

MENTAL CAPACITY ACT 2005

EXPLANATORY NOTES

COMPATIBILITY WITH ECHR

10. The Act meets the state's positive obligation under Article 8 of the European Convention on Human Rights ("ECHR") to ensure respect for private life. ECHR issues arise in relation to a number of provisions.
11. [Article 8](#) issues in relation to private life are engaged in connection with [sections 5, 6, 9](#) and [11](#) and could also be engaged as a result of [section 20](#) and a court order made under [section 16\(2\)](#). Any interference pursues the legitimate aim of protecting the health and wellbeing of the person lacking capacity and ensures that those who care for and treat persons who lack capacity are protected from certain liabilities where appropriate. The principles in [section 1](#), the criteria for lack of capacity ([section 2](#)), the checklist as to best interests ([section 4](#)) and the safeguards within the sections themselves create a framework within which any interference will be proportionate to this legitimate aim. Article 8 rights may also be engaged by [section 49\(7\)](#) to (9), which allows the court to direct a medical examination or interview of the person concerned and the examination of his health and social services records: the court is bound by the principles in [section 1](#) and the best interests checklist. [Sections 35\(6\)](#), [58\(5\)](#) and (6) and [61\(5\)](#) and (6) also make provision whereby particular persons may interview the person concerned and examine relevant records. Again, any interference is justified as being for the protection of that person's own health and welfare and proportionate to that aim. The powers are given to the relevant officials for the purpose of enabling them to carry out their functions, which are directed to the protection of the interests of the person who lacks capacity.
12. Rights under Article 1 of the First Protocol may be engaged in connection with [sections 7](#) to [9](#) and [12](#) which provide for the control of a person's property and affairs and payment on his behalf for necessary goods and services. The statutory rules are intended to be clear and precise and are designed to strike a fair balance between the property interests of the person lacking capacity, his own wider welfare interests and the interests of others (persons supplying necessary goods and services to the person lacking capacity, anyone bearing the cost and, in the case of [section 12](#), persons related to or connected with him).
13. [Sections 10\(2\)](#) and [13\(8\)](#) and (9) prevent a bankrupt from acting as a donee of a lasting power of attorney (an "LPA") where the power covers property and affairs and suspend that power where there is an interim bankruptcy restrictions order. Interim bankruptcy restrictions orders will not bring an LPA to an end; but the appointment and power would be suspended (as far as it concerns the donor's property and affairs) so long as the order has effect. Bankruptcy restrictions orders are provided for in Schedule 4A to the Insolvency Act 1986. Article 8 and Article 14 rights may be engaged but any difference of treatment has the legitimate aim of protecting an incapacitated donor from the possibility of financial abuse and is proportionate to that end.
14. A donee of an LPA can be given power to refuse to give consent to life-sustaining treatment on behalf of the donor (see [section 11\(7\)](#) and (8)). The donor's Article 2 and Article 3 rights could be engaged. A person can also make an advance decision to refuse treatment, including life-sustaining treatment. [Section 25\(5\)](#) provides that an advance

*These notes refer to the Mental Capacity Act 2005
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decision will not apply to any treatment necessary to sustain life unless the advance decision is in writing and is signed and the signature is witnessed. Further, there must be a statement that the decision stands even if life is at risk (and this statement must also be in writing and be signed and the signature must be witnessed). *Sections 6(7)* and *26(5)* provide that action can be taken to preserve life or prevent serious deterioration while the court resolves any dispute or difficulty. These provisions are designed to protect a person's Article 2 and 3 rights, while also discharging the obligation to respect the Article 8 rights of those who choose to give powers to a donee under an LPA or to make an advance decision.

15. *Sections 35* to *39* may engage Article 14 rights in connection with Article 8 by providing for an independent mental capacity advocate to represent and support people who lack capacity where they are being treated and cared for by the NHS or a local authority and there is no one who could be consulted about that treatment or care. Any relevant difference in treatment which there might be would have the legitimate aim of protecting the Article 8 rights of incapacitated persons.
16. The comprehensive jurisdiction of the new Court of Protection (*sections 15* to *21* and *45* to *56*) ensures protection for any rights engaged in connection with the provisions of the Act. The Government is satisfied that *sections 50* (certain applicants to obtain permission to apply), *51(2)(d)* (exercise of jurisdiction by officers or staff) and *54* (court fees) do not breach Article 6 rights.