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

MENTAL CAPACITY ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Persons Who Lack Capacity

Preliminary

Section 2: People who lack capacity

21. This sets out the Act's definition of a person who lacks capacity. It focuses on the particular time when a decision has to be made and on the particular matter to which the decision relates, not on any theoretical ability to make decisions generally. It follows that a person can lack capacity for the purposes of the Act even if the loss of capacity is partial or temporary or if his capacity fluctuates. It also follows that a person may lack capacity in relation to one matter but not in relation to another matter.

22. The inability to make a decision must be caused by an impairment of or disturbance in the functioning of the mind or brain. This is the so-called "diagnostic test". This could cover a range of problems, such as psychiatric illness, learning disability, dementia, brain damage or even a toxic confusional state, as long as it has the necessary effect on the functioning of the mind or brain, causing the person to be unable to make the decision.

23. *Subsection (3)* introduces a principle of equal consideration in relation to determinations of a person's capacity. It makes it clear that such determinations should not merely be made on the basis of a person's age, appearance or unjustified assumptions about capacity based on the person's condition or behaviour. Any preconceptions and prejudicial assumptions held by a person making the assessment of capacity must therefore have no input into the assessment of capacity. The reference to "condition" captures a range of factors, including any physical disability a person may have. So, in making an assessment of capacity, the fact that the person in question has a learning difficulty should not in itself lead the person making the assessment to assume that the person with the learning difficulty would lack capacity to decide, for example, where to live. The reference to "appearance" would also include skin colour.

24. *Subsection (5)* makes it clear that powers under the Act generally only arise where the person lacking capacity is 16 or over (although powers in relation to property might be exercised in relation to a younger person who has disabilities which will cause the incapacity to last into adulthood: see *section 18(3)*). Any overlap with the jurisdiction under the Children Act 1989 can be dealt with by orders about the transfer of proceedings to the more appropriate court (see *section 21*).

25. *Subsection (5)* has the first use of the capital letter "D" to refer to a person exercising powers in relation to a person who lacks capacity. The use of capital letters sometimes makes complex provisions easier to follow (particularly where a number of different people are being referred to), and is a technique often adopted in recent legislation. In this Act, the fact that lack of capacity is specific to particular decisions and that there

are many reasons why a person may lack capacity makes it necessary to use a neutral, rather than descriptive, label for the person concerned.

Section 3: Inability to make decisions

26. This sets out the test for assessing whether a person is unable to make a decision about a matter and therefore lacks capacity in relation to that matter. It is a "functional" test, looking at the decision-making process itself. Four reasons are given why a person may be unable to make a decision. The first three (*subsection (1)(a)* to *(c)*) will cover the vast majority of cases. To make a decision, a person must first be able to comprehend the information relevant to the decision (further defined in *subsection (4)*). *Subsection (2)* makes clear that a determination of incapacity may not be reached without the relevant information having been presented to the person in a way that is appropriate to his circumstances. Secondly, the person must be able to retain this information (for long enough to make the decision, as explained in *subsection (3)*). And thirdly, he must be able to use and weigh it to arrive at a choice. If the person cannot undertake one of these three aspects of the decision-making process then he is unable to make the decision.

27. *Subsection (1)(d)* provides for the fourth situation where someone is unable to make a decision namely where he cannot communicate it in any way. This is intended to be a residual category and will only affect a small number of persons, in particular some of those with the very rare condition of "locked-in syndrome". It seems likely that people suffering from this condition can in fact still understand, retain and use information and so would not be regarded as lacking capacity under subsection (1)(a) to (c). Some people who suffer from this condition can communicate by blinking an eye, but it seems that others cannot communicate at all. *Subsection (1)(d)* treats those who are completely unable to communicate their decisions as unable to make a decision. Any residual ability to communicate (such as blinking an eye to indicate "yes" or "no" in answer to a question) would exclude a person from this category.

Section 4: Best interests

28. It is a key principle of the Act that all steps and decisions taken for someone who lacks capacity must be taken in the person's best interests. The best interests principle is an essential aspect of the Act and builds on the common law while offering further guidance. Given the wide range of acts, decisions and circumstances that the Act will cover, the notion of "best interests" is not defined in the Act. Rather, *subsection (2)* makes clear that determining what is in a person's best interests requires a consideration of all relevant circumstances (defined in *subsection (11)*). *Subsection (1)* makes clear that best interests determinations must not be based merely on a person's age, appearance, or unjustified assumptions about what might be in a person's best interests based on the person's condition or behaviour. Best interests determinations must not therefore be made on the basis of any unjustified and prejudicial assumptions. For example, in making a best interests determination for a person who has a physical disability it would not be acceptable to assume that, because of this disability, they will not have a good quality of life and should therefore not receive treatment. As with *section 2(3)* the references to "condition" and "appearance" capture a range of factors. The section goes on to list particular steps that must be taken. Best interests is not a test of "substituted judgement" (what the person would have wanted), but rather it requires a determination to be made by applying an objective test as to what would be in the person's best interests. All the relevant circumstances, including the factors mentioned in the section must be considered, but none carries any more weight or priority than another. They must all be balanced in order to determine what would be in the best interests of the person concerned. The factors in this section do not provide a definition of best interests and are not exhaustive.

