Consent & Capacity: Meeting Legal and Regulatory Requirements

The steps outlined below will not necessarily occur in a linear fashion or in the order suggested. These steps are applicable to patients aged 16 and over. The steps to be taken for patients 15 and under are slightly different.

1. You must be competent regarding the principles of consent and mental capacity prior to undertaking care, examination or treatment.

2. Provide relevant and sufficient information about the care, examination or treatment that is proposed and any alternative options.

3. Consider whether any special measures can be taken to improve the provision of information e.g. interpreters, SALT.

4. Do you have reason to believe that the patient has put:
   - Understood some or all of the information you gave them? OR
   - Retained the information for long enough to make a decision? OR
   - Weighed up the risks/benefits of having/not having the care, examination or treatment or the various alternatives? OR
   - Been able to communicate the outcome of their decision-making by any means?
   OR
   - Is the patient unconscious, heavily sedated or has a low GCS score?

5. Document that in your opinion the patient does not have the mental capacity to make the decision regarding the particular examination, care or treatment that is proposed, as they are unable to: understand/retain/weigh-up/communicate. The extent of this documentation should be proportionate to the seriousness and potential consequences of the care, examination or treatment. This should be documented on standard pro-forms where required by organisational policy.

6. Ascertain if there is any evidence of a Court of Protection appointed Deputy or a Lasting Power of Attorney for Health and Welfare with the authority to consent/refuse on behalf of the patient for the care or treatment proposed. If so, they will be the decision-maker.

7. Ascertain if there is any evidence of a valid and applicable Advance Decision to Refuse Treatment (ADRT) which relates to the care or treatment proposed. If so, if the care or treatment cannot be undertaken and alternatives should be considered.

8. Ensuring that you consider the checklist in the MCA, establish what you believe would be in the patient’s best interests (medically, emotionally, socially and psychologically), referring to an IMCA for an independent opinion where the patient has no appropriate family to consult and it is a residence or serious medical treatment decision.

9. Document the process of determining best interests. The extent of this documentation should be proportionate to the seriousness and potential consequences of the care, examination or treatment.

10. Proceed with care, examination or treatment where you believe this to be in the patient’s best interests.

11. If the patient resists the care, examination or treatment, consider any reasons there may be for this and whether the care, examination or treatment can be provided differently. Restrictions/restraint may be necessary but ensure that overall the care, examination or treatment remains in the patient’s best interests and the least restrictive alternative.

12. Document care given and any associated observations or anomalies.

13. Ask the patient if they are happy to proceed with the examination, care or treatment that is proposed.

14. The valid, informed consent (oral, non-verbal/implied or written) that a patient provides is sufficient lawful authority for proceeding with the care, examination or treatment. NB: For consent to be valid it must also not be given under duress. If you have concerns about this consider safeguarding.

15. Where a patient refuses the proposed examination, care or treatment, establish if there is a particular reason and consider if the objections can be overcome or the care, examination or treatment provided differently to avoid the cause of the objection. This may lead to the giving of consent.

16. Ultimately refusal must be respected (unless certain provisions of the Mental Health Act apply).

17. Document refusal, any known reasons for it and alternatives suggested. The extent of this documentation should be proportionate to the seriousness and potential consequences of not having the care, examination or treatment.

Please contact our specialist, Elaine Dower, on elaine.dower@360assurance.nhs.uk to discuss how 360 Assurance can help you achieve the steps above.