

*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 2 – Lack of Capacity: Protection from Liability, and Safeguards

CHAPTER 4 – ADDITIONAL SAFEGUARD: AUTHORISATIONS ETC and CHAPTER 6 – EXTENSION OF PERIOD OF CERTAIN AUTHORISATIONS

Sections 19 – 23 - Treatment with serious consequences

Section 19 provides that, in order for D to avail of the defence in section 9 in respect of an act that is, or is done in the course of, the provision to P of treatment with serious consequences (defined in section 21) where there is a reasonable objection from P's nominated person, the provision of the treatment must be authorised under Schedule 1 (unless the situation is an emergency). Importantly, it also provides that a further safeguard must be met - the prevention of serious harm condition. This applies even if the situation is an emergency and its meaning is set out in section 22. It requires D to be satisfied that failure to provide the proposed treatment would create a risk of serious harm to P or serious physical harm to others, and that carrying out the treatment is a proportionate response to the likelihood of harm to P, or the likelihood of physical harm to others, and the seriousness of that harm. The word 'proportionate' is important here because if treatment is provided which is not proportionate then D will not be protected from liability under section 9.

The authorisation of treatment with serious consequences is also required by virtue of section 20 where there is no objection from P's nominated person but, in prescribed circumstances, P is resisting the treatment, or the treatment is given while P is subject to an additional measure (i.e. where P is being detained in circumstances amounting to a deprivation of liberty; is subject to an attendance requirement; is subject to a community residence requirement; or where a supervision and assessment order is in force – see section 23 and sections 24-34 for further explanation of the interventions mentioned here). In such prescribed cases, the prevention of serious harm condition must also be met.

The criteria for authorisation required under sections 19 and 20 are set out in paragraph 9 of Schedule 1.

Section 21 defines 'treatment with serious consequences' in general terms and gives the Department a power to make regulations to specify what treatment would, or would not, fall under each of the four categories in paragraph (1). The wording reflects that a treatment which may be routine for one person could have a significant impact on another person. Section 21 also makes provision for the scenario in which an act is not anticipated to have serious consequences for P but turns out to be treatment with serious consequences. In these cases, provided D had a reasonable belief that the risk of this happening was negligible, the act is not to be treated as treatment with serious consequences.