

CONSENT AND THE MENTAL CAPACITY ACT 2005

(Including care, residence and admission) from the age of 16

START

At the **Time** of providing care or support do you consider the person has any problems with making the specific **Decision**?

Yes

No

Does the person **Consent** to the care proposed?

Yes

No

Assess Mental Capacity to Consent (Mental Capacity Act 2005)

To have capacity to consent to care a person must be able to:

1. **Understand** information relevant to the specific decision to be made
2. **Retain** the information long enough to make the decision
3. **Use or weigh** the information (take account of and process the information relevant to the decision)
4. **Communicate** their decision (in any way) See **Assess Capacity** box below for more detail

DOES THE PERSON PASS ALL FOUR STAGES ABOVE?

Yes

Person has mental capacity to make the specific decision. Go to **Consent**, top right.

Time - a person's mental capacity to consent may fluctuate. Their ability to consent will need to be considered at the time their care is given.
Decision - this means the specific decision (ie personal care, leaving the care home).

For consent to be valid the person giving consent must be properly informed, give it voluntarily and have mental capacity.
Informed = information on the options available and the possible risks/consequences of giving or refusing consent.
Voluntary = the decision is made freely without undue influence or coercion from others.
Capacity – the person must be capable of giving consent, which means they understand the information given to them and they can use it to make an informed decision

Care to which the person consents may be given.

No care can be given. If there is doubt in cases of serious or urgent care provision, you should seek further advice / guidance from other professionals. It may also be appropriate to also seek legal advice.

Do they lack the ability to do one of the four stages above **because of** an impairment of, or disturbance in the functioning of the mind or brain? Examples include: dementia, mental disorders, learning disability, brain injury, unconscious, confusion (however caused ie intoxication or medication).

No

Does the person lack the ability to make the decision because of coercion or undue influence? Consider whether a Safeguarding Adults concern should be raised with the appropriate local authority.

Yes

The person lacks the mental capacity to give consent to this decision. Even if they are compliant with care - this does not mean they are consenting. Care can be given but only if it is in the person's Best Interests. See **Best Interests** box below for more detail.

Is the person compliant with care?

No

Restraint may be appropriate. See **Restraint** box below.

Yes

Give the care and record the Best Interests decision made.

Staff will also need to assess whether a person (lacking capacity) is being deprived of their liberty. Depending on the location and person's circumstances, a deprivation of liberty may be authorised through the Mental Health Act, Deprivation of Liberty Safeguards or a court order. Seek further information from your safeguarding lead, local authority DoLS team or liaison mental health team.

ASSESS CAPACITY

Note: Assume capacity until you have carried out the capacity assessment + use all practicable steps to support the person with the assessment. Remember, just because someone makes an unwise decision, that does not mean they lack capacity. Record the assessment as soon as possible. Staff may use care plans to record assessments for regular care (see page 104, Mental Capacity Act Code of Practice).

BEST INTERESTS

A Best Interests assessment (Section 4 Mental Capacity Act) means the person responsible for care has considered:

1. Whether the decision could be delayed until the person has regained their capacity?
2. Not based the decision solely on age, appearance, behaviour or condition
3. For life-sustaining treatment, they are not motivated by a desire to bring about the person's death.
4. Encouraged the person to participate
5. The person's reasonably ascertainable past and present wishes + their beliefs + values
6. The views of others who are practical and appropriate to consult
7. All relevant circumstances
8. Less restrictive options

Note: If the decision is urgent, there may not be time to examine all possible factors (Mental Capacity Act Code of Practice, paragraph 5.13).

RESTRAINT

Restraint is defined in the Mental Capacity Act (Section 6) as: The use or threat of force to make a person do something they resist or the restriction of liberty of movement whether or not the person resists. To restrain a person under the Mental Capacity Act, the following criteria must be met:

1. The person lacks capacity in relation to the specific act
2. It will be in the person's best interests for that act to be done
3. It is reasonable to believe that it is necessary to restrain the person to prevent harm to them
4. The restraint is a proportionate response to the likelihood of the person suffering harm and the seriousness of that harm.

Examples of restraint include: locking a door to prevent a person who lacks capacity leaving a ward or care home; requiring that a person may only go out with another adult (escorted); physical restraint to enable staff to give required care; using equipment to prevent a person moving freely.

THE FIVE PRINCIPLES OF THE MENTAL CAPACITY ACT 2005

- 1 Assume Capacity :** A person must be assumed to have capacity unless established that she/he lacks capacity
- 2 Practicable Support :** 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
- 3 Unwise Decisions :** A person is not to be treated as unable to make a decision merely because he/she makes an unwise decision
- 4 Best Interests :** Any act done for, or any decision made on behalf of a person who lacks capacity must be done, or made, in that person's *best interests*
- 5 Less Restrictive :** Anything done for or on behalf of a person who lacks capacity should be less restrictive of their basic rights and freedoms

Health and Social Care Act 2008 (Regulated Activities) Regulations 2014: Regulation 11

The intention of this regulation is to make sure that all people using the service, and those lawfully acting on their behalf, have given consent before any care or treatment is provided. Providers must make sure that they obtain the consent lawfully and that the person who obtains the consent has the necessary knowledge and understanding of the care and/or treatment that they are asking consent for.

Consent is an important aspect of providing care and treatment, but in some cases, acting strictly in accordance with consent will mean that some of the other regulations cannot be met. For example, this might apply with regard to nutrition and person-centred care. However, providers must not provide unsafe or inappropriate care just because someone has consented to care or treatment that would be unsafe.

CQC can prosecute for a breach of this regulation or a breach of part of the regulation and can move directly to prosecution without first serving a Warning Notice. Additionally, CQC may also take other regulatory action, more detail of which can be found in the offences section of the CQC website.

Care Quality Commission Key Lines of Enquiry regarding the Mental Capacity Act

E7.1 Do staff understand the relevant consent and decision-making requirements of legislation and guidance, including the Mental Capacity Act 2005 and the Children's Acts 1989 and 2004 and other relevant national guidance?

E7.2 How are people supported to make their own decisions in line with relevant legislation and guidance?

E7.3 How and when is possible lack of mental capacity to make a particular decision assessed and recorded?

E7.4 How is the process for seeking consent monitored and reviewed to ensure it meets legal requirements and follows relevant national guidance?

E7.5 When people lack the mental capacity to make a decision, how do staff ensure that best interests decisions are made in accordance with legislation?

E7.6 How does the service promote supportive practice that avoids the need for physical restraint? Where physical restraint may be necessary, how does the service ensure that it is used in a safe, proportionate, and monitored way as part of a wider person-centred support plan?

E7.7 Do staff recognise when people aged 16 and over, who lack mental capacity, are being deprived of their liberty, and do they seek authorisation to do so when they consider it necessary and proportionate?