

A new system of registration

## **The Mental Capacity Act 2005**

Guidance for providers

December 2011

## Introduction

This guidance explains how the Mental Capacity Act (MCA) 2005 affects the way that registered care, treatment and support services make decisions on behalf of people who do not have the capacity to make some decisions for themselves.

It summarises the Act's codes of practice, and details how this affects the work of registered services. It explains how the Health and Social Care Act 2008 requirements about decision making, assessing needs, dignity and human rights, and planning care, treatment and support all link to the codes of practice.

We have produced this guidance to ensure that, as a provider, you are aware of the duties and responsibilities placed on you by the Act, and are therefore able to judge whether you are meeting them.

## Outcomes for people

The outcomes of the MCA are that people who use registered care, treatment and support services and their supporters can be confident that:

- They will continue to make decisions about their own lives whenever possible, or be included in such decisions as much as possible at all other times.
- If decisions have to be made on their behalf, they are always made in their best interests.
- Care, treatment and support services and their staff are aware of their duties and responsibilities under the Act.
- Their human rights will be respected.

We have published separate guidance on the Act's deprivation of liberty safeguards and CQC's statutory monitoring role.

## Legal framework

1. The MCA was fully implemented on 1 April 2009, when the deprivation of liberty safeguards came into force. It is designed to protect people who lack the ability to make decisions for themselves due to mental capacity difficulties. It covers:
  - What is meant by 'lacking capacity' to make a particular decision.
  - How and when a person's capacity to make a decision should be assessed.
  - The responsibilities and duties of people who make decisions on other people's behalf.
  - Independent support arrangements for people who lack the capacity to make a decision.
  - What people can do if they disagree with a decision made for or about them or someone else.
  - When and how certain health and social care services can deprive people of their liberty.
  - How CQC monitors deprivation of liberty activity.

2. Everyone working in health and social care who makes decisions for people who lack capacity has a duty to know about and follow the Act's codes of practice. There is a general code of practice covering decision-making, and a supplementary code of practice on the deprivation of liberty safeguards. They describe the responsibilities of 'assessors' of capacity, 'decision-makers', independent supporters, providers (including in relation to depriving people of their liberty) and CQC.
3. The Act has five key principles:
  - **We must begin by assuming that people have capacity**  
"A person must be assumed to have capacity unless it is established that he/she lacks capacity."
  - **People must be helped to make decisions**  
"A person is not to be treated as unable to make a decision unless all practicable steps to help him/her to do so have been taken without success."
  - **Unwise decisions do not necessarily mean lack of capacity**  
"A person is not to be treated as unable to make a decision merely because he/she makes an unwise decision."
  - **Decisions must be taken in the person's best interests**  
"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/her best interests."
  - **Decisions must be as least restrictive of freedom as possible**  
"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."
4. Registered persons must ensure that your staff are trained in how the Act affects your work, so that you are able to comply with it.
5. Local councils and primary care trusts (PCTs) have a lead role in implementing the Act across health and social care. You should contact them to ask what support is available in your area to learn about the Act.
6. CQC has no direct powers to enforce the MCA, but the Health and Social Care Act and its regulations have very similar relevant requirements in relation to involvement, choice, decision-making and care planning. These requirements and guidance about compliance with them can be found in the following Essential standards outcomes:
  - Outcome 1: Respecting and involving people who use services
  - Outcome 2: Consent to care and treatment
  - Outcome 4: Care and welfare of people who use services
  - Outcome 14: Supporting workers
7. CQC can take failure to comply with the MCA into account when making judgements about compliance and decisions about registration. The provisions of the MCA 2005 can be "relevant requirements" for enforcement purposes, for example when serving a warning notice.

We have provided links to other sources of information at the end of this guidance.

## Guidance

### 1

#### Who makes assessments of capacity?

Anyone may be in a position where they need to make an assessment of capacity. In particular, people working in health and social care services may find themselves having to assess someone's capacity to make a decision. It is therefore vital that you have copies of the Act's codes of practice available for relevant staff who may have to make such an assessment. It is also vital that your staff know about these, where they can find them, and how they affect their work.

