

The Capacity Act 2023: Code of Practice

Overview

The Department of Health and Social Care is consulting on the draft Capacity Act 2023; Code of Practice. This consultation provides an opportunity for people who may use the Code, be affected by the Act, or have an interest in how it will operate, to share their views before the Code is finalised.

Prior to the Capacity Act 2023 (the Act), in the Isle of Man there was no statutory, legal framework governing decisions about a person's welfare, healthcare or social care where they lacked capacity to make specific decisions. Which in effect left the Isle of Man behind other jurisdictions.

The Act addresses this by providing a modern legal framework for supporting and empowering people to make their own decisions wherever possible. The Act sets out principles that must be followed and the safeguards in place to protect a person's rights wishes and feelings.

Where a person lacks capacity to make a decision, the Act enables decisions to be made or actions to be taken on their behalf, ensuring these are lawful, proportionate, in the person's best interest and the least restrictive way. As part of these protections, the Act also introduces the offences of ill-treatment and deliberate neglect.

The Act generally does not apply to children under 16, except in limited circumstances involving a child's property or financial affairs, and the offence of ill-treatment or neglect, which applies regardless of age.

The Act aims to:

- Support and empower people to make their own decisions wherever possible
- Protect the rights, wishes and feelings of people who may lack capacity
- Ensure that any intervention is proportionate and does not unnecessarily restrict a person's rights or freedoms
- Balance an individual's right to make their own decisions with the need to protect them from harm where they are unable to do so
- Ensure that any decision made on behalf of another person is made in their best interests
- Provide appropriate safeguards for individuals, carers, family members and professionals

At its heart, the Act places the individual at the centre of decision-making and promotes autonomy wherever possible, supported by appropriate safeguards where a person lacks capacity.

The legislation and the Code have been introduced to improve consistency and address weaknesses in current practice. They are intended to support anyone making decisions or taking actions for or on behalf of people who may lack capacity to make a specific decision for themselves.

Phased implementation of the Act

The Act is a significant piece of legislation and will be brought into force in phases rather than all at once. Phase 1 is intended to bring the day-to-day capacity assessment and best interests framework into force, supported by the Code of Practice and workforce training.

This staged approach is intended to ensure that the core decision-making framework is embedded first, before more specialist provisions and arrangements are brought into effect, such as Lasting Powers of Attorney. It also allows time for new processes, systems, guidance and training to be introduced in a planned and proportionate way.

The draft Code of Practice being consulted on has been developed to support the first phase of implementation, which is currently anticipated to commence in April 2027. The Code may be revised and expanded as further provisions of the Act are brought into force.

The Department will continue to work with those affected by the Act throughout the implementation programme to ensure that the Code remains practical, relevant and effective.

The Department has published an Implementation Plan, which is available in the 'Related' section at the bottom of this page, that will be reviewed and updated periodically.

Why your views matter

We know that topics such as capacity, decision-making and best interests can sometimes seem complex.

The purpose of this consultation is to seek views, before the Code is finalised, from people who may use it, be affected by the Act or have an interest in how it operates.

We want to understand whether the draft Code of Practice is clear, accessible, accurate and practically workable. In particular, the Department is seeking views on whether the guidance explains the Act in a way that supports consistent decision-making, whether it provides sufficient practical assistance for professionals and others involved in care and support, and whether there are any areas where further clarification, examples or additional guidance may be required.

The consultation will also provide an opportunity for people with lived experience, families, carers, professionals, providers, partners and representative bodies to comment on how the Code may operate in real-life situations.

The feedback will help inform the final version of the Capacity Act 2023: Code of Practice.

Reasonable adjustments and alternative formats

The Department is committed to equal opportunities and our aim is to make our documents easy to use and accessible to all. This consultation relies on respondents accessing and reading the Code of Practice PDF under 'Related' below, which might not be compatible with all assistive technologies. However, there are text summaries provided throughout the consultation to provide in-page context to answer questions.

We will take steps to accommodate any reasonable adjustments and provide such assistance as you may reasonably require to enable you to access or reply to this consultation.

If you would like to receive this document in another format or need assistance with accessing or replying to this consultation, please email James.Skelly@gov.im or telephone +44 1624 656041.

Responding to this consultation

The questionnaire has been set out in 4 sections:

Section 1 - About you

Section 2 - Questions on specific chapters of the Code

Section 3 - General questions about the Code

Section 4 - Aimed at professionals and organisations that will need to have regard to the Act

You may decide to answer only those questions that are relevant to your experience or area of interest. You may skip any questions where you do not feel able to comment and you do not need to complete every question for your views to be considered.

Before responding, it may be helpful to:

Read the draft Code of Practice, whether this is in full or just the areas of the Code that are of interest to you

Refer to the Capacity Act 2023, if you would like to consider the legal framework alongside the draft Code

However, each page explains the section it relates to and the Code of Practice is available on every page for easier reference.

There are 23 questions on this consultation which are open to everyone, plus an additional 8 questions for professionals or organisations. It should take between 45 minutes to an hour to complete depending on the length and detail of your answers.

