

# MENTAL CAPACITY ACT 2005

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

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

##### **Preliminary**

##### *Section 2: People who lack capacity*

21. This sets out the Act's definition of a person who lacks capacity. It focuses on the particular time when a decision has to be made and on the particular matter to which the decision relates, not on any theoretical ability to make decisions generally. It follows that a person can lack capacity for the purposes of the Act even if the loss of capacity is partial or temporary or if his capacity fluctuates. It also follows that a person may lack capacity in relation to one matter but not in relation to another matter.
22. The inability to make a decision must be caused by an impairment of or disturbance in the functioning of the mind or brain. This is the so-called "diagnostic test". This could cover a range of problems, such as psychiatric illness, learning disability, dementia, brain damage or even a toxic confusional state, as long as it has the necessary effect on the functioning of the mind or brain, causing the person to be unable to make the decision.
23. *Subsection (3)* introduces a principle of equal consideration in relation to determinations of a person's capacity. It makes it clear that such determinations should not merely be made on the basis of a person's age, appearance or unjustified assumptions about capacity based on the person's condition or behaviour. Any preconceptions and prejudicial assumptions held by a person making the assessment of capacity must therefore have no input into the assessment of capacity. The reference to "condition" captures a range of factors, including any physical disability a person may have. So, in making an assessment of capacity, the fact that the person in question has a learning difficulty should not in itself lead the person making the assessment to assume that the person with the learning difficulty would lack capacity to decide, for example, where to live. The reference to "appearance" would also include skin colour.
24. *Subsection (5)* makes it clear that powers under the Act generally only arise where the person lacking capacity is 16 or over (although powers in relation to property might be exercised in relation to a younger person who has disabilities which will cause the incapacity to last into adulthood: see *section 18(3)*). Any overlap with the jurisdiction under the Children Act 1989 can be dealt with by orders about the transfer of proceedings to the more appropriate court (see *section 21*).
25. *Subsection (5)* has the first use of the capital letter "D" to refer to a person exercising powers in relation to a person who lacks capacity. The use of capital letters sometimes makes complex provisions easier to follow (particularly where a number of different people are being referred to), and is a technique often adopted in recent legislation. In this Act, the fact that lack of capacity is specific to particular decisions and that there

*These notes refer to the Mental Capacity Act 2005  
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are many reasons why a person may lack capacity makes it necessary to use a neutral, rather than descriptive, label for the person concerned.