

*These notes refer to the Mental Capacity Act (Northern Ireland)
2016 (c.18) which received Royal Assent on 9 May 2016*

Mental Capacity Act (Northern Ireland) 2016

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – Principles

Section 1 – Principles: capacity

This section sets out the guiding principles that must be complied with when a person is making a determination as to whether a person aged 16 or over lacks capacity in relation to a particular matter for any purpose of the Act.

It provides that a person is not to be treated as lacking capacity in relation to the matter unless it is established that the person lacks capacity (as defined in section 3). It also makes clear that the question of whether or not a person is able to make a decision for him or herself is only to be determined by reference to the matters mentioned in section 4. To be clear, it is important that a person who is thinking about carrying out an intervention in reliance on someone's consent does not misinterpret this section as requiring them to assume that the person has capacity to consent. Rather what it seeks to achieve is the placing of the onus on a person intending to carry out an intervention under the Act to have properly established that capacity is really lacking. This is so that no one finds him or herself in the position where they feel they are being asked to prove they have capacity to make the decision. It is not so as to prevent or obviate the need for proper checks to be made where there are doubts about a person's capacity to make a decision. Proceeding on the basis of a mere assumption that the person has capacity to consent could end in liability if in fact the person lacks capacity.

Section 1 also provides that a person is not to be treated as unable to make a decision for him or herself unless all practicable help and support to enable the person to make the decision has been given without success. The practicable steps that must, in particular, be taken to ensure compliance with this principle are expressly set out in section 5.

Section 1 also provides that a person is not to be treated as lacking capacity to make a decision simply because he or she makes what others consider to be an unwise decision.

Section 2 – Principle: best interests

This section provides for a further principle which requires any act done or decision made under the Act on behalf of a person who is 16 or over and lacks capacity, to be in that person's best interests. This is expanded upon in section 7.

Section 3 – Meaning of “lacks capacity”

This section sets out the definition of “lacks capacity” for the purposes of the Act. It provides that a person lacks capacity in relation to a matter if, at the material time, the person is “unable to make a decision” for him or herself about the matter (as defined in section 4), *because of* an impairment of, or a disturbance in the functioning of, the mind or brain. The inability to make a decision must therefore be caused by an impairment of, or a disturbance in the functioning of the mind or brain.

The definition focuses on the particular time when a decision has to be made and on the particular matter to which the decision relates. It is not an assessment of a person's ability to make decisions generally. A person may lack capacity in relation to one matter but not in relation to another matter. The section also makes it clear that a person can “lack capacity” even if the loss of capacity is only temporary. It also does not matter what the cause of the impairment or disturbance is. It may be caused by a disorder or disability but equally it may not.

Section 4 – Meaning of “unable to make a decision”

This section sets out the test for assessing whether a person is “unable to make a decision” about a matter. A person is unable to make a decision for him or herself if he or she is unable to do any one of the following: (a) understand the information relevant to the decision (which includes information about the reasonably foreseeable consequences of deciding one way or another or failing to make the decision (or an appropriate explanation of such)); (b) retain that information for the time required to make the decision; (c) appreciate the relevance of that information and use and weigh it as part of the decision making process; or (d) communicate his or her decision. The inclusion of the appreciation element in (c) will allow for things, such as lack of insight, delusional or distorted thinking, to be taken into account when assessing someone's ability to make a decision. Section 4 also makes it clear that references in the Act to enabling or helping a person to make a decision include enabling or helping a person to do all or any one of the things listed in paragraphs (a) to (d) of subsection (1).

Section 5 – Supporting person to make decision

This section expressly sets out the sorts of steps that must, where practicable, be taken to ensure compliance with the principle in section 1 which requires all practicable help and support to be given to a person to make a decision for themselves before it can be concluded that he or she is unable to do so.

The steps in this section are not exhaustive but include providing the person with information relevant to the decision in an appropriate way, which includes information about the reasonably foreseeable consequences of deciding one way or another, or failing to make the decision (or an appropriate explanation of such); ensuring the time and environment is as conducive as possible to the decision making process; and involving others likely to help and support the person to make their own decision.