Participants are not required to complete the questionnaire in one sitting. Responses may be saved and revisited at any time before the consultation closes, allowing you to answer further questions, add comments, or amend your responses as needed.

You can respond to this consultation online by clicking on the 'Online survey' link below.

Alternatively, you can download a paper version of this consultation available in the 'Related' section below and email it to James.Skelly@gov.im or post it to:

Policy and Legislation Team,
Department of Health and Social Care,
First Floor, Belgravia House,
Circular Road,
Douglas,
IM1 1AE.

What happens next

Once the consultation closes, the Department will carefully analyse and consider the responses received and revise the Code as necessary. The Department will also publish the results of the consultation, including information about the next steps.

Publication of consultation feedback is expected within 12 weeks of the consultation closing, in line with Consultation Hub guidance.

Subject to the responses from the consultation, a revised version of the Code is expected to be taken back to Tynwald in November 2026.

Section 1: About you

1 Please tell us who this response represents:

Please select only one item

- ☐ I am responding in a personal capacity
- ☐ I am responding on behalf of an organisation, service provider, representative body or other group
- ☐ I am responding in another capacity (please specify below)

If you're responding in another capacity, please specify:

2 Please also select the category or categories that best describe you:

Please select all that apply

- ☐ Member of the public
- ☐ Person with lived experience
- ☐ Family member, friend or unpaid carer
- ☐ Health or social care professional
- ☐ Care provider or support provider
- ☐ Legal professional
- ☐ Public body or organisation
- ☐ Care or support worker
- ☐ Registered manager or service manager
- ☐ Other (please specify below)

If other, please specify:

3 May we publish your response?

Please read our [Privacy Policy](#) for more details and your rights.

More information

- Publish in full – full answers **may** be published on the hub
- Publish anonymously – only your responses **may** be published on the hub
- Do not publish – **nothing will** be published publicly on the hub (your response will only be part of a larger summary response document)

(Required)

Please select only one item

- ☐ Yes, you can publish my response in full
- ☐ Yes, you may publish my response anonymously
- ☐ No, please do not publish my response

Understanding the Code

Using the Code

Throughout the Code of Practice, the Capacity Act 2023 is referred to as 'the Act', and all section references relate to that Act unless otherwise stated. References to sections of the Act are given in the form section 4(1), with subsection numbers shown in brackets.

Where provisions from other legislation are referred to, the full title of the relevant Act will be used (for example, 'the Mental Health Act 1998'), unless otherwise indicated.

The Code of Practice is referred to as 'the Code'.

Each page of this consultation gives a small summary of the Chapter. The Code of Practice, opened to the relevant Chapter it relates to, will be available on every page for easier reference.

Related information

What the Code provides guidance on
The Code explains the Act and its key provisions.

Chapter 1 introduces the Capacity Act 2023.

Chapter 2 sets out the seven 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 supported to make their own decisions as far as possible.

Chapter 4 explains how the Act defines 'a person who lacks capacity to make a decision' and sets out a clear test for assessing whether a person lacks capacity to make a specific decision at the time it needs to be made.

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 who provide care or treatment for someone who lacks the capacity to consent to the action or decision being taken.

Chapter 7 explains those parts of the Act which can apply to children and young people and how these relate to other laws affecting them.

Chapter 8 describes the role of the court in making decisions or declarations 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 how the Act relates to the Mental Health Act 1998.

Chapter 10 explains the new offences of ill-treatment and deliberate neglect under the Act, and the protections in place for individuals who are unable to make decisions for themselves.

Chapter 11 examines the various ways that disagreements and disputes over decisions made under the Act or otherwise affecting people who lack capacity to make relevant decisions can be resolved.

Chapter 12 summarises how the laws about data protection and freedom of information relate to the provision of the Act.

Areas of the Act not covered by the Code and pending implementation

It is acknowledged that certain provisions of the Act, including Advance Decisions to Refuse Treatment (ADRT), Lasting Powers of Attorney (LPA), supervisory functions, safeguards relating to research, and formal processes concerning restrictions on a person's liberty, are not yet in force. As such, the Code does not provide guidance on these areas at this stage. Instead, it focuses on the currently implemented aspects of the legislation, while recognising that further guidance will be developed and introduced as these provisions are enacted through the phased implementation programme. In the interim all users of the Code must continue to operate within existing legal and policy frameworks when addressing matters related to these areas.

Scenarios used in the Code

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

What it means when we talk about 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 specific decision or take a specific action for themselves at the time it 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 day-to-day 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 the time it needs to be taken may be able to make that decision at a later date. For example, they may 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 or regain capacity to make decisions for themselves. Chapter 4 provides a full definition of what is meant by 'lacks capacity'.

Where to find out more information

The Code is not an exhaustive guide or complete statement of the law. Under the Act the Department may revise the Code from time to time and may also issue more than one Code of Practice to provide guidance on specific capacity matters. Many organisations provide guidance on capacity related matters.