In the codes of practice, the people who decide whether or not a person has the capacity to make a particular decision are referred to as 'assessors'. This is not a formal legal title. Assessors can be anyone – for example, family members, a care worker, a care service manager, a nurse, a doctor or a social worker. It is the responsibility of everyone who makes decisions on behalf of others to recognise their role and responsibilities under the code of practice.

### 2

#### When are assessments of capacity made?

As a service provider, you assess people's capacity to make decisions as part of their normal assessment and care planning arrangements, whenever this is needed.

A person's capacity to make decisions can be affected by many factors. Some have long-term or permanent effects, others have only a short-term effect and some will be intermittent. Examples include:

- Stroke
- Brain injury
- Mental health problems
- Dementia
- A learning disability
- Confusion, drowsiness or unconsciousness caused by an illness or the treatment for it
- Substance misuse
- An anaesthetic or sedation.

Assessments of capacity must be made where there may be an 'impairment of or disturbance in a person's mind or brain' affecting their ability to make

particular decisions.

Having an illness such as Alzheimer's disease, mental health difficulties, or a learning disability does not necessarily mean that a person lacks capacity to make **all** decisions.

A person may have the capacity to choose what to have for lunch or what to wear, but not whether to take vital medication. Capacity can vary over time, even over the course of a day.

### 3

## How are assessments of capacity made?

The code of practice includes an important **'two-stage test of capacity'**:

1. Is there an impairment of, or disturbance in, the functioning of the person's mind or brain?  
If so:
2. Is that impairment or disturbance sufficient that the person lacks the capacity to make a particular decision?

A person lacks capacity to make a particular decision if they cannot either:

- Understand information relevant to the decision, or
- Remember the information long enough to make the decision, or
- Weigh up information relevant to the decision, or
- Communicate their decision – by talking, using sign language, or by any other means.

When deciding if or when to undertake an assessment, it is important to take individual circumstances and different capacities into account.

Some decisions can never be made on someone else's behalf, for example about:

- Marriage
- Civil partnership
- Divorce
- Sexual relationships
- Adoption
- Voting
- Consent to fertility treatment.

The following help to show whether your service is meeting the requirements of the Act about when to undertake an assessment of capacity:

- The service has a copy of the Act's codes of practice.
- Induction and training for staff includes learning about how the Act and the deprivation of liberty codes of practice affect their work.
- Staff are aware of the codes of practice and when assessments of capacity are needed.
- Two-stage assessments of capacity have been made and recorded whenever needed.

## 4

### How detailed should capacity assessments and decisions be?

The code of practice does not require care services and workers to undertake formal, recorded assessments for minor day-to-day decisions about giving routine care.

Normal assessment and planning arrangements for care, treatment and support should already be providing staff with full information on a person's capacities, needs and abilities. You must ensure that these records are in place and are regularly reviewed.

All assessments relating to capacity, whether formal or informal, must be undertaken under the five principles of the Act (see page 3). And care services and workers must remember that what is 'routine' for some can be hugely significant to others.

You have to use your judgment over whether individual situations are significant enough to need a formal, written assessment of capacity, and who to involve in making the assessment.

As the significance of a decision increases (and significance must be judged for each person individually), the assessment and decision-making process – who is involved and how it is recorded – should become more detailed.

Records about significant assessments and best interest decisions might become part of formal proceedings in the Court of Protection if they are challenged. They therefore need to be comprehensive and accurate.

You will need to review assessments and decisions regularly to ensure that they continue to meet the requirements of the Act and the codes of practice.

CQC can ask the following to confirm that you are complying with the requirements of the Act about recording assessments of capacity:

- Are your assessment and planning records for care, treatment and support consistent with the Act's code of practice guidelines?
- Do staff giving care, support and treatment know how detailed different assessments of capacity should be?

