

Department for Constitutional Affairs

Mental Capacity Act 2005 Code of Practice

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Foreword by Lord Falconer

Foreword by Lord Falconer, Secretary of State for Constitutional Affairs and Lord Chancellor

The Mental Capacity Act 2005 is a vitally important piece of legislation, and one that will make a real difference to the lives of people who may lack mental capacity. It will empower people to make decisions for themselves wherever possible, and protect people who lack capacity by providing a flexible framework that places individuals at the very heart of the decision-making process. It will ensure that they participate as much as possible in any decisions made on their behalf, and that these are made in their best interests. It also allows people to plan ahead for a time in the future when they might lack the capacity, for any number of reasons, to make decisions for themselves.

The Act covers a wide range of decisions and circumstances, but legislation alone is not the whole story. We have always recognised that the Act needs to be supported by practical guidance, and the Code of Practice is a key part of this. It explains how the Act will operate on a day-to-day basis and offers examples of best practice to carers and practitioners.

Many individuals and organisations have read and commented upon earlier drafts of the Code of Practice and I am very grateful to all those who contributed to this process. This Code of Practice is a better document as a result of this input.

A number of people will be under a formal duty to have regard to the Code: professionals and paid carers for example, or people acting as attorneys or as deputies appointed by the Court of Protection. But for many people, the most important relationships will be with the wide range of less formal carers, the close family and friends who know the person best, some of whom will have been caring for them for many years. The Code is also here to provide help and guidance for them. It will be crucial to the Code's success that all those relying upon it have a document that is clear and that they can understand. I have been particularly keen that we do all we can to achieve this.

The Code of Practice will be important in shaping the way the Mental Capacity Act 2005 is put into practice and I strongly encourage you to take the time to read and digest it.

Introduction

The Mental Capacity Act 2005, covering England and Wales, provides a statutory framework for people who lack capacity to make decisions for themselves, or who have capacity and want to make preparations for a time when they may lack capacity in the future. It sets out who can take decisions, in which situations, and how they should go about this. The Act received Royal Assent on 7 April 2005 and will come into force during 2007.

The legal framework provided by the Mental Capacity Act 2005 is supported by this Code of Practice (the Code), which provides guidance and information about how the Act works in practice. Section 42 of the Act requires the Lord Chancellor to produce a Code of Practice for the guidance of a range of people with different duties and functions under the Act. Before the Code is prepared, section 43 requires that the Lord Chancellor must have consulted the National Assembly for Wales and such other persons as he considers appropriate. The Code is also subject to the approval of Parliament and must have been

placed before both Houses of Parliament for a 40day period without either House voting against it. This Code of Practice has been produced in accordance with these requirements.

The Code has statutory force, which means that certain categories of people have a legal duty to have regard to it when working with or caring for adults who may lack capacity to make decisions for themselves. These categories of people are listed below.

How should the Code of Practice be used?

The Code of Practice provides guidance to anyone who is working with and/or caring for adults who may lack capacity to make particular decisions. It describes their responsibilities when acting or making decisions on behalf of individuals who lack the capacity to act or make these decisions for themselves. In particular, the Code of Practice focuses on those who have a duty of care to someone who lacks the capacity to agree to the care that is being provided.

Who is the Code of Practice for?

The Act does not impose a legal duty on anyone to 'comply' with the Code – it should be viewed as guidance rather than instruction. But if they have not followed relevant guidance contained in the Code then they will be expected to give good reasons why they have departed from it.

Certain categories of people are legally required to 'have regard to' relevant guidance in the Code of Practice. That means they must be aware of the Code of Practice when acting or making decisions on behalf of someone who lacks capacity to make a decision for themselves, and they should be able to explain how they have had regard to the Code when acting or making decisions.

The categories of people that are required to have regard to the Code of Practice include anyone who is:

- an attorney under a Lasting Power of Attorney (LPA) (see chapter 7)
- a deputy appointed by the new Court of Protection (see chapter 8)
- acting as an Independent Mental Capacity Advocate (see chapter 10)
- carrying out research approved in accordance with the Act (see chapter 11)
- acting in a professional capacity for, or in relation to, a person who lacks capacity working
- being paid for acts for or in relation to a person who lacks capacity.

The last two categories cover a wide range of people. People acting in a professional capacity may include:

- a variety of healthcare staff (doctors, dentists, nurses, therapists, radiologists, paramedics etc)
- social care staff (social workers, care managers, etc)
- others who may occasionally be involved in the care of people who lack capacity to make the decision in question, such as ambulance crew, housing workers, or police officers.

People who are being paid for acts for or in relation to a person who lacks capacity may include:

- care assistants in a care home
- care workers providing domiciliary care services, and
- others who have been contracted to provide a service to people who lack capacity to consent to that service.

However, the Act applies more generally to *everyone* who looks after, or cares for, someone who lacks capacity to make particular decisions for themselves. This includes family carers or other carers. Although these carers are not legally required to have regard to the Code of Practice, the guidance given in the Code will help them to understand the Act and apply it. They should follow the guidance in the Code as far as they are aware of it.

What does 'lacks capacity' mean?

One of the most important terms in the Code is 'a person who lacks capacity'. Whenever the term 'a person who lacks capacity' is used, it **means a person who lacks capacity to make a particular decision or take a particular action for themselves at the time the decision or action needs to be taken**. This reflects the fact that people may lack capacity to make some decisions for themselves, but will have capacity to make other decisions. For example, they may have capacity to make small decisions about everyday issues such as what to wear or what to eat, but lack capacity to make more complex decisions about financial matters.

It also reflects the fact that a person who lacks capacity to make a decision for themselves at a certain time may be able to make that decision at a later date. This may be because they have an illness or condition that means their capacity changes. Alternatively, it may be because at the time the decision needs to be made, they are unconscious or barely conscious whether due to an accident or being under anaesthetic or their ability to make a decision may be affected by the influence of alcohol or drugs.

