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

Advance decisions to refuse treatment

Section 24: Advance decisions to refuse treatment: general

84. *Sections 24* to *26*deal with advance decisions to refuse treatment. Some people already choose to make such decisions and their legal effect has been analysed in a number of judicial decisions. It has been confirmed by the High Court that a competent adult patient's anticipatory refusal of consent remains binding and effective notwithstanding that he has subsequently become incompetent (*HE v NHS Trust A and AE* [2003] EWHC 1017 (Fam), a case concerning a refusal of blood transfusion). Broadly, the sections seek to codify and clarify the current common law rules, integrating them into the broader scheme of the Act. There would otherwise be a lacuna in the scheme of the Act and the powers of the new court. Many general forms of advance statement or "living will" will be important and relevant as "past wishes" of the person for the purposes of the best interests checklist in *section 4*. An "advance decision" as defined in these sections is a special type of advance statement that represents an actual decision to refuse treatment, albeit at an earlier date. As now, it will therefore be decisive in certain circumstances.

85. The key characteristics of an "advance decision" for the purposes of the Act are set out in *subsection (1)* of this section. It must be made by a person who is 18 or over and at a time when the person has capacity to make it. A qualifying advance decision must specify the treatment that is being refused, although this can be in lay terms (for example using "tummy" instead of stomach). It may specify particular circumstances, again in lay terms, in which the refusal will apply. A person can change or completely withdraw the advance decision if he has capacity to do so (*subsection (3)*). *Subsection (4)* confirms that the withdrawal, including a partial withdrawal, of an advance decision does not need to be in writing and can be by any means. *Subsection (5)* confirms that an alteration of an advance decision does not need to be in writing, unless it applies to an advance decision refusing life-sustaining treatment, in which case formalities will need to be satisfied in order for it to apply.

Section 25: Validity and applicability of advance decisions

86. This introduces the two important safeguards of validity and applicability in relation to advance decisions to refuse treatment.

87. To be valid the advance decision must not have been withdrawn or overridden by a subsequent LPA giving a donee the authority to consent or refuse consent to the treatment (other LPAs will not override – see *subsection ((7))*. Also, if the person has acted in a way that is clearly inconsistent with the advance decision remaining his fixed decision, then the advance decision is invalid. An example of an inconsistent action might be a former Jehovah's Witness converting to Islam and marrying a Muslim

man. Even if she had forgotten to destroy a written advance decision refusing blood transfusion, her actions could be taken into account in determining whether that earlier refusal remained her fixed decision.

88. An advance decision will not be applicable if the person actually has capacity to make the decision when the treatment concerned is proposed. It will also not be applicable to treatments, or in circumstances, not specified in the decision. Furthermore the decision will not be applicable if there are reasonable grounds for believing that the current circumstances were not anticipated by the person and, if they had been anticipated by him, would have affected his decision. For example, there may be new medications available that radically change the outlook for a particular condition and make treatment much less burdensome than was previously the case.

89. *Subsection (5)* introduces further rules about the applicability of advance decisions to refuse treatment that is necessary to sustain life. An advance decision will not apply to life-sustaining treatment unless it is verified by a statement confirming that the decision is to apply to that treatment even if life is at risk. The reference to "life" includes the life of an unborn child. Both the decision and the statement verifying it must be in writing and be signed and the signature must be witnessed. It is important to note that a person does not physically need to write his advance decision himself. This means that advance decisions recorded in medical notes are considered to be in writing. Writing can also include electronic records.

90. If the maker of the advance decision cannot sign then another person can sign for him at his direction and in his presence (*section 25(6)(b)*). As with a signature by the person himself, the witness must be present when the third party signs.

Section 26: Effect of advance decisions

91. This deals with the legal effect of a qualifying advance decision. If it is both valid and applicable it has the same effect as a contemporaneous refusal of treatment by a person with capacity. That is, the treatment cannot lawfully be given. If given, the person refusing would be able to claim damages for the tort of battery and the treatment-provider might face criminal liability for assault. *Subsections (2)* and *(3)* clarify the rules about liability. A treatment-provider may safely treat unless satisfied that there is a valid and applicable qualifying advance refusal; and a treatment-provider may safely withhold or withdraw treatment as long as he has reasonable grounds for believing that there is a valid and applicable qualifying advance decision.

92. If there is doubt or a dispute about the existence, validity or applicability of an advance decision then the Court of Protection can determine the issue. There is an important proviso to the general rule that an advance refusal is legally effective. There may be a doubt or dispute about whether a particular refusal is in fact one which meets all the tests (existence, validity and applicability). As with decisions by donees or deputies in *section 6(7)*, action may be taken to prevent the death of the person concerned, or a serious deterioration in his condition, whilst any such doubt or dispute is referred to the court.