## 5

### How should people be involved in making decisions?

If there are doubts about a person's capacity to make a decision, they must still be helped to make it as independently as possible. This will include:

- Making sure that the person has all the relevant information they need to make the decision. If there are choices, this includes information about the alternatives.
- Explaining or presenting the decision in a way that is easier for the person to understand. For example, some people will find it easier to understand if care staff use pictures, photographs, videos, tapes or sign language.
- Discussing the matter at times of the day or in places where the person will be most likely to understand. For example, asking someone to make a decision after they have taken medication that makes them drowsy is not the right time.
- Asking someone to become involved who may be better able to help the person understand, for example a relative, friend or advocate who knows them well.

CQC can ask the following questions to confirm that you are complying with Act's requirements about involving people in making decisions:

- Can people confirm that they are properly involved in making decisions?
- Do care, treatment and support records show that people are properly involved in making decisions about their lives?
- Can relevant supporters confirm that they have been consulted, and that the person is properly involved in making decisions?
- Are care, treatment and support staff aware of how people should be included in making decisions?

## 6

### What should be included in records of assessments and decisions?

Records of assessments and decisions must show:

- Details of two-stage assessments of capacity.
- How the person was helped to make a decision for themselves, and how effective the help was.

- How much the person is able to understand information that is relevant to the decision.
- Whether the person can remember relevant information long enough to make the decision.
- How well the person can weigh up relevant pros and cons when making the decision.
- How the person can let other people know what their decisions are, and how well they can do this.
- Information about the person's past and present wishes and feelings, which should include:
  - any 'advance decision' (see below) made when the person had capacity
  - wishes expressed in other ways by the person when they had capacity
  - information provided by others who know about the person's past wishes and feelings.

For decisions that have been made, they must show;

- Why, when and how decisions were made.
- The people who were involved in taking the decision.

The amount of information included in written assessments should increase with the significance of the decision that needs to be made.

Where a person's capacity can vary (for example, due to the time of the day or the temporary effects of illness), the best way and time to help them make their own decisions should be fully taken into account and recorded.

CQC can look at the following to confirm that you are complying with the Act's requirements about what to include in their assessments of capacity:

- Written records of assessments of capacity.
- Whether staff are aware of what should be included in records of assessments and decisions.

## 7

### **When should health and social care practitioners and other experts/professionals be involved in assessments and decision-making?**

Health and social care practitioners and/or other relevant professionals and experts must be involved when an assessment and/or decision has particularly significant consequences. These include when:



- There are disagreements with the person, their family or others about their capacity to make a decision.
- The person's capacity may be challenged by someone.
- The decision is about life sustaining or other particularly significant medical treatment.
- Where a decision not to resuscitate someone is being considered.
- Reporting abuse or crime.
- Other people may be at risk.
- Considering whether the person should move to new accommodation or receive care, treatment or support at home.
- The decision has legal complications or consequences, such as for liability.
- There are significant financial or property issues.

When more than one agency or other individuals are included in an assessment and/or decision, the written record will normally be shared.

QCC can look at the following to confirm whether you are complying with Act's requirements about involving outside agencies and people:

- Written records of assessments and decisions.
- Staff awareness of when to involve external professionals and agencies.
- Whether relevant professionals and experts confirm that they have been appropriately involved in assessments and decisions.

## 8

### **What must be taken into account when making and recording a decision on someone's behalf?**

One of the key principles of the Mental Capacity Act is that decisions made on behalf of a person who lacks capacity are made in the person's 'best interests'.

The code of practice refers to people who make decisions on other people's behalf as 'decision-makers'. Decision-makers should follow the 'best interests' checklist in section 5 of the code of practice, which includes the following guidelines:

- Decisions should not be made just on the basis of a person's age or appearance, or on the basis of behaviour that might lead to unjustified assumptions.
- All relevant circumstances should be taken into account.
- If there is a chance that the person will have capacity in the future, the decision should, if at all possible, be delayed until they do.