Some organisations produce materials to help people who need support to make decisions and for those who support them. Some of this material is designed to help people with specific conditions, such as Alzheimer's disease or a learning disability.

Glossary of terms used throughout the Code

For ease of reference, a range of terms that are referred to within the various Chapters are described below.

Glossary of terms

the Act

Capacity Act 2023.

Adult

For the purposes of the Act and the Code, references to age apply to persons who are aged 16 years or over.

Adult at risk / vulnerable adult

The term 'vulnerable adult' is used in the Safeguarding Act 2018, however in practice the term 'adult at risk' may also be used to describe a person aged 18 or over who:

- Has care and support needs
 - Is experiencing or at risk of abuse or neglect
 - Is unable to protect themselves because of those needs
-

Advance directive

For the Code a term used to describe where a person has made an advance decision when they had capacity to refuse a specified medical treatment in defined future circumstances. Though not legally binding, where they exist, they should be used to help find out what someone's wishes and feelings might be, as part of working out their best interests.

Advocate (legal)

A legal practitioner authorised to practise as an advocate in the Isle of Man, including advising on Manx law and representing clients before the Isle of Man courts.

Advocacy (Health and Social Care) / Independent Advocacy services

Independent Advocacy is a service that ensures individuals are supported to have their voices heard, their wishes and feelings represented, and their rights upheld in decisions affecting their lives, by an advocate who operates wholly independent of care providers, decision-makers, and commissioning authorities, and whose sole duty is to the individual, free from conflicts of interest. Under the Act this is not a statutory function.

Appointee

An individual appointed under social security legislation to act as an appointee, enabling them to claim and manage state benefits on behalf of a person who lacks capacity to manage their own claim. However, an appointee's authority is strictly limited to benefit-related income and does not extend to other assets, savings or property.

Approved Social Worker / ASW

Within the Mental Health Act 1998, an Approved Social Worker (ASW) is a professionally qualified and authorised social worker who carries out specific statutory functions under the Mental Health Act 1998. They are specially trained and experienced in mental disorder and mental health law.

Functions include coordinating assessments that may lead to them making an application for compulsory detention or guardianship, consider the least restrictive options available, and acting as a safeguard for service users' rights by ensuring that compulsory powers are used lawfully, proportionately, and only when necessary. They also consult with the nearest relative and other professionals.

Assessor

A suitably skilled and competent person, appropriate to the decision, who undertakes a capacity assessment by applying the statutory principles and functional test to determine whether a person can make a specific decision. This role is not formally defined by the Capacity Act 2023.

Best interests

Is the legal requirement under the Act that any decision or action made on behalf of a person who lacks capacity must be made for their overall benefit, taking into account all relevant circumstances, including their wishes and feelings, beliefs and values, the views of others, and the least restrictive option available.

Capacity

The ability to make a decision about a particular matter at the time the decision needs to be made. The legal definition of a person who lacks capacity is set out in section 4 of the Act (Lack of capacity).

Carer

The role of the carer is different from the role of a professional care worker. A carer is someone who provides, or intends to provide, unpaid care and support to someone whose health, wellbeing or daily functioning would be adversely affected without that help.

Care worker

Someone employed to provide care and support. They could be employed by the person themselves, by someone acting on the person's behalf or by a care agency.

the Code

Capacity Act 2023: Code of Practice.

Complaint

An expression of dissatisfaction about a service, action, decision, behaviour, conduct, delay, communication or the way a process has been carried out. A complaint can be made formally or informally.

Consent

A person's voluntary and informed agreement to an act or decision.

Court

In the chapters throughout the Code 'court' refers to the Isle of Man Courts of Justice.

Covert treatment

The administration of medication or other treatment to a person without their knowledge, usually by disguising it in food or drink.

Data Protection Act 2018

An Act to enable provision to be made to adequately protect personal data; to regulate the control and processing of personal data; and for connected purposes.

Data subject

The individual to whom personal data relates.

Decision-maker

The person responsible for making the decision on behalf of someone who lacks capacity. This role is not formally defined by the Capacity Act 2023.

Deliberate neglect (offence) / willful neglect

Section 42 of the Act (Ill-treatment or neglect) introduces a criminal offence of deliberate neglect of a person who lacks capacity (otherwise known as wilful neglect). An intentional or deliberate omission or failure to carry out an act of care by someone who has care of a person who lacks (or whom the person reasonably believes lacks) capacity to care for themselves.

the Department

Department of Health and Social Care.

Dispute

A sustained or formal disagreement where early or informal resolution has not been possible and escalation is required.

European Convention on Human Rights / ECHR

An international treaty protecting fundamental human rights and freedoms.

Enduring Power of Attorney / EPA

A document created under the Powers of Attorney Act 1987 appointing one or more people to manage the donor's property and financial affairs if the donor later loses capacity to do so themselves.

Executive function

Mental skills that enable a person to plan, organise, regulate behaviour, consider consequences and follow through on decisions.

Fluctuating capacity

A person's ability to make a decision that changes over time, meaning they may have capacity at some times but not at others. This may occur, for example, due to conditions such as dementia or schizophrenia, or due to the effects of drugs or alcohol.