Finally, it reflects the fact that while some people may always lack capacity to make some types of decisions – for example, due to a condition or severe learning disability that has affected them from birth – others may learn new skills that enable them to gain capacity and make decisions for themselves. Chapter 4 provides a full definition of what is meant by 'lacks capacity'.

What does the Code of Practice actually cover?

The Code explains the Act and its key provisions.

- **Chapter 1** introduces the Mental Capacity Act 2005.
- **Chapter 2** sets out the five statutory principles behind the Act and the way they affect how it is put in practice.
- **Chapter 3** explains how the Act makes sure that people are given the right help and support to make their own decisions.
- **Chapter 4** explains how the Act defines 'a person who lacks capacity to make a decision' and sets out a single clear test for assessing whether a person lacks capacity to make a particular decision at a particular time.
- **Chapter 5** explains what the Act means by acting in the best interests of someone lacking capacity to make a decision for themselves, and describes the checklist set out in the Act for working out what is in someone's best interests.
- **Chapter 6** explains how the Act protects people providing care or treatment for someone who lacks the capacity to consent to the action being taken.
- **Chapter 7** shows how people who wish to plan ahead for the possibility that they might lack the capacity to make particular decisions for themselves in the future are able to grant Lasting Powers of Attorney (LPAs) to named individuals to make certain decisions on their behalf, and how attorneys appointed under an LPA should act.
- **Chapter 8** describes the role of the new Court of Protection, established under the Act, to make a decision or to appoint a decision-maker on someone's behalf in

- cases where there is no other way of resolving a matter affecting a person who lacks capacity to make the decision in question.
- **Chapter 9** explains the procedures that must be followed if someone wishes to make an advance decision to refuse medical treatment to come into effect when they lack capacity to refuse the specified treatment.
 - **Chapter 10** describes the role of Independent Mental Capacity Advocates appointed under the Act to help and represent particularly vulnerable people who lack capacity to make certain significant decisions. It also sets out when they should be instructed.
 - **Chapter 11** provides guidance on how the Act sets out specific safeguards and controls for research involving, or in relation to, people lacking capacity to consent to their participation.
 - **Chapter 12** explains those parts of the Act which can apply to children and young people and how these relate to other laws affecting them.
 - **Chapter 13** explains how the Act relates to the Mental Health Act 1983.
 - **Chapter 14** sets out the role of the Public Guardian, a new public office established by the Act to oversee attorneys and deputies and to act as a single point of contact for referring allegations of abuse in relation to attorneys and deputies to other relevant agencies.
 - **Chapter 15** examines the various ways that disputes over decisions made under the Act or otherwise affecting people lacking capacity to make relevant decisions can be resolved.
 - **Chapter 16** summarises how the laws about data protection and freedom of information relate to the provisions of the Act.

What is the legal status of the Code?

Where does it apply?

The Act and therefore this Code applies to everyone it concerns who is habitually resident or present in England and Wales. However, it will also be possible for the Court of Protection to consider cases which involve persons who have assets or property outside this jurisdiction, or who live abroad but have assets or property in England or Wales.

What happens if people don't comply with it?

There are no specific sanctions for failure to comply with the Code. But a failure to comply with the Code can be used in evidence before a court or tribunal in any civil or criminal proceedings, if the court or tribunal considers it to be relevant to those proceedings. For example, if a court or tribunal believes that anyone making decisions for someone who lacks capacity has not acted in the best interests of the person they care for, the court can use the person's failure to comply with the Code as evidence. That's why it's important that anyone working with or caring for a person who lacks capacity to make specific decisions should become familiar with the Code.

Where can I find out more?

The Code of Practice is not an exhaustive guide or complete statement of the law. Other materials have been produced by the Department for Constitutional Affairs, the Department of Health and the Office of the Public Guardian to help explain aspects of the Act from different perspectives and for people in different situations. These include guides for family carers and other carers and basic information of interest to the general public. Professional organisations may also produce specialist information and guidance for their members.

The Code also provides information on where to get more detailed guidance from other sources. A list of contact details is provided in Annex A and further information appears in the footnotes to each chapter. References made and any links provided to material or organisations do not form part of the Code and do not attract the same legal status. Signposts to further information are provided for assistance only and references made should not suggest that the Department for Constitutional Affairs endorses such material.

Using the code

References in the Code of Practice

Throughout the Code of Practice, the Mental Capacity Act 2005 is referred to as 'the Act' and any sections quoted refer to this Act unless otherwise stated. References are shown as follows: section 4(1). This refers to the section of the Act. The subsection number is in brackets.

Where reference is made to provisions from other legislation, the full title of the relevant Act will be set out, for example 'the Mental Health Act 1983', unless otherwise stated. (For example, in chapter 13, the Mental Health Act 1983 is referred to as MHA and the Mental Capacity Act as MCA.) The Code of Practice is sometimes referred to as the Code.

Scenarios used in the Code of Practice

The Code includes many boxes within the text in which there are scenarios, using imaginary characters and situations. These are intended to help illustrate what is meant in the main text. The scenarios should not in any way be taken as templates for decisions that need to be made in similar situations.

Alternative formats and further information

The Code is also available in Welsh and can be made available in other formats on request.