- The person should be encouraged and helped to join in making the decision wherever and to whatever extent that is possible.
- If the decision is about life sustaining medical treatment, it must not be motivated by a wish to hasten the person's death.
- The person's past and present wishes, feelings, beliefs and values must be considered (see below 'how does the Act help people who want to plan for a time when they might lack capacity').
- The views of other relevant people should also be considered, in particular:
  - Anyone the person has asked to be consulted
  - Those involved in caring for the person
  - Anyone else interested in their welfare
  - An Independent Mental Capacity Advocate (IMCA – see below)
  - Holders of a Lasting Power of Attorney (LPA - see below)
  - Any court appointed deputy (see below).
- There should be no discrimination.

The checklist applies equally to routine, day-to-day decision-making and will need to be taken into account when setting and reviewing care plans.

CQC can look at the following to confirm whether you are complying with the Act's requirements about what to take into account and what to record when making decisions for people who lack capacity:

- Written records of assessments and decisions.
- Whether staff are aware of the decision-maker's checklist.
- Whether people and their supporters confirm that the person's past and/or present wishes have been taken into account.

## 9

### **How does the Act help people who want to plan for a time when they might lack capacity?**

Advances in public health and medical technology mean that people are living longer. Health and social care services are becoming more regularly involved in supporting people and/or their families to make difficult choices over things like giving drugs covertly, resuscitation, and treating serious illness.

It is becoming more common for people to plan ahead for a time when their capacity might become impaired. You should ask people if they have done this as part of your normal assessment and care planning arrangements, in particular when people are new to the service or during reviews.

Future planning is a complicated and difficult area. You need to read

carefully and make sure that you understand the relevant code of practice guidelines.

The Act describes two ways of planning for the future:

- Lasting Powers of Attorney.
- Advance decisions to refuse treatment.

### **Lasting Powers of Attorney (LPA)**

People over 18 who have capacity can appoint other people to make decisions about their health, welfare, money and property if, in the future, they lose the ability to do so themselves.

The Act calls the person appointing an LPA a 'donor', and the person they appoint the 'attorney' or 'donee'.

'Personal welfare' attorneys can make decisions about health and welfare. 'Property and affairs' attorneys can make decisions about money and other financial matters.

The same person can be both, or different people can take on responsibilities for different kinds of decisions. Each LPA agreement is different. Attorneys must act in accordance with the wishes the donor described in writing when they set up their LPA.

LPAs have to be registered with the Office of the Public Guardian and attorneys must always act in the person's 'best interests' (following the five principles detailed on page 3).

You must be made aware when people using your services have LPAs and registered agreements. You must also know about any Enduring Powers of Attorney (see below 'What about Enduring Powers of Attorney'). If the conditions for attorneys to take over a person's decision-making are met, you must involve them in relevant assessments and respect their decisions.

In general, the Mental Health Act does not affect the powers of attorneys and deputies to make decisions for people. But there are two exceptions:

- They cannot give consent for treatment where a person is liable to be detained under Part 4 the Mental Health Act.
- They cannot make decisions about where a person subject to Mental Health Act guardianship should live, or refuse decisions that their guardian has a legal right to make.

It is very important that you know about the powers and duties of an attorney, and the limits placed upon them by the Mental Capacity Act and the Mental Health Act. Challenges to an attorney's decision can only be made through the Court of Protection, though concerns about their decisions can also be referred to the Office of the Public Guardian.

### **Advance decisions to refuse treatment**

Advance decisions can only be made about treatment that should not be carried out in particular circumstances. These circumstances must be

specified and include such things as refusal of resuscitation or life-saving treatment. They must be respected and are legally binding on all who give care in every health and social care service.

There are a number of rules about advance decisions and how they have to be set up in order for them to be valid. It is vital that you know about any advance decisions that people have made, and that you know that the decision is valid, and applicable.

You should also take advance statements about care and treatment into account. These are where a person recorded their wishes and preferences about care and treatment when they had capacity, but not in a way that meets advance decision requirements. While these statements are not binding, they can be a clear indication of what the person would have wanted if they had capacity.

