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

Part 2 creates a new statutory decision making framework that operates where a decision needs to be made in respect of a person aged 16 or over who lacks capacity in relation to a particular matter and no other arrangements are in place that would allow that decision to be made. It provides in section 9 for a general defence against liability for certain acts, subject to certain limitations. The availability of the defence depends on whether certain safeguards have been met. These are also referred to in section 9. Subsequent sections then set out when the safeguards apply and what they involve. Some key concepts are defined at the end of the Part.

Chapter 1 – Protection from Liability, and General Safeguards

Sections 9 – 12

Section 9 is pivotal because it puts into statute what is referred to as the common law doctrine (or defence) of necessity. In broad terms, the defence in section 9 can be availed of by a person "D" who does an act in connection with the care, treatment or personal welfare of another person "P" who is aged 16 or over and lacks capacity in relation to it. However, by virtue of section 10, it does not apply to an act which is, or is done in the course of, psychosurgery. Such treatment can therefore only be given to a person who lacks capacity in relation to it with the authority of the court. Section 10 also includes a regulation making power that allows the Department to expand the list of treatments to which section 9 does not apply should it ever be deemed necessary, or if new treatments are developed which are equally as serious as psychosurgery. The defence in section 9 also does not apply to any act which conflicts with a decision made by an attorney under a lasting power of attorney made by P (see Part 5) or a deputy appointed for P by a court (see Part 6). However, in these situations, it is possible that disputes may arise. Section 10 also provides that life-sustaining treatment or treatment which is necessary to prevent a serious deterioration in P's condition can be provided by D without fear of liability while a decision is being sought from the court on a particular issue in this type of case.

Any act to treat P that conflicts with an effective advance decision under the common law will also not attract the defence in section 9. To be valid, such decisions must meet a number of criteria such as: when making the advance decision, the person must be 18 or over and have the capacity to make the decision; the person must not have done anything since that clearly goes against their advance decision; the advance decision must not have been withdrawn; a power to make the decision has not subsequently been conferred on an attorney; and the person would not have changed their decision if they had known more about the current circumstances. Again, there is an important caveat to the general rule: when a decision of the court is being sought on a relevant issue, D will be protected from liability under section 9 if he or she gives P life-sustaining treatment, or treatment which he or she reasonably believes to be necessary to prevent a serious deterioration in P's condition. The Code of Practice will expand further on advance decisions. The Act does not codify the law on advance decisions; common law currently provides sufficient clarity and flexibility for advance decisions to be determined on a case by case basis. However, in recognition that this is an evolving area of law, section 284 of the Act requires the Department to review the law relating to advance decisions within 3 years of section 284 coming into operation; and to lay a report of the conclusions of that review before the Assembly.

Section 9 also provides that the act must be one in respect of which D would have incurred liability if P had had capacity but did not consent to it. This would exclude any act done in pursuance of a statutory power that does not require P's consent. For the avoidance of doubt, section 60 also sets out other circumstances in which the defence in section 9 would not be relevant i.e. because another authority to do the act exists.

The general effect of section 9 is that D is protected from any liability that he or she would have incurred if P had had capacity and consented to it (or, if P is under 18, that is either 16 or 17 years old, the reference to consent is taken to include any consent that could be given by his or her parent(s) or guardian(s)). As valid consent is a defence to a wide range of torts and crimes, this makes the protection from liability afforded to D under this section significant. However, it also means that, as consent is not a defence to a claim in the tort of negligence, any liability arising from negligence on D's part is not covered by section 9. This is expressly stated in section 10.

Furthermore, section 9 makes it clear that the defence it provides only applies if the general and, where applicable, additional safeguards mentioned in it have been met. For any act falling within the scope of section 9, the general safeguards are that (1) before doing the act, D has taken reasonable steps to establish whether P lacks capacity and (2) when doing the act, D reasonably believes that P lacks capacity and that it will be in P's best interests for the act to be done. These general safeguards attract the principles around capacity (sections 1 and 5) and best interests (sections 2 and 7) and are framed in a flexible way so as to be workable on the ground. What is "reasonable" to expect D to do in a particular

set of circumstances will be different from what is "reasonable" in another, such as in an emergency. This is recognised and accommodated within section 9.

In addition to the general safeguards above, section 12 provides that a further safeguard or condition must be met where the act is an act of restraint. The condition applies not only to an act by D restraining P but also to an instruction or an authorisation given by D to another person to restrain P. This includes any restriction of P's liberty of movement, whether or not P resists, or the threat or use of force where P is resisting. The condition is that the restraint is necessary to prevent harm to P and that it is proportionate both to the likelihood of harm and to its seriousness. Therefore, in all cases, the minimum amount of restraint must be used and if the level of risk diminishes, the level of restraint used must be reduced.

