

MENTAL CAPACITY ACT 2005

EXPLANATORY NOTES

SUMMARY AND BACKGROUND

3. The Act has its basis in the Law Commission Report No.231 on Mental Incapacity, which was published in February 1995 after extensive consultation. The Government consulted further and published a Policy Statement, *Making Decisions*, in October 1999, setting out proposals to reform the law in order to improve and clarify the decision-making process for people unable to make decisions for themselves. On 27 June 2003 the Government published a draft Mental Incapacity Bill and accompanying notes (Cm 5859-I & II) which was subject to pre-legislative scrutiny by a Joint Committee of both Houses. The Joint Committee published their report on 28 November 2003 (HL Paper 189-I & HC 1083-I). The Government's response to the Joint Committee report was presented to Parliament in February 2004 (Cm 6121). The renamed Mental Capacity Bill was introduced in Parliament on 17 June 2004 and received Royal Assent on 7 April 2005, having been carried over from the previous session.
4. The Act aims to clarify a number of legal uncertainties and to reform and update the current law where decisions need to be made on behalf of others. The Act will govern decision-making on behalf of adults, both where they lose mental capacity at some point in their lives, for example as a result of dementia or brain injury, and where the incapacitating condition has been present since birth. It covers a wide range of decisions, on personal welfare as well as financial matters and substitute decision-making by attorneys or court-appointed "deputies", and clarifies the position where no such formal process has been adopted. The Act includes new rules to govern research involving people who lack capacity and provides for new independent mental capacity advocates to represent and provide support to such people in relation to certain decisions. The Act provides recourse, where necessary, and at the appropriate level, to a court with power to deal with all personal welfare (including health care) and financial decisions on behalf of adults lacking capacity.
5. The Act replaces Part 7 of the Mental Health Act 1983 and the whole of the Enduring Powers of Attorney Act 1985. A new Court of Protection with more comprehensive powers will replace the current Court of Protection, which is an office of the Supreme Court.

The Act

6. The Act is divided into 3 parts.

Part 1: Persons who lack capacity

7. **Part 1** contains provisions defining "persons who lack capacity". It contains a set of key principles and sets out a checklist to be used in ascertaining a person's best interests. It deals with liability for actions in connection with the care or treatment of a person who lacks capacity to consent to what is done. Part 1 also establishes a new statutory scheme for "lasting" powers of attorney which may extend to personal welfare (including health care) matters. It sets out the jurisdiction of the new Court of Protection to make declarations and orders and to appoint substitute decision-makers ("deputies"),

*These notes refer to the Mental Capacity Act 2005
(c.9) which received Royal Assent on 7 April 2005*

where a person lacks capacity. This Part also sets out rules about advance decisions to refuse medical treatment and creates new safeguards controlling many types of research involving people who lack capacity. It establishes a system for providing independent mental capacity advocates for particularly vulnerable people. It also provides for codes of practice to give guidance about the legislation and creates a new offence of neglect or ill-treatment.

Part 2: The Court of Protection and the Public Guardian

8. **Part 2** establishes a new superior court of record, to be known as the Court of Protection, and provides for its judges and procedures. It also establishes a new statutory official, the Public Guardian, to support the work of the court. Provision is also made for Court of Protection Visitors.

Part 3: Miscellaneous and General

9. **Part 3** deals with private international law and transitional and other technical provisions and includes a declaratory provision that nothing in the Act is to be taken to affect the law relating to unlawful killing or assisting suicide. ECHR issues arise in relation to a number of provisions.