29. The decision-maker must consider whether the individual concerned is likely to have capacity at some future date (*subsection (3)*). This is in case the decision can be put off, until the person can make it himself. Even if the decision cannot be put off, the

decision is likely to be influenced by whether the person will always lack capacity or is likely to regain capacity.

30. *Subsection (4)* provides that the person concerned must so far as possible be involved in the process. Even where a person lacks capacity he should not be excluded from the decision-making process.

31. *Subsection (5)* applies to determinations as to whether treatment that is necessary to sustain life is in the best interests of the person concerned. It provides that the decision-maker must not be motivated by a desire to bring about the person's death. This means that whatever a decision-maker personally feels about, or wants for, the person concerned this must not affect his assessment of whether a particular treatment is in the person's best interests. This subsection does not change the previously understood common law on best interests. It does not mean that doctors are under an obligation to provide, or to continue to provide, life-sustaining treatment where that treatment is not in the best interests of the person.

32. The decision-maker must also consider, as far as is reasonably ascertainable, the "past and present wishes and feelings" of the person concerned (*subsection (6)*). Such wishes and feelings would include any relevant written statement. Even where people cannot make their own decisions, they can express preferences and feelings which should be taken seriously. For those who have lost capacity (for example because of progressive dementia) it may be particularly important to consider past wishes and feelings as well as current ones. In particular, there must be consideration of written statements made by the person whilst he had capacity. Such statements may be about what sort of care or treatment the person would wish to have in the case of future illness. Where written statements are well-thought out and considered, they are likely to carry particular weight for the purposes of best interests determinations. There must also be consideration of the person's beliefs and values – religious beliefs, cultural values and lifestyle choices are obvious aspects of this. There may also be other factors that the person would have been likely to consider if able to do so. For example, a person with capacity will often consider emotional bonds or family obligations when deciding how to spend his money or where to live.

33. *Subsection (7)* specifies who should be consulted when making a best interests determination, recognising that they will often have important information and views as to what would be in the person's best interests. They will also often have information about the past and present wishes and feelings of the person concerned, his beliefs and values and other factors he would be likely to consider were he able to do so. The decision-maker should consult anyone the person concerned has named as someone to consult and anyone who has a caring role or is interested in his welfare. This will include informal carers, family and friends and others who care for the person in a professional or voluntary capacity, including any kind of existing advocate. Anyone appointed under an LPA and any deputy appointed by the court (dealt with later in Part 1) should also be consulted. Consultation is required where it is "practicable and appropriate". For example, no consultation may be possible in an emergency situation and it might not be appropriate for every day-to-day decision (such as whether to watch television). For significant, non-urgent, decisions, including where there is a series of minor decisions that cumulatively become significant, consultation will be required, as being both practicable and appropriate.

34. *Subsection (8)* applies the best interests principle to situations where the person concerned may not lack capacity. A donee may be acting under a lasting power of attorney while the donor still has capacity. The subsection makes clear that the obligation also applies where the person concerned does not in fact lack capacity but where the other person reasonably believes that he does lack capacity. There would otherwise be a lacuna in the applicability of the best interests test.

35. *Subsection (9)* offers appropriate protection to those who act in the reasonable belief that they are doing so in the other person's best interests. It should be remembered that

"reasonable belief" is an objective test. Where the court makes a decision it must of course be satisfied that its decision is indeed in the person's best interests.

36. *Subsection (11)* explains what relevant circumstances means in the context of considering a person's best interests. The person making the determination must consider those circumstances of which he is aware and which it would be reasonable to regard as relevant. This strikes a balance by acknowledging that the decision-maker cannot be expected to be aware of everything whilst stipulating that he must take into account factors that it is reasonable to regard as relevant.

Section 5: Acts in connection with care or treatment

37. This provides statutory protection against liability for certain acts done in connection with the care or treatment of another person. If an act qualifies as a "section 5 act" then a carer can be confident that he will not face civil liability or criminal prosecution. Civil liability could involve being sued for committing a tort such as battery, false imprisonment or breach of confidence. Criminal prosecution might be for an offence against the person (assault or causing actual bodily harm) or for an offence against property (theft).

38. A qualifying "section 5 act" may be performed by a range of people on any one day. The key requirements are that the person ("D") acts in connection with the care or treatment of another person ("P") and that D has formed a reasonable belief as to P's lack of capacity and best interests.