Health care staff must respect advance decisions to refuse treatment even if a person is detained under the Mental Health Act, unless the treatment is being given under Part 4 of the Mental Health Act. Part 4 of that Act allows treatment for a mental disorder without consent, but not for any other kind of treatment.

Advance decisions must also be respected if a person is the subject of a Mental Health Act guardianship or receiving after-care under supervision.

CQC can ask the following to confirm whether you are complying with requirements of the Mental Capacity Act about working with LPAs and advance decisions:

- Can people confirm that you have asked about LPAs, EPAs and advance decisions, and are you aware of any they personally have made?
- Do people's records include information about LPAs, EPAs and advance decisions (where they exist)?
- Are staff aware of LPAs, EPAs and advance decisions, and relevant ones made by the people they care for?
- Can attorneys confirm that you and your staff are aware of your duties and responsibilities and that you involve them whenever appropriate?

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### **What about the pre-Mental Capacity Act Enduring Powers of Attorney (EPAs)?**

LPAs have replaced EPAs and no new EPAs can be made.

Pre-existing EPAs continue – even if these have not been registered – as the Office of the Public Guardian can still register existing EPAs (see 'what does the Public Guardian do' below).

EPAs only cover property and financial matters. EPA attorneys have no power to make other kinds of decisions, such as those about health and welfare.

## What is an Independent Mental Capacity Advocate (IMCA)?

IMCAs safeguard the interests of people who lack capacity to make important decisions if they have nobody except paid staff to advise, support or represent them.

Local councils pay for IMCA services by contracting with organisations such as specialist charities to provide the service. Referrals to an IMCA service must be made by local council or NHS professionals when there is no family, friend, attorney or deputy to consult and:

- Medical professionals propose serious medical treatment.
- Health service or local council staff want the person to be admitted to a hospital for more than 28 days or a care home for more than eight weeks.
- A care home or hospital wants to deprive someone of their liberty (see our separate guidance).

Referrals to an IMCA service **may** be made by a local council or an NHS professional when:

- There is no-one else available to represent the person during a care review.
- There is to be a multi-disciplinary adults safeguarding co-ordinating meeting concerning the person.
- A person's accommodation needs are being reviewed and they do not have the capacity to make choices for themselves.

You can ask local social services or NHS professionals to request an IMCA to be involved in these and similar circumstances.

It is very important that an IMCA is involved as soon as possible when they are needed. Delay can hold up medical treatment, discharge from hospital or placement in a care home.

IMCAs have the right to see all relevant care records. They must be given a written copy of assessments and decisions, and the reasons for them.

CQC can ask the following to confirm whether you are complying with the Act's requirements about working with IMCAs:

- Are staff aware of what an IMCA is and when they should be involved in decisions?
- Is there evidence that you have sought the involvement of an IMCA where appropriate?
- Can IMCAs confirm that you and your staff are aware of your duties and responsibilities and assist them appropriately?

## 12

### What do the Court of Protection and its deputies do?

The Court of Protection can rule on any matter covered by the Mental Capacity Act, for example:

- Whether someone has capacity and what is in their best interests.
- Whether someone should be deprived of their liberty.

The court can appoint a 'deputy' with powers to make decisions on a person's behalf. Deputies have similar duties, powers and responsibilities to LPAs.

People who work in health and social care services will not usually be appointed as deputies because of conflict of interest problems.

CQC can ask the following to confirm whether you are working properly with the court of protection:

- Are staff aware of the Court of Protection, what a court appointed deputy is, and the involvement of the court in anyone's lives?
- Do people's records include information about any relevant court orders, the appointment of any deputies and what decisions they are able to make?
- Can deputies confirm that you and your staff are aware of your duties and responsibilities and that you involve them whenever appropriate?

## 13

### What does the Public Guardian do and how does it relate to the Court of Protection?

The Office of the Public Guardian keeps a register of attorneys (EPAs as well as LPAs) and monitors what they do. It also keeps a register of court appointed deputies and supervises their activity and provides the Court of Protection with reports and information.