GDPR / The Applied GDPR

General Data Protection Regulation (EU) 2016/679 as applied on the Isle of Man, taking the meanings given in the Data Protection (Application of GDPR) Order 2018.

Guardian ad litem

A person appointed by the court, independently of the Act, to represent and protect the best interests of a child during legal proceedings. They do not act for the parents or any other party; their sole role is to help the court understand what outcome is best for the child's welfare.

Guardianship

Under the Mental Health Act 1998, a guardian is appointed to help manage the care, welfare, and living arrangements of a person with a mental disorder who needs support in the community but does not require detention in hospital.

Harm

In accordance with the Act, harm includes physical, psychological, financial or other harm, and what constitutes harm will vary depending on the circumstances.

Health and Social Care Ombudsmen Board / HSCOB

The HSCOB is a statutory body set up to review unresolved complaints made about health and social care services which have been provided by Manx Care or services commissioned by Manx Care.

Ill-treatment (offence)

Section 42 of the Act (Ill-treatment or neglect) introduces a criminal offence of ill-treatment of a person who lacks capacity. For a person to be found guilty of ill-treatment, they must either have deliberately ill-treated the person or be reckless as to whether they were ill-treating the person or not.

Impairment or disturbance of the mind or brain

A condition or effect that affects how the mind or brain functions, whether temporary or permanent, and which may affect a person's ability to make a decision.

the individual / the person / 'P'

Unless otherwise stated, references in the Code to 'the individual' mean the person who is at the centre of the decision-making process under the Capacity Act 2023 i.e. the person who lacks, or may lack, capacity to make the specific decision at the relevant time.

For ease of reading, the Code uses a range of terms to identify the individual (for example 'the person' or 'the patient'), these are not intended to indicate different legal statuses or different people unless expressly stated.

Information Commissioner's Office / ICO

An independent authority responsible for upholding the public's information rights and promoting and enforcing compliance with the Island's information rights legislation.

Least restrictive option

The requirement to consider whether the purpose of an act or decision can be achieved in a way that is less restrictive of the person's rights and freedoms.

Legal authority

Those who are legally allowed to act, on behalf of a person who lacks capacity, in relation to specified matters. In the Code, this refers to a person acting under Enduring Power of Attorney or a Receiver appointed under the Mental Health Act 1998, and only within the scope of the authority they have been given.

Life-sustaining treatment

The Act states this is treatment that, in the view of a person providing health care for the person concerned, is necessary to sustain life.

Litigation friend

A person appointed by the court to conduct legal proceedings on behalf of, and in the name of, someone who lacks capacity to conduct the litigation or to instruct a legal advocate themselves. This is set out 3.13 of the Rule of the High Court.

Makaton

Makaton is a unique language programme that uses symbols, signs and speech to enable people to communicate.

Mediation

A process for resolving disagreement in which an impartial and independent third party (the mediator) helps to find a mutually acceptable resolution.

MHA

Mental Health Act 1998.

MHA Code

Mental Health Act: Code of Practice.

Multi-disciplinary team

A team of professionals with different skills that contribute to a person's care.

Nearest relative

A legally defined role determined under the Mental Health Act 1998, with a fixed statutory hierarchy (e.g. spouse or partner, then children, then parents, then siblings etc.).

Next of kin

There is no statutory definition of 'next of kin'. It generally means a person's identified close contact for communication and support. It confers no automatic legal rights or decision-making authority, including no automatic authority to consent to treatment or access confidential information. This is distinct from the 'nearest relative' under the Mental Health Act 1998.

Patient

Generally, a patient is any person receiving healthcare services, whether public (Manx Care) or private, including GP patients, hospital inpatients, outpatients, and community patients.

Under the Mental Health Act 1998, a patient is a person who is suffering from (or believed to be suffering from) a mental disorder and who is admitted, detained, treated, assessed, or placed under Guardianship as set out in the Mental Health Act 1998.

Practicable

Practicable actions are reasonable, proportionate, appropriate and realistic given the circumstances.

Protection from liability

Legal protection, granted to anyone who has acted or made decisions in line with the Act's principles.

Property

As defined by the Act, this includes anything a person owns or has rights over, such as land, possessions, money, financial assets, and legal rights (for example, the right to make a claim or enforce a payment).

Rights and freedoms

The individual's legal and human rights, including autonomy, dignity, liberty, and freedom from unnecessary restriction or interference.

Reasonable belief

A belief based on proper steps (as set out in the Act), relevant information and sound reasoning - not guesswork or assumptions - that leads the decision-maker to conclude that what they are doing is in the person's best interests.

Receiver

A Receiver is a person appointed by the court under section 103 of the Mental Health Act 1998 to manage the property and affairs of a person who is incapable, by reason of mental disorder, of managing those matters for themselves.

Restraint

Actions that involve using or threatening force, or limiting a person's freedom of movement, whether or not they are resisting.