1 What is the Mental Capacity Act 2005?

- 1.1 The Mental Capacity Act 2005 (the Act) provides the legal framework for acting and making decisions on behalf of individuals who lack the mental capacity to make particular decisions for themselves. Everyone working with and/or caring for an adult who may lack capacity to make specific decisions must comply with this Act when making decisions or acting for that person, when the person lacks the capacity to make a particular decision for themselves. The same rules apply whether the decisions are life-changing events or everyday matters.
- 1.2 The Act's starting point is to confirm in legislation that it should be assumed that an adult (aged 16 or over) has full legal capacity to make decisions for themselves (the right to autonomy) unless it can be shown that they lack capacity to make a decision for themselves at the time the decision needs to be made. This is known as the presumption of capacity. The Act also states that people must be given all appropriate help and support to enable them to make their own decisions or to maximise their participation in any decision-making process.
- 1.3 The underlying philosophy of the Act is to ensure that any decision made, or action taken, on behalf of someone who lacks the capacity to make the decision or act for themselves is made in their best interests.
- 1.4 The Act is intended to assist and support people who may lack capacity and to discourage anyone who is involved in caring for someone who lacks capacity from being overly restrictive or controlling. But the Act also aims to balance an individual's right to make decisions for themselves with their right to be protected from harm if they lack capacity to make decisions to protect themselves.
- 1.5 The Act sets out a legal framework of how to act and make decisions on behalf of people who lack capacity to make specific decisions for themselves. It sets out some core principles and methods for making decisions and carrying out actions in relation to personal welfare, healthcare and financial matters affecting people who may lack capacity to make specific decisions about these issues for themselves.
- 1.6 Many of the provisions in the Act are based upon existing common law principles (i.e. principles that have been established through decisions made by courts in individual cases). The Act clarifies and improves upon these principles and builds on current good practice which is based on the principles.
- 1.7 The Act introduces several new roles, bodies and powers, all of which will support the Act's provisions. These include:
 - Attorneys appointed under Lasting Powers of Attorney (see chapter 7)
 - The new Court of Protection, and court-appointed deputies (see chapter 8)
 - Independent Mental Capacity Advocates (see chapter 10).

The roles, bodies and powers are all explained in more depth in the specific chapters of the Code highlighted above

What decisions are covered by the Act, and what decisions are excluded?

- 1.8 The Act covers a wide range of decisions made, or actions taken, on behalf of people who may lack capacity to make specific decisions for themselves. These can be decisions about day-to-day matters – like what to wear, or what to buy when doing the weekly shopping – or decisions about major life-changing events, such as whether the person should move into a care home or undergo a major surgical operation.

- 1.9 There are certain decisions which can never be made on behalf of a person who lacks capacity to make those specific decisions. This is because they are either so personal to the individual concerned, or governed by other legislation.
- 1.10 Sections 27–29 and 62 of the Act set out the specific decisions which can never be made or actions which can never be carried out under the Act, whether by family members, carers, professionals, attorneys or the Court of Protection. These are summarised below.

Decisions concerning family relationships (section 27)

Nothing in the Act permits a decision to be made on someone else's behalf on any of the following matters:

- consenting to marriage or a civil partnership
- consenting to have sexual relations
- consenting to a decree of divorce on the basis of two years' separation
- consenting to the dissolution of a civil partnership
- consenting to a child being placed for adoption or the making of an adoption order
- discharging parental responsibility for a child in matters not relating to the child's property, or
- giving consent under the Human Fertilisation and Embryology Act 1990.

Mental Health Act matters (section 28)

Where a person who lacks capacity to consent is currently detained and being treated under Part 4 of the Mental Health Act 1983, nothing in the Act authorises anyone to:

- give the person treatment for mental disorder, or
- consent to the person being given treatment for mental disorder.

Further guidance is given in chapter 13 of the Code.

Voting rights (section 29)

Nothing in the Act permits a decision on voting, at an election for any public office or at a referendum, to be made on behalf of a person who lacks capacity to vote.

Unlawful killing or assisting suicide (section 62)

For the avoidance of doubt, nothing in the Act is to be taken to affect the law relating to murder, manslaughter or assisting suicide.

- 1.11 Although the Act does not allow anyone to make a decision about these matters on behalf of someone who lacks capacity to make such a decision for themselves (for example, consenting to have sexual relations), this does not prevent action being taken to protect a vulnerable person from abuse or exploitation.

How does the Act relate to other legislation?

- 1.12 The Mental Capacity Act 2005 will apply in conjunction with other legislation affecting people who may lack capacity in relation to specific matters. This means that healthcare and social care staff acting under the Act should also be aware of their obligations under other legislation, including (but not limited to) the:
- Care Standards Act 2000
 - Data Protection Act 1998
 - Disability Discrimination Act 1995
 - Human Rights Act 1998
 - Mental Health Act 1983

- National Health Service and Community Care Act 1990
- Human Tissue Act 2004.

What does the Act say about the Code of Practice?

1.13 Section 42 of the Act sets out the purpose of the Code of Practice, which is to provide guidance for specific people in specific circumstances. Section 43 explains the procedures that had to be followed in preparing the Code and consulting on its contents, and for its consideration by Parliament. Section 42, subsections (4) and (5), set out the categories of people who are placed under a legal duty to 'have regard to' the Code and gives further information about the status of the Code. More details can be found in the Introduction, which explains the legal status of the Code.

2. What are the statutory principles and how should they be applied?

Section 1 of the Act sets out the five 'statutory principles' – the values that underpin the legal requirements in the Act. The Act is intended to be enabling and supportive of people who lack capacity, not restricting or controlling of their lives. It aims to protect people who lack capacity to make particular decisions, but also to maximise their ability to make decisions, or to participate in decision-making, as far as they are able to do so.

The five statutory principles are:

1. A person must be assumed to have capacity unless it is established that they lack capacity.
2. A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
4. An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

This chapter provides guidance on how people should interpret and apply the statutory principles when using the Act. Following the principles and applying them to the Act's framework for decision-making will help to ensure not only that appropriate action is taken in individual cases, but also to point the way to solutions in difficult or uncertain situations.

In this chapter, as throughout the Code, a person's capacity (or lack of capacity) refers specifically to their capacity to make a particular decision at the time it needs to be made.

Quick summary

- Every adult has the right to make their own decisions if they have the capacity to do so. Family carers and healthcare or social care staff must assume that a person

has the capacity to make decisions, unless it can be established that the person does not have capacity.

- People should receive support to help them make their own decisions. Before concluding that individuals lack capacity to make a particular decision, it is important to take all possible steps to try to help them reach a decision themselves.
- People have the right to make decisions that others might think are unwise. A person who makes a decision that others think is unwise should not automatically be labelled as lacking the capacity to make a decision.
- Any act done for, or any decision made on behalf of, someone who lacks capacity must be in their best interests.
- Any act done for, or any decision made on behalf of, someone who lacks capacity should be an option that is less restrictive of their basic rights and freedoms – as long as it is still in their best interests.