The Public Guardian's 'visitors' can investigate concerns about the conduct of attorneys and deputies. Visitors have full access rights to people who have an attorney or deputy, and to relevant records.

CQC can ask the following to confirm whether you are working properly with the Public Guardian:

- Are staff aware of the Office of the Public Guardian, what the Public Guardian and its visitors do, and the involvement of the Public Guardian in people's lives?
- Do people's records include information about the involvement of the Public Guardian or a visitor?
- Can the Public Guardian and/or a visitor confirm that you and your

staff are aware of your duties and responsibilities and assist them appropriately?

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### **What if there is disagreement over the person's best interests or a decision made on their behalf?**

Disagreements and concerns over a person's best interests and the decisions made on their behalf will inevitably happen from time to time.

Concerns should be raised with assessors and decision makers.

Assessors should be asked to explain why they believe the person lacks capacity and provide evidence to support that conclusion.

Decision-makers should be asked to explain why they think their decision is in the person's best interests and/or is consistent with any advanced decision.

Assessment and decision-making processes must follow the principles of the Mental Capacity Act and its codes of practice. Where there is concern that this is not happening and agreement cannot be reached, the matter should be referred to the office of the Public Guardian.

Ultimately, the Court of Protection can rule on whether a person has capacity to make the decision(s) included in an assessment and on whether a particular decision is in a person's best interests.

CQC can ask the following to confirm you are working in people's best interests:

- Are staff aware of the 'best interests' principle?
- Can outside professionals and people's other supporters confirm that staff act in people's best interests and that any concerns are properly listened to and taken into account?
- Do records confirm that decisions have been made in people's best interests?

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### **Does the Mental Capacity Act allow the use of restraint?**

'Restraint' covers a wide range of actions that include either the use, or threatened use, of force to ensure that a person does something they would otherwise refuse to do. It also includes the restriction of a person's liberty, whether or not they resist the restriction.

Examples include:

- Using 'bed rails' to prevent people from getting up.
- Using keypads or other devices to prevent people going where they

want.

- Using pressure pads to monitor people's movements.

The Act requires that two conditions must be satisfied for you and your staff to be protected from legal action when using active or passive means of restraint. You must:

1. Reasonably believe that the restraint is absolutely necessary to prevent the person coming to harm, and
2. Ensure that the restraint used is reasonable and in proportion to the potential harm.

And, like all other decisions, you must keep it under review.

Using unnecessary or excessive restraint could leave you and your staff liable to civil and criminal penalties, including the new Mental Capacity Act criminal offence of ill-treating or wilfully neglecting a person who lacks capacity.

We will check that any decision that leads, or may lead, to someone being restrained was made under an assessment and decision-making process that meets the Mental Capacity Act code of practice guidelines and complies with regulation 9 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2009 and Outcome 4 (Care and welfare of people who use services)..

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### **When should the Mental Health Act 1983 be used rather than the Mental Capacity Act?**

Before making an application for a person to be detained under the Mental Health Act, decision-makers should consider whether they could achieve their aims safely and more effectively by using the Mental Capacity Act.

The Mental Health Act should be used when:

- The person meets the conditions for detention under the Mental Health Act.
- Required medical treatment cannot be given without detention under the Act.
- The treatment cannot be given under the Mental Capacity Act (for example, where the person made a valid advance decision to refuse treatment they now require).
- The person needs to be restrained in a way not allowed under the Mental Capacity Act.
- The person is expected to regain capacity and may then refuse the treatment or part of the treatment they require.



- There is some other reason the person might not get treatment and they or someone else may suffer as a result.

The Mental Health Act Code of Practice provides detailed guidance on the Mental Health Act and consent to treatment.

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## Who can give consent for a person to take part in research?

Properly undertaken research helps to develop new techniques and services, but normal research rules require people taking part to consent to being involved.

Researchers sometimes ask care providers if people using the service can take part in research.