Some of the additional safeguards apply to all serious interventions; others only apply to more serious interventions, such as deprivations of liberty. "Serious intervention" is defined in section 63. As it is a key concept in Part 2 of the Act, it is suggested that the reader may wish to read the explanation of that section (and the related section 64) at this point. In addition, as most of the additional safeguards do not apply where the situation is an emergency, it is suggested that the reader may also wish to read the explanation of the meaning of "emergency" in section 65 and section 66.

Chapter 2 – Additional Safeguards for Serious Interventions

The additional safeguard provisions refer to acts. This is because section 9 applies to individual acts. This does not mean, however, that every act that forms part of a larger, more complex intervention in P's life, such as a deprivation of liberty, has to be considered separately. Any consideration of P's case carried out before such an intervention should take account of the different acts. It will depend on the circumstances whether, as the intervention proceeds, a further process of consideration is required for the purposes of Part 2 in respect of a particular act.

Sections 13 – 14 - Formal assessments of capacity

Section 13 provides that the formal assessment of capacity safeguard applies to an act that is, or is part of, a serious intervention. In these cases, a formal capacity assessment must be carried out and a statement of incapacity made, otherwise D will not be able to avail of the protection from liability under section 9. The section makes it clear that a belief by D that P lacks capacity in relation to such acts is not a reasonable one for the purposes of section 9 if a formal capacity assessment has not been carried out where the Act requires it. In addition, the formal capacity assessment must be carried out recently enough so as to be relevant and meaningful. This safeguard does not apply where the situation is an emergency (see sections 65 and 66).

"Formal capacity assessment" is defined in section 14 as an assessment carried out by a "suitably qualified person" to be defined in regulations. "Statement of

incapacity" is also defined in section 14. It means a statement in writing by the assessor, certifying that in the assessor's opinion, P lacks capacity in relation to the serious intervention. The statement must also specify, among other things, which of the functional aspects of the capacity test set out in section 4 P is not able to do because of an impairment or disturbance in the functioning of P's mind or brain. Also, importantly, the statement must specify any help or support given to P, without success, to enable P to make the decision for him or herself.

Section 15 – Nominated person: need to have in place and consult

Section 15 provides for a further additional safeguard - the nominated person safeguard. It replaces and improves upon the nearest relative provisions in the Mental Health Order. Like the formal assessment of capacity, it also applies to an act that is, or is part of, a serious intervention except where the situation is an emergency. In such cases, unless a nominated person has been put in place and, where practicable and appropriate, consulted and his or her views taken into account when D is determining whether the act is in P's best interests, the defence in section 9 will not apply. Further provision about the appointment of nominated persons is made in Part 3 of the Act.

Chapter 3 – Additional Safeguard: Second Opinion

Sections 16 – 18

The second opinion additional safeguard is based on a similar safeguard in the Mental Health Order. Sections 16-18 set out when it applies and what it involves.

Section 16 provides that, unless the situation is an emergency, a second opinion is required for the following types of treatment:

> electro-convulsive therapy;
>
> any treatment with serious consequences (defined in section 21) prescribed for this purpose in regulations to be made under the Act; or
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> any treatment with serious consequences (in circumstances to be prescribed in regulations) where the question of whether it is in the person's best interests is finely balanced.

In these cases, the second opinion must have been obtained recently enough for it to be reasonable to rely on it.

In addition, section 17 provides for another set of circumstances in which a second opinion is required, that is where medication that is treatment with serious consequences and of a prescribed description is given to P for any condition for a period of more than three months. This applies only where P is an in-patient or resident in a hospital, care home or other place to be prescribed in regulations, or subject to an attendance requirement (see section 28). The effect of this section is that if medication falling within its scope is given to P at any time after the first three months of the intervention, a second opinion must have been obtained within the three months before it is given and recently enough

for it to be reasonable to rely on it. The three month time limit is therefore a rolling one.

For the purposes of sections 16 and 17, "second opinion" means a 'relevant certificate' as defined in section 18. It must include a statement in writing made by an "appropriate medical practitioner": someone who is qualified to undertake the assessment; is not connected with the person who lacks capacity; has been approved by the Regulation and Quality Improvement Authority (RQIA) for the purpose of providing second opinions and has been asked by the RQIA to provide the second opinion on whether the treatment is in P's best interests. When asking a medical practitioner to provide a second opinion certificate, the RQIA should have regard to the desirability of asking someone who is independent of the medical practitioner providing treatment to P. The certificate must state that, in the medical practitioner's opinion, it is in P's best interests to have the proposed treatment. Once made, the medical practitioner must ensure that a copy of the medical certificate is immediately sent to the RQIA.

