

EXPLANATORY MEMORANDUM TO
THE MENTAL CAPACITY ACT 2005 (TRANSITIONAL AND
CONSEQUENTIAL PROVISIONS) ORDER 2007

2007 No. 1898

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Description

- 2.1. This instrument contains transitional provisions to give full effect to the Mental Capacity Act 2005 (“the Act”) and also makes consequential amendments to other secondary legislation. The transitional provisions are articles 3, 4 and 5 of the instrument. Article 6 and the Schedule to the instrument contain a number of minor and consequential amendments to other secondary legislation.
- 2.2. Article 3 makes provision for transitional arrangements in relation to pending proceedings when the Act is implemented. Article 4 provides for the current Master of the Court of Protection to exercise the jurisdiction of the Court of Protection and to be the Senior Judge in the new Court of Protection. Article 5 enables pre-existing written advance decisions on which individuals are relying to have effect after the Act comes into force notwithstanding that they do not meet all the criteria which will be required of such decisions in the future. The conditions specified in article 5 must still be met for the advance decision to be valid and applicable.

3. Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1. None.

4. Legislative Background

- 4.1. The order is made by the Lord Chancellor under section 67(3) of the Act, which allows him to make transitional provisions and consequential amendments for the purpose of giving full effect to the Act.
- 4.2. No undertakings relating to this instrument were given to Parliament at the time of the passage of the Mental Capacity Act 2005.

5. Extent

- 5.1. The Act and these regulations apply to England and Wales only.

6. European Convention on Human Rights

- 6.1. As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy Background

- 7.1. The Mental Capacity Act 2005 provides a statutory framework for people who lack the mental capacity to make their own decisions or, where necessary, to have decisions made on their behalf and in their best interests. It contains principles, procedures and safeguards to empower people to make as many decisions as they can themselves and to play as full a part as possible in the decision-making process when they lack the capacity to make a decision.
- 7.2. The Act enables people with capacity to make provision for a time in the future when they may lack the capacity to make some decisions. They can do this by making a lasting power of attorney (LPA) to authorise someone they choose to make decisions on their behalf. People with capacity will also be able to make advance decisions to refuse specified types of medical treatment in accordance with the Act should they lose capacity to do so in the future.
- 7.3. The Act establishes a new specialist court, to be known as the Court of Protection, with a new jurisdiction to make decisions and to appoint people to make decisions on behalf of people who lack capacity to make decisions for themselves. In addition to the jurisdiction that the current Court of Protection has over the property and affairs of people lacking capacity, the new court will also have the jurisdiction to make decisions in relation to their personal welfare. Personal welfare decisions are currently made under the inherent jurisdiction of the High Court.
- 7.4. The instrument contains transitional provisions and consequential amendments to secondary legislation to enable continuity and the efficient operation of other legislation when the Act is in force. These provisions enable the objectives of the Act to be fully achieved when it comes into force on 1 October 2007.
- 7.5. Article 3 of the instrument provides for cases pending under the inherent jurisdiction of the High Court to remain in the High Court until they are finalised.
- 7.6. Article 4 of the instrument provides for continuity of judicial experience in the Court of Protection by enabling the current Master of the Court of Protection to continue as the Senior Judge of the new court. This will allow the new court, with its extended jurisdiction, to draw on the specialist knowledge and experience of the current court.
- 7.7. Article 5 of the instrument relates to advance decisions to refuse life-sustaining treatment. An advance decision means a decision made by an adult that at a later time and in such circumstances as he may specify, a specified treatment is not to be carried out or continued. Where a valid and applicable advance decision is made before 1 October 2007 under the common law, the person making that advance decision would expect their expressed decision to be respected and

acted upon. Article 5 waives certain requirements of the Act with regard to advance decisions to refuse life-sustaining treatment *provided that* the conditions in article 5(2) are met. This will mean that on the date of commencement, any pre-existing advance decisions to refuse life-sustaining treatment of people who lack the capacity to change the decision in order to comply with the requirements of the Act will still be valid and applicable.

- 7.8. Article 6 contains a Schedule of minor and consequential amendments needed to amend concepts, references, terminology and language in other secondary legislation which will not be appropriate when the Act is implemented.
- 7.9. The transitional provisions and consequential amendments have not been subject to a formal public consultation process. The Ministry conducted wide-ranging consultation before the passing of the Act, including publishing a draft Mental Incapacity Bill in 2003 for public comment and parliamentary review.
- 7.10. Following Royal Assent of the Act in April 2005 the Ministry and the Department of Health have continued to formally consult on a number of areas related to the implementation of the Act including, but not limited to, LPAs, Court of Protection rules and fees and the IMCA service. The Ministry has, as required by the Act, published general guidance on the operation of the Act in the form of a Code of Practice, which had its own consultation process from 9 March to 2 June 2006. The Office of the Public Guardian will also be producing comprehensive guidance for its users.
- 7.11. The Ministry has informally consulted with stakeholders on a number of issues relating to this instrument. Article 3 has been developed in consultation with a group comprising members of the judiciary and legal profession with experience of the operation of the current court and the High Court, under the auspices of the President Designate of the new court. This is the same group that has assisted with the development of the Court of Protection rules.
- 7.12. The Department of Health has informally consulted a range of stakeholders about the article 5 provision on advance decisions, in particular professional groups who will be involved in implementing the provisions, groups that support people who make advance decisions and those with a particular interest in the wider issues involved.
- 7.13. The minor and consequential amendments have been developed through extensive consultation with the relevant government departments.
- 7.14. This order creates no penalties or sanctions.

8. Impact

- 8.1. A Full Regulatory Impact Assessment (RIA) was produced for the passage of the Mental Capacity Act 2005. The RIA considered the benefits, cost and risks of setting up a statutory framework for decision making. The RIA can be accessed at <http://www.dca.gov.uk/risk/mcbria.pdf>

8.2. The Ministry has also produced an Equality Impact Assessment (EIA) to cover the Act and its implementation, which was published on 30 May 2007. The EIA examines the potential impacts of the Act on the diverse groups of people affected by it. The potential impacts of the Act have been assessed on the grounds of race, disability, gender, sexual orientation, age, religion or belief, and caring responsibilities. The EIA can be accessed at <http://www.justice.gov.uk/docs/mc-equality-impact.pdf>

9. Contact

9.1. Any enquiries about the contents of this memorandum should be addressed to: Lucy McKee, Mental Capacity Implementation Programme, Ministry of Justice
Email: lucy.mckee@justice.gsi.gov.uk Tel: 020 7210 0035.