3 How should people be helped to make their own decisions?

Before deciding that someone lacks capacity to make a particular decision, it is important to take all practical and appropriate steps to enable them to make that decision themselves (statutory principle 2, see chapter 2). In addition, as section 3(2) of the Act underlines, these steps (such as helping individuals to communicate) must be taken in a way which reflects the person's individual circumstances and meets their particular needs. This chapter provides practical guidance on how to support people to make decisions for themselves, or play as big a role as possible in decision-making.

In this chapter, as throughout the Code, a person's capacity (or lack of capacity) refers specifically to their capacity to make a particular decision at the time it needs to be made.

Quick summary

To help someone make a decision for themselves, check the following points:

Providing relevant information

- Does the person have all the relevant information they need to make a particular decision?
- If they have a choice, have they been given information on all the alternatives?

Communicating in an appropriate way

- Could information be explained or presented in a way that is easier for the person to understand (for example, by using simple language or visual aids)?
- Have different methods of communication been explored if required, including nonverbal communication?
- Could anyone else help with communication (for example, a family member, support worker, interpreter, speech and language therapist or advocate)?

Making the person feel at ease

- Are there particular times of day when the person's understanding is better?
- Are there particular locations where they may feel more at ease?
- Could the decision be put off to see whether the person can make the decision at a later time when circumstances are right for them?

Supporting the person

- Can anyone else help or support the person to make choices or express a view?

4 How does the Act define a person's capacity to make a decision and how should capacity be assessed?

This chapter explains what the Act means by 'capacity' and 'lack of capacity'. It provides guidance on how to assess whether someone has the capacity to make a decision, and suggests when professionals should be involved in the assessment.

In this chapter, as throughout the Code, a person's capacity (or lack of capacity) refers specifically to their capacity to make a particular decision at the time it needs to be made.

Quick summary

This checklist is a summary of points to consider when assessing a person's capacity to make a specific decision. Readers should also refer to the more detailed guidance in this chapter and chapters 2 and 3.

Presuming someone has capacity

- The starting assumption must always be that a person has the capacity to make a decision, unless it can be established that they lack capacity.

Understanding what is meant by capacity and lack of capacity

- A person's capacity must be assessed specifically in terms of their capacity to make a particular decision at the time it needs to be made.

Treating everyone equally

- A person's capacity must not be judged simply on the basis of their age, appearance, condition or an aspect of their behaviour.
- Supporting the person to make the decision for themselves
- It is important to take all possible steps to try to help people make a decision for themselves (see chapter 2, principle 2, and chapter 3).

Assessing capacity

- Anyone assessing someone's capacity to make a decision for themselves should use the two-stage test of capacity.
- Does the person have an impairment of the mind or brain, or is there some sort of disturbance affecting the way their mind or brain works? (It doesn't matter whether the impairment or disturbance is temporary or permanent.)
- If so, does that impairment or disturbance mean that the person is unable to make the decision in question at the time it needs to be made?

Assessing ability to make a decision

- Does the person have a general understanding of what decision they need to make and why they need to make it?
- Does the person have a general understanding of the likely consequences of making, or not making, this decision?
- Is the person able to understand, retain, use and weigh up the information relevant to this decision?

- Can the person communicate their decision (by talking, using sign language or any other means)? Would the services of a professional (such as a speech and language therapist) be helpful?

Assessing capacity to make more complex or serious decisions

- Is there a need for a more thorough assessment (perhaps by involving a doctor or other professional expert)?

5 What does the Act mean when it talks about ‘best interests’?

One of the key principles of the Act is that any act done for, or any decision made on behalf of a person who lacks capacity must be done, or made, in that person’s *best interests*. That is the same whether the person making the decision or acting is a family carer, a paid care worker, an attorney, a court-appointed deputy, or a healthcare professional, and whether the decision is a minor issue – like what to wear – or a major issue, like whether to provide particular healthcare.

As long as these acts or decisions are in the best interests of the person who lacks capacity to make the decision for themselves, or to consent to acts concerned with their care or treatment, then the decision-maker or carer will be protected from liability.

There are exceptions to this, including circumstances where a person has made an advance decision to refuse treatment (see chapter 9) and, in specific circumstances, the involvement of a person who lacks capacity in research (see chapter 11). But otherwise the underpinning principle of the Act is that all acts and decisions should be made in the best interests of the person without capacity.

Working out what is in someone else’s best interests may be difficult, and the Act requires people to follow certain steps to help them work out whether a particular act or decision is in a person’s best interests. In some cases, there may be disagreement about what someone’s best interests really are. As long as the person who acts or makes the decision has followed the steps to establish whether a person has capacity, and done everything they reasonably can to work out what someone’s best interests are, the law should protect them.

This chapter explains what the Act means by ‘best interests’ and what things should be considered when trying to work out what is in someone’s best interests. It also highlights some of the difficulties that might come up in working out what the best interests of a person who lacks capacity to make the decision actually are. In this chapter, as throughout the Code, a person’s capacity (or lack of capacity) refers specifically to their capacity to make a particular decision at the time it needs to be made.

Quick summary

A person trying to work out the best interests of a person who lacks capacity to make a particular decision (‘lacks capacity’) should:

Encourage participation

- do whatever is possible to permit and encourage the person to take part, or to improve their ability to take part, in making the decision

Identify all relevant circumstances

- try to identify all the things that the person who lacks capacity would take into account if they were making the decision or acting for themselves

Find out the person's views

- try to find out the views of the person who lacks capacity, including:
 - the person's past and present wishes and feelings – these may have been expressed verbally, in writing or through behaviour or habits.
 - any beliefs and values (e.g. religious, cultural, moral or political) that would be likely to influence the decision in question.
 - any other factors the person themselves would be likely to consider if they were making the decision or acting for themselves.

Avoid discrimination

- not make assumptions about someone's best interests simply on the basis of the person's age, appearance, condition or behaviour.

Assess whether the person might regain capacity

- consider whether the person is likely to regain capacity (e.g. after receiving medical treatment). If so, can the decision wait until then?