Statutory principles

The seven legal principles set out in section 3 of the Act (The principles) that must be followed when making decisions or taking actions for a person who lacks capacity. They underpin all decisions made under the Act.

Treatment

As defined by the Act, this includes care, medical intervention, and procedures used to diagnose a condition.

Unwise decision

A decision that others may consider risky, ill-judged or contrary to advice, but which does not of itself indicate that a person lacks capacity to make the decision.

Vulnerable adult / Adult at risk

See 'adult at risk'.

Written statements of wishes and feelings

For the purposes of the Code, a person might have made statements before losing capacity about their wishes and feelings regarding issues such as the type of medical treatment they would want in the case of future illness, where they would prefer to live, or how they wish to be cared for. Where they exist, they should be used to help find out what someone's wishes and feelings might be, as part of working out their best interests.

Introduction

The Capacity Act 2023 ('the Act') provides a statutory framework for people in the Isle of Man who lack capacity to make decisions for themselves, or who have capacity but wish to prepare for a time when they may lack capacity.

The Code is not law, but it does have statutory force. This means that certain categories of people have a legal duty to have regard to it when working with or caring for individuals who may lack capacity to make decisions for themselves.

Once the Act is fully in force, the categories of people that are required to have regard to the Code include anyone who is:

- An attorney under a Lasting Power of Attorney
- Persons assessing whether another person has capacity in relation to any matter
- Persons acting in connection with the care or treatment of another person (including those being paid for acts for or in relation to a person who lacks capacity)
- Persons carrying out research in reliance on any provision made under the Act
- Persons appointed as receivers under Part 7 of the Mental Health Act 1998

Those assessing someone's capacity, or acting in connection with the care and treatment of another person, in a professional manner may include:

- Healthcare professionals
- Social care professionals
- Others who may, from time to time, be involved in the care of individuals who lack capacity to make the decision in question

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

- Care assistants in care homes
- Care workers providing domiciliary care services
- Support workers
- Others who may have been contracted to provide a service to people who lack capacity to consent to that service, for example staff at a day care centre or at an activity group

The Act also applies more generally to anyone who provides care for, or support to, a person who lacks capacity to make specific decisions. Although such individuals may not be under a legal duty to have regard to the Code, they should, so far as they are aware of it, follow the guidance it contains. Doing so will assist them in understanding and applying the Act correctly and appropriately.

A failure to follow the Code may be relied on as evidence in civil or criminal proceedings where the court or tribunal considers it relevant. If a court or tribunal finds that a person making decisions for someone who lacks, or may lack, capacity has not acted in that person's best interests, it can take their non-compliance with the Code into account as evidence. For this reason, anyone involved in caring for or making decisions on behalf of a person who lacks, or may lack, capacity should be familiar with the Code.

Section 2: Questions on specific chapters of the Code

Chapter 1- Introduction to the Capacity Act 2023

Summary

Chapter 1 introduces the Capacity Act 2023, explains why it has been introduced, who it applies to, and the overall purpose of the legislation in supporting and protecting people who may have difficulty making certain decisions for themselves.

Key points

- The underlying philosophy of the Act is to empower people to make their own decisions where possible
 - The Act provides the legal framework for making decisions and taking actions on behalf of people who lack the capacity to make specific decisions for themselves
 - It applies whenever someone is working with, treating, supporting or caring a person who may lack capacity
 - The Act covers a wide range of decisions made, these can be decisions about day-to-day matters or for major life-changing events
 - Certain decisions can never be made on someone's behalf
 - The Capacity Act sits alongside other legislation (e.g. Mental Health Act 1998, Human Rights Act 2001) which may also apply
-
- Anyone required to follow the Act should use the Code as guidance to inform their actions and decisions

Chapter 2 – Statutory principles

Summary

Chapter 2 sets out the seven statutory principles that underpin the Act and explains how they should guide all actions, decisions and interactions involving people who may lack capacity.

Key points

There are seven statutory principles which underpin all decision-making and actions taken under the Act, summarised below:

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

4 Do you agree the draft Code clearly explains the seven statutory principles of the Capacity Act 2023?

Please select only one item

- ☐ Strongly agree
- ☐ Agree
- ☐ Neither agree nor disagree
- ☐ Disagree
- ☐ Strongly disagree
- ☐ Don't know or not applicable

Please provide any comments that you may consider relevant:

Chapter 3 – Helping people to make their own decisions

Summary

Chapter 3 explains the duty to take all practicable steps to support a person to make their own decision before concluding that they lack capacity. It provides guidance on practical steps that can be taken to maximise a person's ability to participate in decision making.

