Humber Teaching
NHS Foundation Trust

GUIDANCE IN RELATION TO ADVANCE STATEMENTS, AND ADVANCE DECISIONS TO REFUSE TREATMENT

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Date of Next Review	March 2026 *Please note the Mental Capacity (Amendment) Act 2019 Code of Practice will be published in the near future and a further review of this guidance will take place at that time to ensure it meets the new regulations.*
Ratified by: **Date**	MHL Steering Group, 15th February 2023 QPaS, **16th March 2023**

VALIDITY – Documents should be accessed via the Trust intranet to ensure the current version is used.

CHANGE RECORD

Version	Date	Change details (Including approval information)
1.0	*2012*	*New Guidance*
2.0	*Feb-2013*	*Update of telephone and contact details; inclusion of personal identifiers to link to the Lorenzo patient data system*
3.0	*June-2013*	*To conform with the format for Trust Guidance*
3.1	*July-2013*	*Addition to ECT in section 3.5 and spelling error on front page corrected.*
3.2	*Oct-2013*	*Changes to proformas for service users*
3.3	*May-2014*	*Clarification on the process for inputting and accessing electronically held statements*
4.0	*Jan-2017*	*Major update in relation to the MHA Code of Practice 2015*
4.1	*01-Mar-2017*	*Definitions of Advance Decision/Advance Statement added as requested by MHLC*
4.2	*06-Sept-2018*	*Removal of request to send hard copy to Mental Health Legislation*
5.0	*07 February 2020*	*Full review – additional narrative added of how the guidance applies to under 18s.*
5.1	*18-Jan-2022*	*Dec-21 - Minor amendment to add the icon that staff should expect to see on the patient's banner on Lorenzo to alert them that they have an advance deciion/statement (page 11).* *Approved at Mental Helath Legislation Steering Group 18-Jan-22*
5.2	*16-Mar-2023*	*Full Review – minor amends January 2023* Added "and the person lacks the capacity to make a decision at the time" (p4), *removed obsolete telephone numbers (p5), and explained where to record advance decision details (p7,9,10 and 11).* *Appendix 1 – advanced statement/decision form removed as appendix and hyperlink added to link to editable work document on intranet* *Approved at MHL Steering Group 15th February and QPaS 16th March 2023.*

Contents

1. INTRODUCTION

Humber Teaching NHS Foundation Trust is committed to ensuring that, as far as practicable, all patients are encouraged and enabled to make choices and decisions about their future care should they become unwell or lack capacity.

Many service users with long term mental health conditions are well for much of the time. A service user, who has had the experience of different types of care and treatment may wish to put on record, when well, what sort of treatment he/ she would prefer, or choose not to have, in times of a future mental health crisis.

The Mental Capacity Act (MCA) 2005 provides a legal framework for acting and making decisions on behalf of vulnerable people who lack the mental capacity to make specific decisions for themselves. The MCA provides a statutory framework to empower and protect such individuals. It makes it clear who can take decisions, in which situations and how they should go about this. It also enables people to plan ahead for a time when they may lose capacity.

We refer to this advance planning as an Advance Statement or an Advance Decision. It is essential that there is an understanding of the difference between these terms:

An **Advance Decision** is a refusal to accept certain medical treatments in the future if specified circumstances arise and the person lacks the capacity to make a decision at the time. Advance Decisions are governed by the Mental Capacity Act 2005 and, if valid and applicable to the circumstances arising, are legally binding. This can only be completed by people over the age of 18.
Clinical professionals who continue to provide a specific intervention against a patient's wishes as outlined in a validly created Advance Decision risk criminal prosecution, civil litigation and professional practice proceedings. An exception to this is when treatment is being administered under the Mental Health Act 1983 (MHA). Where treatment is required under the MHA 1983, a patient's wishes may be overridden if this is considered necessary, although their views should be taken into account as far as possible.

Advance Statements are used to express wishes and preferences in relation to care and treatment and would include statements about how they would need or want their everyday social, home, family and occupational needs addressing. It can reflect the religious or other beliefs that they have and allows the person to state how they would like to be treated should they not be able to communicate their wishes in the future. Such expressions of wishes/preferences must be taken into account when considering an incapacitated service user's best interests, but they are not legally binding. The provision to make an advance statement applies to everyone; there is no upper or lower age limit. Patients under 16 would need to be competent to do so, while those 16 over would need to have capacity to do so. There is no provision for parents to make an advance statement on behalf of their child (if the child does not have capacity to consent) or for welfare guardians, named persons or others to do so for adults who do not have capacity.

(Please note: The term *Advance Directive* is now outdated, however in the past it was commonly in use to describe a document covering both Advance Statements and Directives. The term is included here for clarification).

Humber Teaching NHS Foundation Trust acknowledges that it is the right of every service user to influence their care and treatment and to make Advance Decisions to refuse treatment (henceforth referred to as "Advance Decisions") and Advance Statements in order to provide an opportunity to support autonomy, shared decision making and the recovery process.

This guidance is aimed at providing a framework for discussion between staff, service users and supporters (where appropriate) regarding the making of an Advance Statement / Decision that would direct and guide the service user's future care. It also includes the procedures for staff

registering a new or amended statement. The guidance should be read in conjunction with the Mental Capacity Act 2005 and the Mental Capacity Act Code of Practice (2007) Chapter 9. It is not a substitute for the Mental Capacity Act or the Code of Practice, to which all professionals must adhere.

Professionals must act with due care and attention and may be legally liable if they disregard a valid and applicable Advance Decision.

If there are any questions you may have about the use of Advance Statements / Decisions please contact
Mental Health Legislation Department by e mail at her-tr.mentalhealthlegislation@nhs.net or Safeguarding Team by email at HNF-TR.SafeguardingHumber@nhs.net

The original development of this Guidance and the Advance Statement / Decision Form (See Appendix 1) was based around the document "*Your Advance Statement/ Wishes*" developed by the local user and carer team in 2002 and draws on examples of positive practice from the national voluntary sector i.e. MIND and Rethink. It had considerable initial guidance from local user representative group and was consulted upon with staff and users of Humber Teaching NHS Foundation Trust.

1.2 Definitions

Advance decision to refuse treatment	This is a potentially legally binding instrument which enables patients with capacity aged 18 and over to refuse specific medical treatment in specified circumstances at a time in the future when they may lack the capacity to consent to or refuse the proposed treatment.
Advance statement	This is not legally binding. This is a written statement by a patient of any age when they have competence or capacity, specifying their preferences and wishes for future treatment and care should they lose capacity in the future. As it is a statement of the patient's views, wishes and feelings, it should be taken into consideration by health and social care professionals and carers as part of the "best interests" decision making process at a time when the patient does not have capacity.
Capacity	The MCA sets out a 2 stage test of capacity for those aged 16 or over. This is time and decision specific. To be assessed as lacking capacity, the person must have an impairment of or disturbance in the functioning of their mind or brain. The person must also be unable to do any one of the following: • understand information relevant to the decision • retain the information for long enough to make the decision • use or weigh the information as part of the process of making the decision • communicate their decision in any way
Competence	For children under the age of 16, the appropriate test is not capacity under the MCA

	but competence, sometimes referred to as "Gillick competence". To be assessed as competent, a child must have sufficient maturity, understanding and intelligence to enable them to comprehend sufficiently the implications of a particular decision, in which case they may consent to or refuse particular treatment on their own behalf regardless of their age.

2. SCOPE

This document is aimed at all staff in a paid, professional or voluntary capacity (this includes social care staff who are either seconded to the Trust or work in partnership with the Trust, agency staff, students and volunteers) who is involved in the care, treatment or support of people of any age who are under the care of the Trust, and aims to encourage:

- those in a care co-ordination role to support the completion of Advance Statements / Decisions;
- all staff, students, and agency staff to work towards the execution of the wishes laid down in service users' existing Advance Statement / Decisions.

3. PROCEDURES

3.1. When to make an Advance Statement / Decision

There are certain times when staff may suggest service users complete an Advance Statement / Decision, such as prior to discharge from hospital or just before or after a Care Programme Approach review.

An Advance Statement / Decision can be made by the service user on their own, with a friend, relative, supporter or with the support of their care co-ordinator.

Patients will be offered assistance when completing Advance Decisions and advance statements, but the decision is the patient's and must be a choice made with capacity. Patients will be informed of their right to complete Advance Decisions and advance statements through patient information leaflets and advice provided by staff in hospital and in the community.