If the decision concerns life-sustaining treatment

- not be motivated in any way by a desire to bring about the person's death. They should not make assumptions about the person's quality of life.

Consult others

- If it is practical and appropriate to do so, consult other people for their views about the person's best interests and to see if they have any information about the person's wishes and feelings, beliefs and values. In particular, try to consult:
 - anyone previously named by the person as someone to be consulted on either the decision in question or on similar issues
 - anyone engaged in caring for the person
 - close relatives, friends or others who take an interest in the person's welfare
 - any attorney appointed under a Lasting Power of Attorney or Enduring Power of Attorney made by the person
 - any deputy appointed by the Court of Protection to make decisions for the person.
- For decisions about major medical treatment or where the person should live and where there is no-one who fits into any of the above categories, an Independent Mental Capacity Advocate (IMCA) must be consulted. (See chapter 10 for more information about IMCAs.)
- When consulting, remember that the person who lacks the capacity to make the decision or act for themselves still has a right to keep their affairs private – so it would not be right to share every piece of information with everyone.
- see if there are other options that may be less restrictive of the person's rights.

Avoid restricting the person's rights

- See if there are other options that may be less restrictive of the person's rights

Take all of this into account

- weigh up all of these factors in order to work out what is in the person's best interests.

6 What protection does the Act offer for people providing care or treatment?

Section 5 of the Act allows carers, healthcare and social care staff to carry out certain tasks without fear of liability. These tasks involve the personal care, healthcare or treatment of people who lack capacity to consent to them. The aim is to give legal backing for acts that need to be carried out in the best interests of the person who lacks capacity to consent.

This chapter explains:

- how the Act provides protection from liability
- how that protection works in practice
- where protection is restricted or limited, and
- when a carer can use a person's money to buy goods or services without formal permission.

In this chapter, as throughout the Code, a person's capacity (or lack of capacity) refers specifically to their capacity to make a particular decision at the time it needs to be made.

Quick summary

The following steps list all the things that people providing care or treatment should bear in mind to ensure they are protected by the Act.

Acting in connection with the care or treatment of someone who lacks capacity to consent

- Is the action to be carried out in connection with the care or treatment of a person who lacks capacity to give consent to that act?
- Does it involve major life changes for the person concerned? If so, it will need special consideration.
- Who is carrying out the action? Is it appropriate for that person to do so at the relevant time?

Checking whether the person has capacity to consent

- Have all possible steps been taken to try to help the person make a decision for themselves about the action?
- Has the two-stage test of capacity been applied?
- Are there reasonable grounds for believing the person lacks capacity to give permission?

Acting in the person's best interests

- Has the best interests checklist been applied and all relevant circumstances considered?
- Is a less restrictive option available?
- Is it reasonable to believe that the proposed act is in the person's best interests?

Understanding possible limitations on protection from liability

- If restraint is being considered, is it necessary to prevent harm to the person who lacks capacity, and is it a proportionate response to the likelihood of the person suffering harm – and to the seriousness of that harm?
- Could the restraint be classed as a 'deprivation of the person's liberty'?
- Does the action conflict with a decision that has been made by an attorney or deputy under their powers?

Paying for necessary goods and services

- If someone wishes to use the person's money to buy goods or pay for services for someone who lacks capacity to do so themselves, are those goods or services necessary and in the person's best interests?
- Is it necessary to take money from the person's bank or building society account or to sell the person's property to pay for goods or services? If so, formal authority will be required.

7 What does the Act say about Lasting Powers of Attorney?

This chapter explains what Lasting Powers of Attorney (LPAs) are and how they should be used. It also sets out:

- how LPAs differ from Enduring Powers of Attorney (EPAs)
- the types of decisions that people can appoint attorneys to make (attorneys are also called 'donees' in the Act)
- situations in which an LPA can and cannot be used
- the duties and responsibilities of attorneys
- the standards required of attorneys, and
- measures for dealing with attorneys who don't meet appropriate standards.

This chapter also explains what should happen to EPAs that were made before the Act comes into force.

In this chapter, as throughout the Code, a person's capacity (or lack of capacity) refers specifically to their capacity to make a particular decision at the time it needs to be made.

Quick summary

Anyone asked to be an attorney should:

- consider whether they have the skills and ability to act as an attorney (especially if it is for a property and affairs LPA)
- ask themselves whether they actually want to be an attorney and take on the duties and responsibilities of the role.

Before acting under an LPA, attorneys must:

- make sure the LPA has been registered with the Public Guardian
- take all practical and appropriate steps to help the donor make the particular decision for themselves.

When acting under an LPA:

- make sure that the Act's statutory principles are followed
- check whether the person has the capacity to make that particular decision for themselves. If they do:
 - a personal welfare LPA cannot be used – the person must make the decision
 - a property and affairs LPA can be used even if the person has capacity to make the decision, unless they have stated in the LPA that they should make decisions for themselves when they have capacity to do so.

At all times, remember:

- anything done under the authority of the LPA must be in the person's best interests

- anyone acting as an attorney must have regard to guidance in this Code of Practice that is relevant to the decision that is to be made
- attorneys must fulfil their responsibilities and duties to the person who lacks capacity.

8 What is the role of the Court of Protection and court-appointed deputies?

This chapter describes the role of the Court of Protection and the role of court-appointed deputies. It explains the powers that the court has and how to make an application to the court. It also looks at how the court appoints a deputy to act and make decisions on behalf of someone who lacks capacity to make those decisions. In particular, it gives guidance on a deputy's duties and the consequences of not carrying them out responsibly.

The Office of the Public Guardian (OPG) produces detailed guidance for deputies. See the Annex for more details of the publications and how to get them. Further details on the court's procedures are given in the Court of Protection Rules and Practice Directions issued by the court.

In this chapter, as throughout the Code, a person's capacity (or lack of capacity) refers specifically to their capacity to make a particular decision at the time it needs to be made.