Key points

- The Act requires that all practicable steps are taken to support a person to make their own decisions before concluding that they lack capacity
- The type and level of support required will depend on the nature and significance of the decision, and the person's individual circumstances
- Support may include:
 - Providing information in accessible formats
 - Using appropriate communication methods
 - Choosing suitable timing and settings
 - Involving trusted people where appropriate
- Support must not amount to coercion or undue influence
- In urgent or emergency situations, decisions may need to be made without full support, but the person should still be involved as far as practicable

5 Do you agree the draft Code gives enough practical guidance on supporting people to make their own decisions?

Please select only one item

- ☐ Strongly agree
- ☐ Agree
- ☐ Neither agree nor disagree
- ☐ Disagree
- ☐ Strongly disagree
- ☐ Don't know or not applicable

Please provide any comments that you may consider relevant:

Chapter 4 – What capacity means and how to assess it

Summary

Chapter 4 explains how the Act defines a person who lacks capacity and the approach for applying the legal test for assessing whether a person can make a particular decision at the time it needs to be made. It provides guidance on how capacity assessments should be recorded.

Key points

- There is an assumption that people have the capacity to make their own decisions. If there is a proper reason to doubt that the person has capacity to make the decision, it is necessary to assess their capacity
- Before acting for someone, carers and professionals must take reasonable steps to support decision-making and have a reasonable belief about whether the person lacks capacity
- For day-to-day decisions, the person involved in providing care or support at the time may assess capacity. For more serious or complex decisions, a more formal assessment and professional input may be needed
- 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. It is important to take all possible steps to try to help people to make a decision for themselves
- The legal test asks:
 - Is there an impairment of or disturbance in the functioning of the mind or brain?
 - Does that impairment mean the person is unable to make the specific decision when required?
- Someone is unable to make a decision if they cannot understand the information relevant to the decision, retain that information for an appropriate period, use or weigh that information as part of the process of making the decision, or communicate their decision

6 Do you agree the draft Code clearly explains how capacity should be assessed?

Please select only one item

- ☐ Strongly agree
- ☐ Agree
- ☐ Neither agree nor disagree
- ☐ Disagree
- ☐ Strongly disagree
- ☐ Don't know or not applicable

Please provide any comments that you may consider relevant:

Chapter 5 – Best interests

Summary

Chapter 5 explains how decisions should be made when a person lacks capacity to make a particular decision for themselves. It provides guidance on applying the best interests checklist and involving the person and others in the decision-making process.

Key points

A decision-maker trying to work out the best interests of a person who lacks capacity to make a particular decision should:

- Identify the available options
- Consider the factors in the best interests checklist set out in the Act
- Avoid restricting the person's rights by seeing if there are other options that may be less restrictive of the person's rights and explaining reasoning if the least restrictive option is not pursued
- Weigh up all of these factors in order to work out what is in the person's best interests
- Consider whether a record of the decision needs to be made
- Where ascertainable, wishes and feelings, beliefs and values should be treated as a paramount consideration when determining best interests

7 Do you agree the draft Code clearly explains how best interests decisions should be made?

Please select only one item

- ☐ Strongly agree
- ☐ Agree
- ☐ Neither agree nor disagree
- ☐ Disagree
- ☐ Strongly disagree
- ☐ Don't know or not applicable

Please provide any comments that you may consider relevant:

Chapter 6 – Protection for people providing care or treatment

Summary

Chapter 6 explains the legal protections available to those providing care, support or treatment to a person who lacks capacity, including the circumstances in which actions taken in connection with care or treatment may be protected from liability.

Key points

- Section 8 of the Act (Acts in connection with care or treatment) provides protection from liability for people who provide care or treatment for someone who lacks capacity, as long as they have acted reasonably and, in the person's best interests under section 6 of the Act (Best interests)
 - Before acting or making a decision, reasonable steps must be taken to establish whether the person has capacity to consent to the care or treatment
 - Care and treatment should be the least restrictive option that can safely achieve the purpose
 - If restraint is being considered, it must be necessary to prevent harm to the person who lacks capacity and be proportionate to both the likelihood of the person suffering harm and to the seriousness of that harm
 - Records should be kept of the reasons for actions taken, the steps used to support decision-making, and the basis for any reasonable belief
 - Using a person's money to buy goods or services must only be for what is necessary and in their best interests, and any withdrawal from their accounts or sale of their property for this purpose requires legal authority
 - Protection from liability only applies where the person reasonably believes the individual lacks capacity and that the action or decision is in their best interests
-

8 Do you agree the draft Code gives enough guidance on the legal protection and safeguards for those providing care and treatment?

Please select only one item

- ☐ Strongly agree
- ☐ Agree
- ☐ Neither agree nor disagree
- ☐ Disagree
- ☐ Strongly disagree
- ☐ Don't know or not applicable

Please provide any comments that you may consider relevant:

Chapter 7 – The Act and children and young people

Summary

Chapter 7 explains how certain provisions of the Act apply to children and young people, and how these provisions interact with other legislation and responsibilities relating to those under the age of 18.