Encouraging the use by patients of Advance Decisions and advance statements will promote:

- patients being treated as responsible and active participants in their future interactions with mental health services
- meaningful patient involvement and person-centred care
- culturally and religiously appropriate services
- increased understanding by staff of patients' wishes and preferences
- increased knowledge by patients of their legal rights to refuse treatment, when these apply and their non-legal rights to express preferences and wishes
- increased knowledge by staff of how to assist patients to set out their legal rights to refuse treatment (where applicable) and their non-legal preferences and wishes where patients wish to do so

3.2. Making an Advance Statement / Decision

Appendix 1 link contains a Humber Teaching NHS Foundation Trust Advance Statement / Decision form. However, it is not essential that this template is used. The service user may choose to use other examples available on the internet from MIND (www.mind.org.uk) or Rethink

(www.rethink.org). Indeed, the service user does not have to use a template, it can be made on any piece of paper and still be valid.

Advance Statement

Anyone with capacity (16 or over) or competence (under 16) can make an advance statement.

Staff must be able to demonstrate that, wherever possible, the service user's wishes have been taken into account as part of considering what is in the service user's best interests if they lose capacity. This includes taking into account any wishes set out in an Advance Statement. If a service user's wishes are not followed, then reasons for this must be documented in the service user's records.

Examples of issues which may be included in an Advance Statement:

- An appointment of representative: a service user may name another person to be consulted about health care decisions when the service user lacks the capacity to decide for him/herself. The named person should be consulted in considering what is in the service user's best interests once they lose capacity. However, the views of the named person will not be legally binding unless they have been granted Lasting Power of Attorney to make personal welfare decisions on a service user's behalf or appointed as a Court Appointed Deputy under the provisions of the Mental Capacity Act 2005.
- A statement about particular treatment the person would like to receive should they become unwell. Although not legally binding, this should be taken into account when deciding treatment.

To make an Advance Statement:

- The service user must have capacity to decide to make the statement.
- The Advance Statement should preferably be in writing; although a service user's verbally expressed wishes should also be taken into account when considering what is in their best interests. This should be recorded in the Advance Directives tab in the Health Issues section – report advance directive and enter in the patient statement box.
- Staff should facilitate the recording of a service user's Advance Statement in writing, if the service user has the capacity, but is unable to write.
- The content of an Advance Statement should be the service user's own views and wishes and should not be unduly influenced by any other person.
- The Advance Statement must be clear. If the statement is unclear or ambiguous it must be discussed and clarified with the service user while they still have capacity.
- An Advance Statement can be made in conjunction with the care coordination process (which may be the Care Programme Approach (CPA)), and a copy should be kept within the care record. **It is important that, where appropriate, service users are given information about Advance Statements as part of their assessment and/or CPA review.**

Service users can withdraw or alter their Advance Statement at any time while they have capacity. It is the service user's responsibility to notify the Trust of any changes made to their Advance Statement.

Service Users detained under the Mental Health Act (MHA) 1983

Encouraging patients to set out their wishes in advance is often a helpful therapeutic tool, encouraging collaboration and trust between patients and professionals. It is a way in which effective use can be made of patients' expertise in the management of crises in their own conditions.

Whenever expressing a preference for their future treatment and care, patients should be encouraged to identify as precisely as possible the circumstances they have in mind. If they are saying that there are certain things that they do not want to happen – e.g. being given a particular type of treatment or being restrained in a particular way – they should be encouraged to give their views on what should be done instead.

Patients should be made aware that expressing their preference for a particular form of treatment or care in advance like this does not legally compel professionals to meet that preference. However, professionals should make all practicable efforts to comply with these preferences and explain to patients why their preferences have not been followed.

Where patients express views to any of the professionals involved in their care about how they should be treated or ways they would not wish to be treated in future, the professional should record those views in the patient's notes. If the views are provided in a written form, they should be kept with the patient's notes.

Whether the patient or the professional records the patient's views, steps should be taken, unless the patient objects, to ensure that the information:

- is drawn to the attention of other professionals who ought to know about it, and
- it is included in care plans and other documentation which will help ensure that the patient's views are remembered and considered in situations where they are relevant in future.