39. D will not incur any liability which would not have arisen if P, with capacity to do so, had in fact consented to D's act. Consent is a complete defence to a wide range of torts (battery, false imprisonment, trespass to land or goods, breach of confidence) and to many offences against the person or against property. Many people who are fully capable will regularly consent (expressly or impliedly) to others touching them, locking the doors of a car or dealing with their property. If a person takes someone else's unwanted clothes to a charity shop he could, in the absence of the owner's consent, in principle face civil liability for trespass to goods or criminal prosecution for theft. This section offers protection against liability where the owner is unable to give a valid consent, as long as the step is taken in connection with caring for him and is in his best interests.

40. Consent is not a defence to a claim in the tort of negligence. There are some offences which depend on a finding of negligence as defined in civil law (most notably, manslaughter where the element of unlawful killing may be made out by grossly negligent behaviour, whether an act or an omission to act in breach of duty). Consent might be relevant to issues of contributory negligence. *Subsection (3)* therefore makes it clear that liability for negligence is unaffected by the section.

41. This section does not affect the operation of advance decisions to refuse treatment, as covered by *sections 24* to *26*. If a person has made a valid and applicable advance decision then that takes priority over the rules in this section.

Section 6: Section 5 acts: limitations

42. This sets two limitations to "section 5 acts". *Subsections (1)* to *(4)* deal with restraint, which is defined as the use or threat of force where P is resisting and any restriction of liberty of movement, whether or not P resists. This will include actions such as pulling someone away from the road, putting a seat belt on someone in a car or administering sedatives in order to undertake treatment. Restraint is permitted only when the person using it reasonably believes it is necessary to prevent harm to P. The restraint used must be proportionate both to the likelihood of the harm and the seriousness of the harm. It follows that the minimum level of restraint must be used; if the risk of harm diminishes, the restraint used must be reduced. It should be remembered that the principles in

section 1 also apply when restraint is proposed. The principle of the "least restrictive option" in *section 1(6)* is likely to be particularly significant here.

43. Decisions of the European Court of Human Rights draw a clear distinction between acts which restrict a person's liberty of movement and those which deprive a person of his liberty within the meaning of Article 5 of the ECHR. *Subsection (4)(b)* refers only to restriction of the person's liberty of movement. *Subsection (5)* makes clear that for *section 6* a deprivation of liberty, within the ECHR meaning, amounts to more than mere restraint. *Section 6* will therefore not provide protection for an action that amounts to a deprivation of liberty for the purposes of Article 5.

44. The second limitation is in *subsection (6)* which makes it clear that a valid decision by an attorney or a deputy takes priority over any action which might be taken under section 5. However, there is a limitation on the authority of an attorney or deputy. There could be a dispute or difficulty over a decision made by an attorney or deputy. For example, a doctor might be concerned that the attorney is not acting in P's best interests. *Subsection (7)* makes it clear that action can be taken to sustain life or prevent serious deterioration while any such dispute is referred to the court.

Section 7: Payment for necessary goods and services

45. This revises and extends the statutory rule in section 3(2) of the Sale of Goods Act 1979 insofar as it applies to people who lack capacity to contract. In general, a contract entered into by a person who lacks capacity to contract is voidable if the other person knew or must be taken to have known of the lack of capacity. This does not apply if "necessaries" are supplied. In those circumstances, the person lacking capacity must still pay a reasonable price. The rule in section 3(2) of the 1979 Act only applies to "necessary" goods, but there is a matching common law rule about "necessary" services. This section combines these rules to set out a single statutory rule to cover "necessary" goods and services. *Subsection (2)* repeats the established legal definition of what is 'necessary'. Thus, for example, if the milkman carries on delivering milk to the house of someone who has a progressive dementia, he can expect to be paid. If, however, a roofer puts a completely unnecessary new roof on to that person's house, when all that was required was a minor repair, then the rule will operate to prevent the roofer from being able to recover his charges.

Section 8: Expenditure

46. This is to be read with *sections 5* and *7*. It allows a person who is acting under *section 5* and who arranges something for P's care or treatment that costs money to do certain things. He can promise that P will pay, use money which P has in his possession and pay himself back from P's money in his possession or consider himself owed by P. This restates existing common law rules which provide that a person acting as an "agent of necessity" for another person should not be out of pocket as a result. A carer might, acting in P's best interests, arrange the delivery of disability aids or household items. Nothing in this section allows a carer to gain access to P's funds where they are held by a third party such as a bank or building society. The bank or building society would remain bound by contractual obligations to P until formal steps were taken (for example, registering a relevant power of attorney, or obtaining a court order).

47. *Subsection (3)* recognises that some people may have control over P's money or property by other routes, for example under the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968) or by way of banking arrangements.