Key points

- The Act does not generally apply to children under 16, except for limited provisions including that the court may make decisions about the property and financial affairs of a child under the age of 16 where the child is likely to still lack capacity at 18
 - Most of the Act applies to young people aged 16 to 17 years, who may lack the relevant capacity to make a particular decision
 - The same principles and approach that apply to adults also apply to determine the best interests regarding care or treatment of a young person who lacks capacity to make a decision. This means considering the factors set out in the best interests checklist (see Chapter 5, Best Interests) to ascertain what is right for the young person when the decision needs to be made
 - Depending on the situation, either the Capacity Act or the Children and Young Persons Acts may apply. The Capacity Act only applies if the young person lacks capacity to make the decision. If neither law is suitable, other options (such as the Mental Health Act or the High Court's powers) may need to be used
 - Professionals may consider it more appropriate, due to the circumstances of the case, to rely upon the consent of a person with parental responsibility regarding the young person's care and treatment
-

9 Do you agree the draft Code clearly explains how the Act applies to children and young people?

Please select only one item

- ☐ Strongly agree
- ☐ Agree
- ☐ Neither agree nor disagree
- ☐ Disagree
- ☐ Strongly disagree
- ☐ Don't know or not applicable

Please provide any comments that you may consider relevant:

Chapter 8 – The role of the court

Summary

Chapter 8 describes the powers and functions of the court, including when applications may be made, the types of decisions and declarations the court can make, and how court involvement can help resolve complex or disputed cases.

Key points

- The court has powers to decide whether a person has capacity to make decisions for themselves
 - The court can make declarations, decisions or orders on health or welfare matters affecting people who lack capacity to make such decisions, which are legally binding and must be followed unless changed or discharged by the court
 - If the court refuses medical treatment on behalf of a person, then it will not be lawful to give it
 - When reaching any decision, the court must apply all the statutory principles set out in section 3 of the Act (The principles)
-

10 Do you have any comments about Chapter 8 - The Role of the Court?

Chapter 9 – The Act and The Mental Health Act 1998

Summary

Chapter 9 explains how the Capacity Act 2005 and the Mental Health Act 1998 operate alongside one another, including the different purposes of the two legislative frameworks and how they may apply in practice.

i For the purposes of this chapter, Mental Health Act 1998 will be referred to as MHA and the Capacity Act 2005/the Act will be referred to as the Act.

Key points

- The Act and the MHA work alongside each other
- The MHA provides the legal framework for assessment, detention and treatment of people where they have a serious mental disorder and there are risks
- The Act can apply to people with mental disorder who lack capacity, but there are situations where the MHA should be used instead
- Part 4 of the MHA sets out when treatment for mental disorder can be given to detained patients without consent. Where it applies, it authorises treatment for mental disorder and the Act cannot be used to give that treatment
- The Act continues to apply to physical healthcare and to treatment for mental disorder where Part 4 does not apply
- If a person is subject to guardianship under the MHA, the guardian has the exclusive right to take certain decisions, including where the person is to live. Therefore, nobody else can use the Act to arrange for the person to live elsewhere
- Under the Act, treatment can usually be given in best interests if capacity is lacking, whereas under the MHA, some treatments require the patient's own informed consent and cannot proceed without it

11 Do you agree the draft Code clearly explains how the Capacity Act works alongside the Mental Health Act 1998?

Please select only one item

- ☐ Strongly agree
- ☐ Agree
- ☐ Neither agree nor disagree
- ☐ Disagree
- ☐ Strongly disagree
- ☐ Don't know or not applicable

Please provide any comments that you may consider relevant:

Chapter 10 – Protection for people who lack capacity

Summary

Chapter 10 explains the offences of ill-treatment and deliberate neglect introduced by the Act, the behaviours these offences are intended to address, and the wider safeguards available to protect people who may lack capacity.

Key points

- Abuse covers a wide range of behaviours or omissions that result in harm, distress or breach of a person's rights
- Everyone has a role to play in safeguarding people who lack capacity and those working with people who lack capacity should be familiar with safeguarding procedures
- Suspicions of abuse or neglect of a person who lacks capacity should always be reported to the relevant agency
- The Act helps to support the safeguarding framework designed to protect people who may lack capacity, reducing their vulnerability to abuse, neglect, coercion, or exploitation
- Under the Act, a person who has responsibility for the care, support, or representation of an individual lacking capacity commits a criminal offence if they:
 - Ill-treat by acting deliberately or recklessly in a way that mistreats; or
 - Deliberately neglects by knowingly failing to carry out duties or care they are responsible for providing

12 Do you agree the draft Code gives enough guidance on the legal protection, safeguards and restrictions for those lacking capacity?

Please select only one item

- ☐ Strongly agree
- ☐ Agree
- ☐ Neither agree nor disagree
- ☐ Disagree
- ☐ Strongly disagree
- ☐ Don't know or not applicable

Please provide any comments that you may consider relevant:

Chapter 11 – Settling disagreements and disputes about issues covered in the Act

Summary

Chapter 11 provides guidance on how disagreements about capacity assessments, best interests decisions or other matters arising under the Act can be addressed and resolved, including informal and formal routes for resolution.