Advance Decision

An Advance Decision to refuse treatment can only be made by an individual aged 18 and over with capacity to make advance care and treatment decisions. There are no set formats for Advance Decisions; they can be written, witnessed oral statements or written statements, printed cards or notes of a discussion recorded in the clinical record. The Advance Decision may be written in medical language or in lay terms and must be clear and unambiguous in order to be legally enforceable**. An important exception to this is the refusal of life sustaining treatment which must be in writing (and must comply with a number of other requirements set out at section 25 (5) (a) (b) and section 25 (6) (a) (b) (c) (d) of the Mental Capacity Act 2005 in order to be legally binding).**

What is life-sustaining treatment?

Life-sustaining treatment is, by definition, treatment that is needed to keep a person alive. While particular treatment cannot be demanded from healthcare professionals, it can be refused, even if this would bring about the person's death. However, a patient does not have the right to refuse "basic care", which means hydration and nutrition offered by mouth, warmth, shelter, pain relief; hygiene and relief from distressing symptoms, which health care professionals always have a duty to provide. Nevertheless, artificial nutrition and hydration (ANH) does constitute life-sustaining treatment, so this could be refused in a valid and applicable Advance Decision, in which case it could not be given. If there is any doubt as to the validity or applicability of an Advance Decision refusing life-sustaining treatment, treatment should be continued pending the outcome of an urgent court application.

VALID + APPLICABLE = LEGALLY BINDING

The health professional treating the service user must be assured of the following to ensure that the Advance Decision is valid and applicable:

***The person was competent at the time the Decision was made*.** Professionals must be satisfied that the Advance Decision was made whilst the person had capacity to make it. In line with the wider Mental Capacity Act, the healthcare professional must start from the assumption that the person had capacity to make the Advance Decision, unless they are aware of reasonable grounds to doubt this capacity.

The service user is free from the undue influence of others. Professionals must be satisfied that the Advance Decision was not based on false information or pressure from other people.

***The service user is sufficiently informed*.** Professionals must assure themselves that the service user understood the implications of the decision they made at the time and also that they have acted in a way that is consistent with the Advance Decision. There is no requirement for an individual to take professional advice.

The person intended the refusal to apply to the circumstances that subsequently arise*.* The person must have envisaged the type of situation the decision applies to. The Advance Decision can be deemed invalid if it does not apply to a specific treatment or the stated circumstances. For example, a new anti-psychotic medication may become available after an Advance Decision is made. If it is not specified, the Advance Decision could be taken to mean that a refusal of medication might not apply to newly available medication.

An Advance Decision will not be valid where:

- The service user has withdrawn the Advance Decision, at a time when he or she had capacity to do so (NB. withdrawal of an Advance Decision does not have to be in writing); if verbally withdrawn this should be recorded in the Advance Directives tab in the Health Issues section – close advance decision and select 'withdrawn' in the 'closure reason' area.
- The service user has subsequently conferred the power to give or refuse consent to the treatment to which the Advance Decision relates, to a Lasting Power of Attorney;
- The patient has done or said anything which clearly goes against the contents of the Advance Decision (which suggests that they have changed their mind);
- The service user would have changed their decision if they had known more about the current circumstances.

An Advance Decision refusing 'basic care' is also invalid. An Advance Decision may not refuse, for example, warmth, shelter and hygiene measures to maintain body cleanliness and the offer of oral food and hydration by mouth; such care may be provided in the best interests of a person lacking capacity to consent to it. An Advance Decision can refuse artificial nutrition and hydration.

An Advance Decision will not be applicable if:

- The service user has capacity to make the decision at the time the treatment is proposed
- The proposed treatment is not the treatment specified in the Advance Decision or it is unclear what treatment is being refused
- There are reasonable grounds for believing that circumstances now exist which the service user did not anticipate at the time of writing the Advance Decision, which would have affected the decision, such as pregnancy, advances in treatment or changes in the service user's religious beliefs.

Healthcare professionals must follow an advance decision if it is valid and applies to the particular circumstances. If they do not, they could face criminal prosecution.

Advance decisions have serious consequences for the people who make them. They can also have an important impact on family and friends, and professionals involved in their care. Before healthcare professionals can apply an advance decision there must be proof that the decision:

- exists
- is valid, and
- is applicable in the current circumstances.