Subsection (4) clarifies that, when providing the person with information, it may be appropriate to use simple language or visual aids or to provide support to help with the communication of the information. Subsection (5) also clarifies that, when involving others in the decision making process, it may be appropriate to involve someone who can provide communication support, for example a Speech and Language Therapist.

This is a significant section in the Act that promotes a key message that the Act aims to get across: that by far the best outcome is for decisions to be made on the basis of informed consent by the person themselves.

Section 6 – Compliance with section 1(2)

This section provides that, for any proceedings under the Act (that is, court, Tribunal or HSC trust panel proceedings) or any other legislation, the standard of proof to be applied where a question arises about whether a person lacks capacity (as defined in section 3) should be decided on the balance of probabilities. That is to say, it is more likely than not that the person lacks capacity in relation to the matter in question. It follows, therefore, that it is up to the person claiming a lack of capacity to prove it on the balance of probabilities. Otherwise, where a question arises about whether a person lacks capacity (as defined in section 3), compliance with section 1(2) is achieved if the person reasonably believes that the person lacks capacity in relation to the matter (having taken reasonable steps to establish this) and in arriving at that belief, the principles in section 1(3) to (5) and section 5 must have been complied with.

This section is the first occurrence in the Act where the capital letter “P” is used to refer to a person who is 16 or over and lacks capacity. This is to make complex provisions easier to follow particularly where a number of different people are being referred to.

Section 7 – Best interests

Section 7 makes further provision in relation to the best interests principle. It is not, however, defined given the wide range of acts and decisions the Act covers. Instead, section 7 provides a list of factors that are not intended to be exhaustive but which must all be balanced in order to comply with the principle in section 2.

Section 7 makes it clear that determining what is in P’s best interests must not be based merely on his or her age, appearance, or any other characteristic of P, including any condition P may have. Rather all relevant circumstances must be considered (that is to say, those which the person making the determination is

aware of and which it is reasonable to regard as relevant). Consideration must also be given to whether P is likely to regain capacity at a future date in case the decision can be put off until P can make the decision for him or herself.

The section goes on to list particular steps that must be taken. Importantly, the person determining best interests is required, so far as is practicable, to encourage and help P to participate as fully as possible in assessing best interests following consultation. It also requires special regard to be had to P's past and present wishes and feelings and, in particular, any relevant written statement made by P when he or she had capacity (sometimes referred to as an "advance statement"), P's beliefs and values and any other factors likely to influence P's decision if he or she had capacity, in so far as they are reasonably ascertainable.

The person determining best interests must also (where practicable and appropriate) consult with "the relevant people" and take into account their views as to what would be in P's best interests. This could include the nominated person, the independent mental capacity advocate, anyone named by P to be consulted on the matter, anyone engaged in P's care or interested in his or her welfare, any attorney appointed under a lasting power of attorney or an enduring power of attorney and any deputy appointed by the court.

The person determining best interests must also have regard to any less restrictive alternatives to the intervention being proposed and whether failure to do an act is likely to result in harm to other persons which could ultimately have harmful consequences for P. Finally, this section provides that where determining whether treatment that is necessary to sustain life is in the best interests of P, the decision maker must not be motivated by a desire to bring about P's death.

Given the scope of decisions to which it might apply, this provision in the Act has been drafted in such a way as to allow it to operate in a wide range of situations, including, for example, an emergency or what might generally be a routine intervention, such as washing or dressing someone. This has been achieved by conditioning some of the requirements set out above around what is reasonable, practicable and appropriate.

Section 8 – Compliance with section 2

This section provides that where a person (other than the court) does an act or makes a decision on behalf of a person who is 16 or over and lacks capacity, he or she will be considered to have sufficiently complied with the best interests principle in section 2, provided he or she reasonably believes the act or decision was in P's best interests and he or she complied with the checklist in section 7.