

MENTAL CAPACITY ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Persons Who Lack Capacity

Preliminary

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.