These tests are a legal requirement under section 25(1) Mental Capacity Act 2005. Paragraphs 9.38-9.44 explain the standard of proof required.

Service Users detained under the Mental Health Act (MHA) 1983

In certain circumstances, described in chapter 24 of the Mental Health Act 1983 Code of Practice, the MHA allows patients to be given medical treatment for their mental disorder without their consent ,even though they have made a valid and applicable advance decision to refuse the

treatment. This only applies to patients who are detained under the Act and to patients on community treatment orders (CTOs) who are recalled.. This means that where a service user is subject to compulsory detention and treatment under Part IV MHA 1983, **with the exception of non-urgent ECT (Electroconvulsive Therapy)**, an Advance Decision is not legally binding on decisions relating to the service user's mental disorder.

Even where clinicians may lawfully treat a patient compulsorily under the Act, they should, where practicable, try to comply with the patient's wishes as expressed in an advance decision. They should, for example, consider whether it is possible to use a different form of treatment not refused by the advance decision. If it is not, they should explain why to the patient and the reason is to be recorded in the patient's clinical records.

Except where the Act means that they need not, clinicians must follow all other advance decisions made by their patients which they are satisfied are valid and applicable, even if the patients concerned are detained under the Act or on CTOs. By definition, this includes all valid and applicable advance decisions made by detained and community patients to refuse treatment which is not for mental disorder.

Making an Advance Decision
The Advance Decision must:

- Set out clearly the treatment which is not to be carried out or continued.
- Set out any circumstances which are applicable to the decision.

Professionals must consider the following if asked for assistance with an Advance Decision:

- Does the service user have sufficient knowledge of the condition?
- Does the service user have sufficient knowledge of possible treatment options?
- Is it clear that the service user is reflecting their own view and not being pressured by other people?
- Is the service user aware of the risks of Advance Decisions as well as the benefits?
- Are professionals aware that any doubt or ambiguity about intention or capacity at the time of drafting the decision could lead to it becoming invalid? This is particularly important where the decision involves advances of care e.g. new medications.

Professionals must document in the clinical records all involvement and discussions about Advance Decisions.

It is worth noting that some forms of treatment referred to in Advance Decisions should also be reflected in CPA documentation. Care must be taken to ensure these are not contradictory.

Where an Advance Decision is received by a professional in the form of an oral statement, this should be recorded in writing, and the service user should be asked to sign this document (if they are able to do this) in the presence of a witness (the witness should not be the staff member who records the Advance Decision); this is a matter of good practice. **A witnessed signature is only a legal requirement in the case of Advance Decisions refusing life-sustaining treatment.** This document should then be uploaded to Advance Directives tab in the Health Issues section – go to 'Attachments' – upload and associate.

Service users may prefer not to make a legal document and may talk to a professional about their wishes and have these reflected in their record, for example their medical notes and/or CPA documentation. In such cases, service users should be encouraged to check the notes made about them to ensure that they agree with what is written before signing them. This would be a legal document.

In drawing up an Advance Decision it is recommended that the minimum information below is included:

- Full name
- Address
- Name and address of General Practitioner
- Whether advice has been sought from health professionals
- A statement that the Decision is intended to have effect if the maker lacks capacity to make treatment Decisions
- A clear statement of the decision, specifying the treatment(s) to be refused and the circumstances in which the decision will apply, or which will trigger a particular course of action
- Signature of the person the Advance Decision refers to
- Date drafted and date reviewed
- Witness signature and relationship to individual

Witness signature and date are essential for the Advance Decision to be legally accepted if this relates to refusal of life sustaining treatment.

Healthcare professionals will be protected from liability for failing to provide treatment if they 'reasonably believe' that a valid and applicable Advance Decision to refuse that treatment exists and is applicable to the current circumstances. Therefore, staff should always try to ascertain if a new service user has an Advance Decision.

Emergency treatment must not be delayed in order to look for the Advance Decision, if there is no clear indication that one exists.

3.3. Registering the Advance Statement / Decision

It is essential that the Advance Statement / Decision is available for future access by Trust staff.

