1. Are adults presumed to have capacity?
All people aged 16 and over are presumed, in law, to have the capacity to give or withhold their consent to disclosure of confidential information unless there is evidence to the contrary. A patient who is suffering from a mental disorder or impairment does not necessarily lack the capacity to give or withhold their consent. Equally, patients who would otherwise be competent may be temporarily incapable of giving valid consent due to factors such as extreme fatigue, drunkenness, shock, fear, severe pain or sedation. The fact that an individual has made a decision that appears to others to be irrational or unjustified should not be taken on its own as conclusive evidence that the individual lacks the mental capacity to make that decision. If, however, the decision is clearly contrary to previously expressed wishes, or is based on a misperception of reality, this may be indicative of a lack of capacity and further investigation will be required.

2. Are children and young people presumed to have capacity?
There is no presumption of capacity for people under 16 in England, Wales and Northern Ireland and those under this age must demonstrate their competence by meeting certain standards set by the
The central test is whether the young person has sufficient understanding and intelligence to understand fully what is proposed. In Scotland, anyone aged 12 or over is legally presumed to have such capacity.

3. What factors are to be taken into account when assessing capacity?

To demonstrate capacity individuals should be able to:

- understand in simple language (with the use of communication aids, if appropriate) what is to be disclosed and why it is being disclosed
- understand the main benefits of disclosure
- understand, in broad terms, the consequences of disclosure
- retain the information long enough to use it and weigh it in the balance in order to arrive at a decision
- communicate the decision (by any means)
- make a free choice (ie free from undue pressure).

4. Determining ‘best interests’

All decisions taken on behalf of someone who lacks capacity must be taken in their best interests. A best interests judgement is not an attempt to determine what the patient would have wanted. It is as objective a test as possible of what would be in the patient’s actual best interests, taking into account all relevant factors. A number of factors should be addressed including:

- the patient’s own wishes (where these can be ascertained)
- where there is more than one option, which option is least restrictive of the patient’s future choices
• the views of the parents, if the patient is a child
• the views of people close to the patient, especially close relatives, partners, carers, welfare attorneys, court-appointed deputies or guardians, about what the patient is likely to see as beneficial.

(See also Card 1: ‘0-18’, ‘Children’, ‘Capacity’, ‘MCA’ and ‘Scotland Incapacity’.)