

*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 9 – Definitions for Purposes of Part 2

Sections 65 – 67 – Meaning of “emergency” in relation to safeguard provisions

In order to avail of the defence in section 9 of Part 2 of the Act, D needs to ensure that all of the applicable safeguards mentioned in that section and provided for in Part 2 are in place. However, the Act also recognises that there will not be time in every case to put in place the safeguards. This is why there is provision in each of the additional safeguard provisions in Part 2 saying that the safeguard does not apply where the situation is an emergency.

Sections 65 and 66 explain what this means. In practical terms, it means that D must weigh up the risks involved for P in delaying the act to put in place the safeguard or to check if it is in place against the risk of proceeding without the safeguard in place. This exercise has to be done for each safeguard as there may be time to put one or more of the safeguards in place but not others. If the risk involved in delaying is greater, the situation is an emergency and D can proceed without putting the safeguard in place or checking if it is in place.

However, an unreasonable failure to take the necessary steps to meet the safeguard will not satisfy this test, meaning that the person intervening may not be afforded the defence in section 9 in such cases. A failure by D at any time to take reasonable steps to put a safeguard in place by the time it is required to be in place under Part 2 is unreasonable unless D believes that the safeguard is not applicable; or that any delay in putting the safeguard in place is reasonable under the circumstances. By virtue of section 67, if the unreasonable failure is due to another employee of D’s employer “E” not D, E can be held liable for the act i.e. the emergency provisions will not apply in such circumstances. It must also be assumed for the purposes of this section that the steps necessary to ensure a safeguard is met or to check it is met will be taken as soon as practicable.

Section 65 also covers the situation in which D is not someone who could reasonably be expected to know about the safeguard provisions in the Act and

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does an act which he or she believes is necessary to prevent harm to P. In such cases, the situation is also an emergency for the purposes of the safeguard provisions.