When the Advance Statement / Decision is written, it is the responsibility of the clinical team to ensure that the document is scanned into the patient electronic record system, while the contact is still open. Staff should ensure that the correct document type is selected (i.e. is it a Statement or Decision).

The document's existence should be entered in the Advance Directives tab in the Health Issues section (e.g. *see advance statement document dated xx/xx/xxxx)*

The signed copy of the original Advance Statement / Decision should be uploaded to the Advance Directives tab in the Health Issues section – go to 'Attachments' – upload and associate.

The member of staff supporting the completion, or accepting receipt of the Advance Statement / Decision, is responsible for writing to the patient within 10 days to confirm that it is on the system.

The patient retains the original copy of the Advance Statement / Decision. They are then able to log this document wherever they want it to be available. In addition to the Trust, the service user may wish to consider logging it with their G.P., family members, carers or friends. They should be asked if they are happy for the adult social services to have a copy of the document and this decision should be clearly recorded in the service user's notes. If the service user is in agreement, the clinical team are responsible for ensuring that adult social services are notified of the existence of an advance statement and forwarding a copy to the relevant care management team or social worker.

3.4. Review of the Advance Statement/ Decision

Advance Decisions made a long time before the proposed treatments are not automatically invalid. However, this may raise doubts about the extent to which it remains valid and applicable. The Advance Statement / Decision should be reviewed regularly to check it continues to meet the service users' needs. It is recommended that this should be at least 6 monthly and could fit into the review of the care plan under the Care Programme Approach system.

When the service user reviews their Advance Statement / Decision and changes are made, a new Advance Statement / Decision should be scanned and entered on to the system as above to ensure that the electronic version kept on the Trusts computer system is updated.

If the service user appoints a Lasting Power of Attorney, any existing Advance Statement / Decision will need to be updated to reflect this.

An Advance Decision may be withdrawn by the service user at any time when they have capacity. The withdrawal of an Advance Decision does not need to be in writing, including in the case of advance refusals of life sustaining treatment - i.e. a verbal withdrawal will be sufficient. This must be documented in the patient's records.

3.5. Checking if a person has an Advance Statement / Decision

If a service user has registered an Advance Statement / Decision, an icon will appear on the patient's banner in Lorenzo.

This can be accessed in an emergency and inform staff on the service user's preferences.

3.6. Adherence to the Advance Statement

In the event of a patient presenting without or losing capacity or competence, staff must check the Trust's clinical information system and the patient's clinical file to see if the patient has made an advance statement. Staff must be alert to the possibility that an advance statement may be recorded in a number of formats and may not be set out on the Trust's advance statement form (Appendix A). Emergency treatment must never be delayed in order to look for an advance statement.
Where the patient is detained under the MHA, the care co-ordinator/ward manager should inform the patient's Responsible Clinician about the existence of the advance statement. All staff in the clinical team must be made aware of the existence and content of the advance statement.

The advance statement must be taken into consideration to the extent that it is clear and unambiguous. The advance statement must be considered as part of any best interests decision making meeting/process under the MCA.

Statements expressing requests, preferences or authorisations for treatment are not legally binding but should be accommodated by the clinical team where possible. The clinical team's final decision must always be based on professional judgement following assessment of the current situation and must be in the person's best interests. If this differs from the advance statement, then this must be recorded, and the team must be prepared to justify their actions if challenged. When the patient regains capacity or competence, the reasons for not complying with their advance statement should be explained to them.

Health and social care professionals do not have to provide treatment or services requested by the patient if they do not believe it is in the patient's best interests or the treatment is not available from the Trust. An advance statement has no legal force to make a healthcare professional do anything. It is a statement of the patient's wishes and preferences intended to help inform healthcare professionals in making the right choices for the patient.

Where there is a clinical need to act against the expressed wishes of the service user, the rationale must be defensible and recorded clearly in their notes.

3.7. Adherence to the Advance Decision

In the event of a patient losing capacity, staff should check the Trust's Clinical Information System to see if the patient has made an Advance Decision. Staff must be alert to the possibility that an

Advance Decision may be recorded in a variety of formats and not necessarily on the Trust form (Appendix A). Advance Decisions refusing life-sustaining treatment must meet the prescribed validity requirements set out above. Trust staff must satisfy themselves that an Advance Decision is valid and applicable before following it.

Trust staff must first determine if the patient currently lacks capacity. If the patient has capacity at the time of treatment, then the patient should be asked what they wish to do and the Advance Decision is irrelevant. The Advance Decision only becomes relevant if the patient is assessed to lack capacity using the MCA 2 stage test.

If the patient lacks capacity, Trust staff should not delay emergency treatment to look for an Advance Decision if there is no clear indication that one exists. If it is clear that a person has made an Advance Decision that is likely to be relevant, healthcare professionals should assess its validity and applicability as soon as possible. Sometimes the urgency of the treatment will make this difficult. In such a situation, treatment should be provided until the situation can be clarified.

Trust staff must confirm as far as possible that:

- the patient was 18 or over when they made their Advance Decision
- the patient had capacity at the time that the Advance Decision was made (always starting from the presumption that the patient did have capacity unless there is genuine doubt about this)

An Advance Decision can be over-ruled in certain circumstances, such as:

- If the Advance Decision directs the care workers to do, or not to do, something that a person could not request. For example: something that is illegal or unreasonable.

- Generally an Advance Decision to refuse treatment for mental disorder can be overruled if the person is detained in hospital under the Mental Health Act 1983, when treatment could be given compulsorily under Part 4 of that Act. However, it would be expected that the service users' Advance Decision would be taken into consideration before making the decision. This does not apply to an Advance Decision to refuse ECT.

3.7.1 Is the Advance Decision valid?

An Advance Decision will be invalid if the patient:

- was under 18 when they made the advance decision
- withdrew it while they still had capacity
- drew up a Lasting Power of Attorney for health and welfare, after they had made the Advance Decision, authorising their attorney to refuse or consent to the treatment covered by the Advance Decision
- has acted in ways which clearly go against the Advance Decision, and which suggest that they have changed their mind.

3.7.2 Is the Advance Decision applicable?

For an Advance Decision to be applicable, it must specify the situation in question and apply to the precise circumstances that have arisen.

The Advance Decision must apply to the proposed treatment. It is not applicable to the treatment in question if:

- The proposed treatment is not the treatment specifically refused in the Advance Decision
- The circumstances are different from those that have been set out
- There are reasonable grounds for believing that there have been changes in circumstance which would have affected the person's decision if they had known about them at the time that they made the Advance Decision.

If the Advance Decision is either not valid or not applicable, then it is not legally binding on Trust staff, and they do not need to comply with it. However, Trust staff must still treat it as a non-legally-

binding advance statement, if they have reasonable grounds to think that it is a true expression of the person's wishes and comply with it as far as possible.

If it is reasonably believed that a valid and applicable Advance Decision refusing medical treatment exists, then not to abide by it could lead to a legal claim for damages or a criminal prosecution for assault, unless the patient is a detained patient under the MHA and the proposed treatment is for their mental illness, in which case a decision could be made to override it. This is never an option in the case of Advance Decisions refusing ECT.

4. REFERENCES/DEFINITIONS

Department of Health (2008) *Refocusing the Care Programme Approach*
CSIP (2006) *Our Choices in Mental Health: a framework for improving choice for people who use mental health services and their carers*.
Jones. R. (2014) Mental Capacity Act Manual (Sixth Edition) London. Sweet & Maxwell

Department of Health (2007) Mental Capacity Act Code of Practice. London TSO

Sheffield Health and Social Care NHS Foundation Trust – Advance Decisions to Refuse Treatment/Advance Statements Policy

Jones. R. (2015) Mental Health Act Manual (Eighteenth Edition). London. Sweet & Maxwell

Department of Health (2015) Mental Health Act Code of Practice. London TSO

Sussex Partnership NHS Foundation Trust - Advance Decisions to Refuse Treatment (ADRT) and Advance Statements Policy

5. RELEVANT HFT POLICIES/PROCEDURES/PROTOCOLS/GUIDELINES

- Mental Health Act Policy P053
- National Institute for Clinical Excellence (NICE) (2011) Clinical Guidance 136 - Service user experience in adult mental health: improving the experience of care for people using adult NHS mental health services.