Quick summary

The Court of Protection has powers to:

- decide whether a person has capacity to make a particular decision for themselves
- make declarations, decisions or orders on financial or welfare matters affecting people who lack capacity to make such decisions
- appoint deputies to make decisions for people lacking capacity to make those decisions
- decide whether an LPA or EPA is valid, and
- remove deputies or attorneys who fail to carry out their duties.

Before accepting an appointment as a deputy, a person the court nominates should consider whether:

- they have the skills and ability to carry out a deputy's duties (especially in relation to property and affairs)
- they actually want to take on the duties and responsibilities.

Anyone acting as a deputy must:

- make sure that they only make those decisions that they are authorised to make by the order of the court
- make sure that they follow the Act's statutory principles, including:
 - considering whether the person has capacity to make a particular decision for themselves. If they do, the deputy should allow them to do so unless the person agrees that the deputy should make the decision
 - taking all possible steps to try to help a person make the particular decision
- always make decisions in the person's best interests
- have regard to guidance in the Code of Practice that is relevant to the situation
- fulfil their duties towards the person concerned (in particular the duty of care and fiduciary duties to respect the degree of trust placed in them by the court).

9 What does the Act say about advance decisions to refuse treatment?

This chapter explains what to do when somebody has made an advance decision to refuse treatment. It sets out:

- what the Act means by an ‘advance decision’
- guidance on making, updating and cancelling advance decisions
- how to check whether an advance decision exists
- how to check that an advance decision is valid and that it applies to current circumstances
- the responsibilities of healthcare professionals when an advance decision exists
- how to handle disagreements about advance decisions.

In this chapter, as throughout the Code, a person’s capacity (or lack of capacity) refers specifically to their capacity to make a particular decision at the time it needs to be made.

Quick summary

- An advance decision enables someone aged 18 and over, while still capable, to refuse specified medical treatment for a time in the future when they may lack the capacity to consent to or refuse that treatment.
- An advance decision to refuse treatment must be valid and applicable to current circumstances. If it is, it has the same effect as a decision that is made by a person with capacity: healthcare professionals must follow the decision.
- Healthcare professionals will be protected from liability if they:
 - stop or withhold treatment because they reasonably believe that an advance decision exists, and that it is valid and applicable
 - treat a person because, having taken all practical and appropriate steps to find out if the person has made an advance decision to refuse treatment, they do not know or are not satisfied that a valid and applicable advance decision exists.
- People can only make an advance decision under the Act if they are 18 or over and have the capacity to make the decision. They must say what treatment they want to refuse, and they can cancel their decision – or part of it – at any time.
- If the advance decision refuses life-sustaining treatment, it must:
 - be in writing (it can be written by a someone else or recorded in healthcare notes)
 - be signed and witnessed, and
 - state clearly that the decision applies even if life is at risk.
- To establish whether an advance decision is valid and applicable, healthcare professionals must try to find out if the person:
 - has done anything that clearly goes against their advance decision
 - has withdrawn their decision
 - has subsequently conferred the power to make that decision on an attorney, or
 - would have changed their decision if they had known more about the current circumstances.
- Sometimes healthcare professionals will conclude that an advance decision does not exist, is not valid and/or applicable – but that it is an expression of the person’s wishes. The healthcare professional must then consider what is set out in the advance decision as an expression of previous wishes when working out the person’s best interests (see chapter 5).

- Some healthcare professionals may disagree in principle with patients' decisions to refuse life-sustaining treatment. They do not have to act against their beliefs. But they must not simply abandon patients or act in a way that affects their care.
- Advance decisions to refuse treatment for mental disorder may not apply if the person who made the advance decision is or is liable to be detained under the Mental Health Act 1983.

10 What is the new Independent Mental Capacity Advocate service and how does it work?

This chapter describes the new Independent Mental Capacity Advocate (IMCA) service created under the Act. The purpose of the IMCA service is to help particularly vulnerable people who lack the capacity to make important decisions about serious medical treatment and changes of accommodation, and who have no family or friends that it would be appropriate to consult about those decisions. IMCAs will work with and support people who lack capacity, and represent their views to those who are working out their best interests.

The chapter provides guidance both for IMCAs and for everyone who may need to instruct an IMCA. It explains how IMCAs should be appointed. It also explains the IMCA's duties and the situations when an IMCA should be instructed. Both IMCAs and decision-makers are required to have regard to the Code of Practice.

In this chapter, as throughout the Code, a person's capacity (or lack of capacity) refers specifically to their capacity to make a particular decision at the time it needs to be made.

Quick summary

Understanding the role of the IMCA service

- The aim of the IMCA service is to provide independent safeguards for people who lack capacity to make certain important decisions and, at the time such decisions need to be made, have no-one else (other than paid staff) to support or represent them or be consulted.
- IMCAs must be independent.

Instructing and consulting an IMCA

- An IMCA must be instructed, and then consulted, for people lacking capacity who have no-one else to support them (other than paid staff), whenever:
 - an NHS body is proposing to provide serious medical treatment, or
 - an NHS body or local authority is proposing to arrange accommodation (or a change of accommodation) in hospital or a care home, and
 - the person will stay in hospital longer than 28 days, or
 - they will stay in the care home for more than eight weeks.
- An IMCA may be instructed to support someone who lacks capacity to make decisions concerning:
 - care reviews, where no-one else is available to be consulted
 - adult protection cases, whether or not family, friends or others are involved

Ensuring an IMCA's views are taken into consideration

- The IMCA's role is to support and represent the person who lacks capacity.

11 How does the Act affect research projects involving a person who lacks capacity?

It is important that research involving people who lack capacity can be carried out, and that is carried out properly. Without it, we would not improve our knowledge of what causes a person to lack or lose capacity, and the diagnosis, treatment, care and needs of people who lack capacity.

This chapter gives guidance on involving people who lack capacity to consent to take part in research. It sets out:

- what the Act means by 'research'
- the requirements that people must meet if their research project involves somebody who lacks capacity
- the specific responsibilities of researchers, and
- how the Act applies to research that started before the Act came into force.

This chapter only deals with research in relation to adults. Further guidance will be provided on how the Act applies in relation to research involving those under the age of 18.

In this chapter, as throughout the Code, a person's capacity (or lack of capacity) refers specifically to their capacity to make a particular decision at the time it needs to be made.

Quick summary

The Act's rules for research that includes people who lack capacity to consent to their involvement cover:

- when research can be carried out
- the ethical approval process
- respecting the wishes and feelings of people who lack capacity
- other safeguards to protect people who lack capacity
- how to engage with a person who lacks capacity
- how to engage with carers and other relevant people.

This chapter also explains:

- the specific rules that apply to research involving human tissue and
- what to do if research projects have already been given the go-ahead.

The Act applies to all research that is intrusive. 'Intrusive' means research that would be unlawful if it involved a person who had capacity but had not consented to take part. The Act does not apply to research involving clinical trials (testing new drugs).

12 How does the Act apply to children and young people?

This chapter looks at the few parts of the Act that may affect children under 16 years of age. It also explains the position of young people aged 16 and 17 years and the overlapping laws that affect them. #

This chapter does not deal with research. Further guidance will be provided on how the Act applies in relation to research involving those under the age of 18.

Within this Code of Practice, 'children' refers to people aged below 16. 'Young people' refers to people aged 16–17. This differs from the Children Act 1989 and the law more generally, where the term 'child' is used to refer to people aged under 18.

In this chapter, as throughout the Code, a person's capacity (or lack of capacity) refers specifically to their capacity to make a particular decision at the time it needs to be made.

Quick summary

Children under 16

- The Act does not generally apply to people under the age of 16.
- There are two exceptions:
 - The Court of Protection can make decisions about a child's property or finances (or appoint a deputy to make these decisions) if the child lacks capacity to make such decisions within section 2(1) of the Act and is likely to still lack capacity to make financial decisions when they reach the age of 18 (section 18(3)).
 - Offences of ill treatment or wilful neglect of a person who lacks capacity within section 2(1) can also apply to victims younger than 16 (section 44).

Young people aged 16–17 years

- Most of the Act applies to young people aged 16–17 years, who may lack capacity within section 2(1) to make specific decisions.
- There are three exceptions:
 - Only people aged 18 and over can make a Lasting Power of Attorney (LPA).
 - Only people aged 18 and over can make an advance decision to refuse medical treatment.
 - The Court of Protection may only make a statutory will for a person aged 18 and over.

Care or treatment for young people aged 16–17

- People carrying out acts in connection with the care or treatment of a young person aged 16–17 who lacks capacity to consent within section 2(1) will generally have protection from liability (section 5), as long as the person carrying out the act:
 - has taken reasonable steps to establish that the young person lacks capacity
 - reasonably believes that the young person lacks capacity and that the act is in the young person's best interests, and
 - follows the Act's principles.
- When assessing the young person's best interests (see chapter 5), the person providing care or treatment must consult those involved in the young person's care and anyone interested in their welfare – if it is practical and appropriate to do so. This may include the young person's parents. Care should be taken not to unlawfully breach the young person's right to confidentiality (see chapter 16).
- Nothing in section 5 excludes a person's civil liability for loss or damage, or his criminal liability, resulting from his negligence in carrying out the act.

Legal proceedings involving young people aged 16-17

- Sometimes there will be disagreements about the care, treatment or welfare of a young person aged 16 or 17 who lacks capacity to make relevant decisions. Depending on the circumstances, the case may be heard in the family courts or the Court of Protection.
- The Court of Protection may transfer a case to the family courts, and vice versa.

13 What is the relationship between the Mental Capacity Act and the Mental Health Act 1983?

This chapter explains the relationship between the Mental Capacity Act 2005 (MCA) and the Mental Health Act 1983 (MHA). It:

- sets out when it may be appropriate to detain someone under the MHA rather than to rely on the MCA
- describes how the MCA affects people lacking capacity who are also subject to the MHA
- explains when doctors cannot give certain treatments for a mental disorder (in particular, psychosurgery) to someone who lacks capacity to consent to it, and
- sets out changes that the Government is planning to make to both Acts.

It does not provide a full description of the MHA. The MHA has its own Memorandum to explain the Act and its own Code of Practice to guide people about how to use it.⁵⁹

In this chapter, as throughout the Code, a person's capacity (or lack of capacity) refers specifically to their capacity to make a particular decision at the time it needs to be made.

Quick summary

- Professionals may need to think about using the MHA to detain and treat somebody who lacks capacity to consent to treatment (rather than use the MCA), if:
- it is not possible to give the person the care or treatment they need without doing something that might deprive them of their liberty
- the person needs treatment that cannot be given under the MCA (for example, because the person has made a valid and applicable advance decision to refuse an essential part of treatment)
- the person may need to be restrained in a way that is not allowed under the MCA
- it is not possible to assess or treat the person safely or effectively without treatment being compulsory (perhaps because the person is expected to regain capacity to consent, but might then refuse to give consent)
- the person lacks capacity to decide on some elements of the treatment but has capacity to refuse a vital part of it – and they have done so, or
- there is some other reason why the person might not get treatment, and they or somebody else might suffer harm as a result.
- Before making an application under the MHA, decision-makers should consider whether they could achieve their aims safely and effectively by using the MCA instead.
- Compulsory treatment under the MHA is not an option if:
 - the patient's mental disorder does not justify detention in hospital, or
 - the patient needs treatment only for a physical illness or disability.
- The MCA applies to people subject to the MHA in the same way as it applies to anyone else, with four exceptions:
 - if someone is detained under the MHA, decision-makers cannot normally rely on the MCA to give treatment for mental disorder or make decisions about that treatment on that person's behalf
 - if somebody can be treated for their mental disorder without their consent because they are detained under the MHA, healthcare staff can treat them even if it goes against an advance decision to refuse that treatment
 - if a person is subject to guardianship, the guardian has the exclusive right to take certain decisions, including where the person is to live, and

- Independent Mental Capacity Advocates do not have to be involved in decisions about serious medical treatment or accommodation, if those decisions are made under the MHA.
- Healthcare staff cannot give psychosurgery (i.e. neurosurgery for mental disorder) to a person who lacks capacity to agree to it. This applies whether or not the person is otherwise subject to the MHA.

