATION AND COMPLIANCE

Monitoring of implementation and compliance with this policy and associated procedural guideline will be undertaken by the compliance function and Quality and Governance Committee.

6.0 ASSOCIATED DOCUMENTATION

- BMJ – UK Law on Consent finally embraces the prudent patient standard BMJ 2015;350:h2877 doi: 10.1136/bmj.h2877 (Published 28 May 2015)
- BMJ – update on UK Law on Consent *BMJ* 2015;350:h1481 doi: 10.1136/bmj.h1481 (Published 16 March 2015)
- BMA and The Law Society, *Assessment of mental capacity: guidance for doctors and lawyers*
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- British medical Association, *Advance statements about medical treatment* (1995) BMA Publishing Group: London
- BMA: The Mental Capacity Act 2005 – Guidance for Health Professionals. April 2007
- Care Quality Commission – Regulation 11: Need for Consent
  https://www.cqc.org.uk/guidance-providers/regulations-enforcement/regulation-11-need-consent#hide2 Accessed 4th January 2019
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  BMJ 2017;357:j2224 https://www.bmj.com/content/357/bmj.j2224
- Department of Health, *Reference Guide to Consent for Examination or Treatment* 2nd Edition (2009)
  https://www.gov.uk/government/publications/reference-guide-to-consent-for-examination-or-treatment-second-edition Accessed 4th January 2019
- Department of Health (2015) Mental Health Act 1983: Code of Practice
  The Stationery Office
- *Gillick v West Norfolk and Wisbech* AHA [1986] AC 112
- GMC, *Seeking patients' consent: the ethical considerations*, November 1998
- The Human Rights Act 1998

- *Mental Health Act 1983 as amended by Mental Health Act 2007* (issued August 1997 and updated March 1999)
- Nursing and Midwifery Council (2015) The Code of practice Professional standards of practice and behaviour for nurses, midwives and nursing associates https://www.nmc.org.uk/standards/code/ Accessed 4th January 2019
- The Care Act 2014 http://www.legislation.gov.uk/ukpga/2014/23/contents Accessed 4th January 2019
- The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 http://www.legislation.gov.uk/uksi/2014/2936/contents/made Accessed 4th January 2019
- The Health and Social Care Act 2008 (Regulated Activities) (Amendment) Regulations 2015
- Children Act 1989 http://www.legislation.gov.uk/ukpga/1989/41/contents Accessed 4th January 2019
- Children Act 2004 http://www.legislation.gov.uk/ukpga/2004/31/contents Accessed 4th January 2019
- Children and Young Persons Act 1933 http://www.legislation.gov.uk/ukpga/Geo5/23-24/12/contents Accessed 4th January 2019
- Mental Capacity Act 2005 http://www.legislation.gov.uk/ukpga/2005/9/contents Accessed 4th January 2019
- Mental Capacity Act Code of Practice https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice Accessed 4th January 2019
- Mental Health Act 1983 http://www.legislation.gov.uk/ukpga/1983/20/contents Accessed 4th January 2019
- Mental Health Act 2007 http://www.legislation.gov.uk/ukpga/2007/12/contents Accessed 4th January 2019

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