Key points

- When disagreements occur about issues that are covered in the Act, it is usually best to try and settle them before they become serious
- Disagreements are informal differences of view, whereas disputes are sustained/formal conflict requiring escalation
- Organisations should have processes for dealing with disagreements and disputes
- 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
- Guidance does not address disputes relating to financial and property decisions, enduring powers of attorney, or other matters which fall outside of the scope of the Act
- Court determination is sometimes necessary
- Safeguarding is separate and takes priority over dispute processes
- Urgent/emergency action may proceed to prevent serious harm

13 Do you agree the draft Code gives enough guidance on settling disagreements and disputes about issues covered in the Act:

Please select only one item

- ☐ Strongly agree
- ☐ Agree
- ☐ Neither agree nor disagree
- ☐ Disagree
- ☐ Strongly disagree
- ☐ Don't know or not applicable

Please provide any comments that you may consider relevant:

Chapter 12 – Access to information about a person who lacks capacity

Summary

Chapter 12 explains how data protection and freedom of information legislation relates to the Act. Including guidance on confidentiality, how information should be accessed, use of and information sharing.

Key points

- The Capacity Act 2005 does not create a general right of access to a person's information and does not override data protection legislation
- Guidance explains how information relating to a person who lacks capacity should be accessed, used, and shared lawfully and proportionately
- Access to information must always be decision specific, time specific, and limited to what is necessary for the purpose of the act or decision
- Those accessing or sharing information must consider:
 - Whether the person has capacity to control access to their information
 - Whether access is required to support capacity assessments, best interests - decision making, or the provision of care or treatment
 - The person's rights to privacy, confidentiality, and respect for their private and family life
- Those working in health and social care may disclose information about somebody who lacks capacity only when it is in the best interests of the person concerned, or when there is some other, lawful reason for them to do so. Access to information is the viewing, obtaining, use, or disclosure of personal data or confidential information relating to an individual, whether held in health, social care, or other records

14 Do you agree the draft Code gives enough guidance on confidentiality, data protection and information sharing?

Please select only one item

- ☐ Strongly agree
- ☐ Agree
- ☐ Neither agree nor disagree
- ☐ Disagree
- ☐ Strongly disagree
- ☐ Don't know or not applicable

Please provide any comments that you may consider relevant:

Section 3: General questions about the Code

In this section you will find 8 questions relating to the Capacity Act 2023: Code of Practice as a whole.

15 Overall, is the draft Code of Practice clear, well-structured and easy to follow?

Please select only one item

- ☐ Yes, it is
- ☐ No, it is not

Please provide any comments that you may consider relevant:

16 Are there any terms, concepts, explanations or sections that could be made clearer?

Please select only one item

- ☐ Yes, there are (please leave a comment below)
- ☐ No, there are not

If you answered 'yes' to this question, please describe which parts should be clearer:

17 Do you agree the draft Code clearly explains who should have regard to it and when it should be used?

Please select only one item

- ☐ Strongly agree
- ☐ Agree
- ☐ Neither agree nor disagree
- ☐ Disagree
- ☐ Strongly disagree
- ☐ Don't know or not applicable

Please provide any comments that you may consider relevant:

18 Are there any roles, settings or situations where further explanation would be helpful?

Please select only one item

- ☐ Yes, there is (please leave a comment below)
- ☐ No, there is not

If you answered 'yes' to this question, please describe where further explanation would be helpful:

19 Are the examples and scenarios in the draft Code are helpful, realistic and relevant?

Please select only one item

- ☐ Yes, they are
- ☐ No, they are not (please leave a comment below)

If you answered 'no' to this question, please explain why:

20 What additional guidance, training, templates, checklists, flowcharts or practical tools would help people use the Code in practice?

21 Are there any topics, situations or groups that the draft Code does not cover well enough?

Please select only one item

- ☐ Yes, there is (please leave a comment below)
- ☐ No, there is not

If you answered 'yes' to this question, please describe what is not covered well enough:

22 Please provide any other comments, concerns or suggestions you may have:

23 If you are a professional or part of an organisation, we have 8 additional questions we would like to ask. Would you like to answer these optional questions?

If you answer 'yes' you will be taken to the additional questions.

If you answer 'no' you will be taken to the end of the consultation.

(Required)

Please select only one item

- ☐ Yes, I will answer additional questions
- ☐ No, I would like to go to the end of the consultation

Section 4: Optional professional and organisation questions

24 Please provide any feedback and comments you may have on the guidance relating to the capacity assessment process, including who should assess capacity, evidence, recording and documentation:

25 Please provide any feedback and comments you may have on the guidance for best interests checklist, consultation duties, wishes and feelings, balancing of factors and serious decisions:

26 Please provide any feedback and comments you may have on the guidance for restraint, any restrictions placed on a person's rights and freedoms, safeguards, proportionality, recording, monitoring and review:

27 If there any age groups, decision types, or links with other legal duties where you think further guidance is needed please provide the specifics:

28 Please identify any areas where additional explanation, examples or signposting would assist understanding of how the Capacity Act interacts with other legal frameworks:

29 Please provide any feedback and comments you may have on the guidance on confidentiality, data protection, safeguarding and lawful information sharing:

30 How do you expect the Act and the draft Code of Practice to affect you, your role, your organisation, or the people you support?

31 Please identify any implementation considerations, risks, resource implications or support needs: