

FAQ

Who must follow the Code?

Anyone acting in a professional or formal capacity under the Act must follow the Code. This may include:

- health professionals, for example consultants, doctors, nurses, allied health professionals
- social care professionals, for example social workers, safeguarding leads, safeguarding teams, community care staff
- care providers, for example care home managers, care home staff, domiciliary/home care workers, supported living staff
- emergency and front-line services, for example police officers, paramedics, ambulance staff, emergency responders dealing with vulnerable people
- public body staff, for example government workers, regulatory bodies such as Registration and Inspection, Department of Health and Social Care
- court and legal system, for example legal professionals, court officers or
- anyone with legal authority to act on behalf of the person in relation to financial or property matters, for example attorneys acting under an Enduring Powers of Attorney, court appointed receivers and appointees.

Family and informal carers are not legally required to follow the Code in the same way but are expected to have regard to it when making decisions.

How is capacity assessed?

[Capacity Act 2023, section 4 and 5.](#)

Capacity is assessed using the legal test as set out in the Act:

A person is considered to lack capacity if, at the time a decision needs to be made, they are unable to make that specific decision because of an impairment or disturbance in the functioning of their mind or brain.

A person may have capacity for some decisions (e.g. daily choices) while lacking capacity for more complex ones (e.g. financial or medical decisions).

What are the seven statutory principles?

[Capacity Act 2023, section 3.](#)

The following seven principles underpin all actions and decisions made under the Act:

1. Assume capacity unless established otherwise.
2. Do not assume lack of capacity because of age, appearance, condition or behaviour.
3. Take all practicable steps to help the person decide.
4. People may make unwise decisions, that does not mean they lack capacity.
5. Actions taken on behalf people lacking capacity must be in their best interests.
6. Decisions taken on behalf people lacking capacity must be in their best interests.
7. Choose the least restrictive option that still meets the purpose.

The Code explains how these principles must be applied in real life.

Can someone's capacity change?

[Capacity Act 2023, section 4\(2\) and 6\(5\)](#).

Yes. An impairment or disturbance in the functioning of the mind or brain may be temporary or permanent. This means a person's capacity may fluctuate due to:

- illness
- medication
- mental health conditions
- brain injury
- intoxication
- recovery or rehabilitation.

Support must be adapted accordingly, and decisions postponed when possible if the person is likely to regain capacity.

Does the Code apply to children and young people?

[Capacity Act 2023, section 4\(4\) and Chapter 7 of the Code](#).

The Act relates primarily to people aged 16 and over. The Code provides dedicated guidance on how the Act interacts with children and young people, and other legal frameworks within Chapter 8.

What decisions can never be made on someone's behalf?

[Capacity Act 2023, section 38 to 40](#).

Some decisions remain so personal that no one can make them for a person lacking capacity, including:

- consenting to marriage or civil partnership
- consenting to sexual relations
- consenting to end a marriage or civil partnership
- consenting to adoption
- decisions governed by mental health legislation
- voting in elections.

What does "best interests" mean?

[Capacity Act 2023, section 6 and Chapter 5 of the Code](#).

When a person lacks capacity, any action done or decision made must be in their best interests. This requires the decision-maker to:

- consider the person's past and present wishes, feelings, beliefs, values
- involve them as much as possible
- consult with those who know the person well
- consider less restrictive alternatives
- weigh all relevant circumstances.

Best interests is not about what the decision-maker would do, but what is right for that individual.

Who makes the best interests decision?

The decision-maker is the person responsible for making a particular decision at the time it needs to be made depending on the type of decision and the situation.

Examples:

- a doctor might make decisions about treatment, prescribing medication or surgery
- a social worker may make decisions about care arrangements, such as a care package or where a person should live.

The decision-maker will vary depending on the specific decision being made.

What support must be provided to help someone make a decision?

Capacity Act 2023, section 3(4) to 5(2).

All practicable steps must be taken to support a person to make their own decision. Support should be tailored to the needs of the individual and may include:

- using clear language or visual aids
- choosing the best time and location
- involving trusted people
- treating medical issues affecting cognition
- allowing extra time or breaking decisions into parts, and
- using alternative communication (e.g. signs, technology, Makaton).

Can restraint ever be used on someone who lacks capacity?

Capacity Act 2023, section 9(1-2) and Chapter 6 of the Code.

If there is reasonable belief that the person lacks capacity, restraint can only be used if:

- it is necessary to prevent harm to the person, and it is proportionate to the likelihood and seriousness of that harm and
- it is the least restrictive option and used for the shortest possible time.

How does the Act interact with the Mental Health Act 1998?

Chapter 9 of the Code.

If a person is detained under the Mental Health Act 1998 ("MHA") for treatment of a mental disorder, the MHA takes priority for treating mental disorder, but the Capacity Act may still apply to other decisions such as physical healthcare.

Protecting those who lack capacity

Chapter 10 of the Code.

Key protections include:

- assumption of capacity
- support to make decisions
- best interests requirement
- least restrictive option