

# MENTAL CAPACITY ACT 2005

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 1: Persons Who Lack Capacity**

##### **Preliminary**

##### *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.