6. APPENDICES

Appendix 1 - Advance Statement/Decision Form
Appendix 2 – Equality Impact Assessment

Appendix 1 – Advance Statement/Decision Form

Advance Statement Decision Form - Electronic Version

Advance Statement Decision Form - Hand Writing Version

Appendix 2 - Equality Impact Assessment (EIA)

Screening pro forma for strategies, policies, procedures, processes, tenders, and services

1. Document or Process or Service Name: **Guidance in relation to advance statements, and advance decisions to refuse treatment**
2. EIA Reviewer (name, job title, base and contact details): **Michelle Nolan, Mental Health Act Clinical Manager**
3. Is it a Policy, Strategy, Procedure, Process, Tender, Service or Other? **Guidance**

Main Aims of the Document, Process or Service Humber Teaching NHS Foundation Trust is committed to ensuring that, as far as practicable, all patients are encouraged and enabled to make choices and decisions about their future care should they become unwell or lack capacity. The aim of this guidance is to ensure that all Trust Staff are aware of the requirement to encourage and support the completion of Advance Statements / Decisions and to work towards the execution of the wishes laid down in service users' existing Advance Statement / Decisions.		
Please indicate in the table that follows whether the document or process has the potential to impact adversely, intentionally or unwittingly on the equality target groups contained in the pro forma		
Equality Target Group 1. Age 2. Disability 3. Sex 4. Race 5. Religion or belief 6. Sexual Orientation 7. Gender Re-assignment	Is the document or process likely to have a potential or actual differential impact with regards to the equality target groups listed? Equality Impact Score Low = Little or No evidence or concern (Green) Medium = some evidence or concern(Amber) High = significant evidence or concern (Red)	How have you arrived at the equality impact score? a) who have you consulted with b) what have they said c) what information or data have you used d) where are the gaps in your analysis e) how will your document/process or service promote equality and diversity good practice

Equality Target Group	**Definitions**	**Equality Impact Score**	**Evidence to support Equality Impact Score**
Age	Including specific ages and age groups: Older people, Young people, Children, Early	**Low**	This policy is consistent in its approach regardless of age. Staff must carry out mandatory Equality, Diversity and Human Rights training via e-learning.
Disability	Where the impairment has a substantial and long term adverse effect on the ability of the person to carry out their day to day activities: Sensory, Physical, Learning, Mental	**Low**	This policy is consistent in its approach regardless of disability. For patients who have a communication need or have English as their second language consideration must be given to providing information in an accessible format. Staff must carry out mandatory Equality, Diversity and Human Rights training via e-learning.
Sex	Men/Male, Women/Female	**Low**	This policy is consistent in its approach regardless of sex. Staff must carry out mandatory Equality, Diversity and Human Rights training via e-learning.
Race	Colour, Nationality, Ethnic/national origins	**Low**	This policy is consistent in its approach regardless of race. It is acknowledged however that

			for any patient whose first language is not English, as information needs to be provided and understood, staff will follow the Trust interpretation procedure. Staff must carry out mandatory Equality, Diversity and Human Rights training via e-learning.
Religion or Belief	All Religions Including lack of religion or belief and where belief includes any religious or philosophical belief	**Low**	This policy is consistent in its approach regardless of religion or belief. Staff must carry out mandatory Equality, Diversity and Human Rights training via e-learning.
Sexual Orientation	Lesbian Gay Men Bisexual	**Low**	This policy is consistent in its approach regardless of sexual orientation. Staff must carry out mandatory Equality, Diversity and Human Rights training via e-learning.
Gender Re-assignment	Where people are proposing to undergo, or have undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attribute of sex.	**Low**	This policy is consistent in its approach regardless of the gender the individual wishes to be identified as. We recognise the gender that people choose to live in hence why the terms gender identity and gender expression ensure we are covering the full spectrum of LGBT+ and not excluding trans, gender fluid or asexual people. Staff must carry out mandatory Equality, Diversity and Human Rights training via e-learning.

Summary

Is a FULL Equality Impact Assessment required?	Yes	**No**
Please describe the main points arising from your screening that supports your decision above: The guidance is specifically aimed at enabling all service users to express their wishes regarding future care arrangements. Significant attention has been paid to ensure that no groups are discriminated against either directly or indirectly.		
EIA Reviewers: **Michelle Nolan, Mental Health Act Clinical Manager**		
Date completed: **21 February 2023**	Signature: **M Nolan**	