The Code of Practice includes guidelines on what should happen if someone lacks capacity to consent to being involved in research:

- A family member, friend, or another independent person must be consulted and agree to the person being involved.
- If the person shows any sign of not being happy to take part, their involvement must end.
- A research ethics committee must have checked and approved the research.
- The committee must have agreed that the research could not be carried out as effectively with people who have capacity.
- The committee must also have agreed to the researcher's plans for what would happen if a person involved lost their capacity while the research was being carried out.

All of the normal decision-makers' guidelines and other code of practice principles also apply to making decisions about people taking part in research.

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## What protection does the Mental Capacity Act give to social and health care services and workers who have to make decisions on other people's behalf?

The Act protects care services and workers from legal action when providing personal care or taking other action on behalf of people who lack capacity to make decisions about their care.

Relevant care and other action includes:

Help with:

- Washing, dressing or attending to personal hygiene
- Eating and drinking
- Walking and assistance with transport
- Arranging household services such as power supplies, housework, repairs or maintenance.

And acts performed in relation to:

- Domiciliary care or other services
- Other community care services (such as day care, residential accommodation or nursing care)
- A change of residence
- The person's safety
- Adult protection and safeguarding procedures
- Providing other activities regulated by the Health and Social Care Act
- Depriving people of their liberty to leave a care home or hospital.

**BUT**, in providing care and undertaking acts, care, treatment and support workers and services will need to be able to show that they:

- Are working within the principles and code of practice of the Act.
- Are working under a proper assessment of capacity and reasonably believe that the person cannot make decisions about the relevant aspect(s) of their care.
- Reasonably believe that what they are doing is in the person's best interests.
- Believe that any restrictions of freedom are reasonable, proportionate and kept under review.

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### What can CQC do if we find that the Mental Capacity Act or codes of practice are not being complied with?

Although CQC has no specific duty or powers to enforce the Mental Capacity Act, we can set compliance actions and improvement actions, or take enforcement action under the Health and Social Care Act 2008 as a result of breaches of the Mental Capacity Act in certain circumstances.

For example:

- If people are not being involved in decisions about their care, we can take action in relation to failure to comply with regulation 17 (outcome 1) of the essential standards of quality and safety.
- If people are not being properly supported to consent to the care, treatment and support they receive, we can take action in relation to

failure to comply with regulation 18 (outcome 2) of the essential standards.

We can set compliance actions and improvement actions about relevant aspects of people's care. For example:

- If assessments of capacity and decision-making are not being undertaken in a way that complies with the codes of practice, we can consider whether regulation 9 (outcome 4) of the essential standards is being met.
- If we have concerns about the use of restraint and people's capacity to consent, we can consider whether regulation 11 (outcome 7) of the essential standards is being met.

We can also serve a warning notice about failure to comply with the Mental Capacity Act 2005, which is a 'relevant enactment' for Health and Social Care Act purposes.

## Links to more information about the Mental Capacity Act

- Ministry of Justice webpage on the Act. You can download leaflets and guidance on the Mental Capacity Act and a copy of the codes of practice:  
<http://www.justice.gov.uk/guidance/mental-capacity.htm>
- Department of Health's webpages on the Act:  
<http://webarchive.nationalarchives.gov.uk/+www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/index.htm>
- Office of the Public Guardian's website for links to information on the Act and code of practice, including easy-read guidance: <http://www.publicguardian.gov.uk/>
- Information about the Act on CQC's website:  
[http://www.cqc.org.uk/guidanceforprofessionals/adultsocialcare/guidance.cfm?widCall1=customWidgets.content\\_view\\_1&cit\\_id=34918](http://www.cqc.org.uk/guidanceforprofessionals/adultsocialcare/guidance.cfm?widCall1=customWidgets.content_view_1&cit_id=34918)
- Department of Health's webpages on end-of-life care:  
<http://www.dh.gov.uk/en/Policyandguidance/Organisationpolicy/Endoflifecare/index.htm>
- The Mental Health Act code of practice:  
[http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_084597](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_084597)