14 What means of protection exist for people who lack capacity to make decisions for themselves?

This chapter describes the different agencies that exist to help make sure that adults who lack capacity to make decisions for themselves are protected from abuse. It also explains the services those agencies provide and how they supervise people who provide care for or make decisions on behalf of people who lack capacity. Finally, it explains what somebody should do if they suspect that somebody is abusing a vulnerable adult who lacks capacity.

In this chapter, as throughout the Code, a person's capacity (or lack of capacity) refers specifically to their capacity to make a particular decision at the time it needs to be made.

Quick summary

Always report suspicions of abuse of a person who lacks capacity to the relevant agency.

Concerns about an appointee

- When someone is concerned about the collection or use of social security benefits by an appointee on behalf a person who lacks capacity, they should contact the local Jobcentre Plus. If the appointee is for someone who is over the age of 60, contact The Pension Service.

Concerns about an attorney or deputy

- If someone is concerned about the actions of an attorney or deputy, they should contact the Office of the Public Guardian.
- Concerns about a possible criminal offence
- If there is a good reason to suspect that someone has committed a crime against a vulnerable person, such as theft or physical or sexual assault, contact the police.
- In addition, social services should also be contacted, so that they can support the vulnerable person during the investigation.

Concerns about possible ill-treatment or wilful neglect

- The Act introduces new criminal offences of ill treatment or wilful neglect of a person who lacks capacity to make relevant decisions (section 44).
- If someone is not being looked after properly, contact social services.
- In serious cases, contact the police.

Concerns about care standards

- In cases of concern about the standard of care in a care home or an adult placement scheme, or about the care provided by a home care worker, contact social services.
- It may also be appropriate to contact the Commission for Social Care Inspection (in England) or the Care and Social Services Inspectorate for Wales.

Concerns about healthcare or treatment

- If someone is concerned about the care or treatment given to the person in any NHS setting (such as an NHS hospital or clinic) contact the managers of the service.
- It may also be appropriate to make a formal complaint through the NHS complaints procedure (see chapter 15).

15 What are the best ways to settle disagreements and disputes about issues covered in the Act?

Sometimes people will disagree about:

- a person's capacity to make a decision
- their best interests
- a decision someone is making on their behalf, or
- an action someone is taking on their behalf.

It is in everybody's interests to settle disagreements and disputes quickly and effectively, with minimal stress and cost. This chapter sets out the different options available for settling disagreements. It also suggests ways to avoid letting a disagreement become a serious dispute. Finally, it sets out when it might be necessary to apply to the Court of Protection and when somebody can get legal funding.

In this chapter, as throughout the Code, a person's capacity (or lack of capacity) refers specifically to their capacity to make a particular decision at the time it needs to be made.

Quick summary

- When disagreements occur about issues that are covered in the Act, it is usually best to try and settle them before they become serious.
- Advocates can help someone who finds it difficult to communicate their point of view. (This may be someone who has been assessed as lacking capacity.)
- Some disagreements can be effectively resolved by mediation.
- Where there is a concern about healthcare or social care provided to a person who lacks capacity, there are formal and informal ways of complaining about the care or treatment.
- The Health Service Ombudsman or the Local Government Ombudsman (in England) or the Public Services Ombudsman (in Wales) can be asked to investigate some problems that have not been resolved through formal complaints procedures.
- Disputes about the finances of a person who lacks capacity should usually be referred to the Office of the Public Guardian (OPG).
- When other methods of resolving disagreements are not appropriate, the matter can be referred to the Court of Protection.
- There are some decisions that are so serious that the Court of Protection should always make them.

16 What rules govern access to information about a person who lacks capacity?

This chapter gives guidance on:

- what personal information about someone who lacks capacity people involved in their care have the right to see, and
- how they can get hold of that information.

This chapter is only a general guide. It does not give detailed information about the law. Nor does it replace professional guidance or the guidance of the Information Commissioner's Office on the Data Protection Act 1998 (this guidance is available on its website, see Annex A). Where necessary, people should take legal advice.

This chapter is mainly for people such as family carers and other carers, deputies and attorneys, who care for or represent someone who lacks capacity to make specific decisions and in particular, lacks capacity to allow information about them to be disclosed. Professionals have their own codes of conduct, and they may have the support of experts in their organisations.

In this chapter, as throughout the Code, a person's capacity (or lack of capacity) refers specifically to their capacity to make a particular decision at the time it needs to be made.

Quick summary

Questions to ask when requesting personal information about someone who may lack capacity

- Am I acting under a Lasting Power of Attorney or as a deputy with specific authority?
- Does the person have capacity to agree that information can be disclosed? Have they previously agreed to disclose the information?
- What information do I need?
- Why do I need it?
- Who has the information?
- Can I show that:
 - I need the information to make a decision that is in the best interests of the person I am acting for, and
 - the person does not have the capacity to act for themselves?
- Do I need to share the information with anyone else to make a decision that is in the best interests of the person who lacks capacity?
- Should I keep a record of my decision or action?
- How long should I keep the information for?
- Do I have the right to request the information under section 7 of the Data Protection Act 1998?

Questions to ask when considering whether to disclose information

- Is the request covered by section 7 of the Data Protection Act 1998? Is the request being made by a formally authorised representative? If not:
 - Is the disclosure legal?
 - Is the disclosure justified, having balanced the person's best interests and the public interest against the person's right to privacy?

Questions to ask to decide whether the disclosure is legal or justified

- Do I (or does my organisation) have the information?
- Am I satisfied that the person concerned lacks capacity to agree to disclosure?
- Does the person requesting the information have any formal authority to act on behalf of the person who lacks capacity?
- Am I satisfied that the person making the request:
 - is acting in the best interests of the person concerned?

- needs the information to act properly?
- will respect confidentiality?
- will keep the information for no longer than necessary?
- Should I get written confirmation of these things?