MENTAL CAPACITY ACT 2005

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EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Persons Who Lack Capacity

Preliminary

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.