For the purpose of providing a second opinion, the appropriate medical practitioner can, at any reasonable time, visit and examine the person in private and obtain and examine relevant health records. A certificate may only be given if the medical practitioner has examined the person and any relevant health records and consulted persons principally concerned with treating P.

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

Chapter 4 provides for further additional safeguards, including authorisation. This safeguard applies to four types of interventions under the Act. These are explained below. The authorisation process and the criteria for authorisation are set out in Schedules 1 and 2. Schedule 1 covers the authorisation of all interventions that require authorisation except short-term detention in hospital for examination of an illness which is dealt with in Schedule 2. Schedule 1 also makes provision for interim authorisations.

Where an authorisation has been granted under Schedule 1 (other than an interim authorisation), the authorisation can last for up to six months unless revoked. An interim authorisation can last for up to 28 days. An authorisation under Schedule 2 can also last for 28 days. However, the fact that an authorisation has been granted does not mean that the intervention can be carried out if the other safeguards and conditions in Part 2 are no longer met at the time of the intervention. Similarly, in the case of an ongoing intervention requiring authorisation, if the other safeguards or conditions cease to be met, the intervention must also cease.

Chapter 6 (including Schedule 3) provides for the extension of certain authorisations.

Provision is also made in these Chapters requiring new duties to be fulfilled where the person making an application for authorisation or an extension report is of the opinion that P is likely to lack capacity to apply to the Tribunal for a review of the authorisation made in respect of them. A statement to this effect must be made in the application/extension report and, on grant/making, the Attorney General must be notified of such cases so that a referral to the Tribunal under section 47 can be made if necessary. See paragraphs 6(2), 19(4) and 20(7) to Schedule 1, paragraphs 2(5) and 7(2) to Schedule 2, sections 39(3) and 43(6) and paragraphs 4(2) and 9(4) to Schedule 3. The duty also applies to interim authorisations and at the six month point of extensions made under section 38 and Schedule 3 (yearly subsequent extensions) (see section 50). The purpose of these new duties is to ensure that a person's right to challenge their detention has practical effect where the person lacks or probably lacks capacity to decide whether to make an application to the Tribunal.

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.

Sections 24 – 27 - Deprivation of liberty

Sections 24-27 make provision in respect of an act or acts that together amount to a deprivation of liberty (defined in section 306 by reference to Article 5 of the ECHR so as to attract relevant case law). The Act aims to address the legislative gap in Northern Ireland for such deprivations of liberty of persons who lack capacity in relation to them, in a way that avoids many of the difficulties encountered in other jurisdictions and takes account of developments in ECHR and domestic case law. Section 24 provides that only certain kinds of deprivation of liberty can have the protection from liability afforded by section 9 and, even then, they must be authorised by either a HSC trust panel under Schedule 1 or by the making of a report under Schedule 2 (relating to a short term detention for examination) unless the situation is an emergency. The criteria for detention are set out in paragraph 10 to Schedule 1 and paragraph 2(3) to Schedule 2. The prevention of serious harm condition set out in section 25 – a further safeguard - must also be met. This applies even if the situation is an emergency.

There are three types of deprivation of liberty that may be authorised under Part 2. First, the detention of P in circumstances amounting to a deprivation of liberty in a place in which care or treatment is available for P. This is the main type of deprivation of liberty falling within the scope of Part 2.

The two remaining types of deprivation of liberty that can be authorised under Part 2 are set out in section 25, namely detention while being taken to a place in which care or treatment is available, and detention in pursuance of a condition imposed during a period of permitted absence from a relevant place (as defined in section 27 and which that section makes clear fall within the scope of section 9). Paragraph 22 to Schedule 1 and paragraph 18 to Schedule 2 ensure that such detention is covered by an authorisation under those Schedules granted in respect of the detention of P in a specified place in which care or treatment is available for P. In the case of the latter detention, however, only the detention of P in pursuance of such conditions lasting 7 days or less is covered by the authorisation.

Section 26 deals with the scenario in which there is a need to take P to a place where P is to be detained in circumstances amounting to a deprivation of liberty, and the act of taking P there does not amount to a deprivation of liberty. In this case, section 26 makes it clear that any act which is, or is done in the course of, taking P to such a place is only covered by section 9, and therefore lawful under the Act, if the deprivation of liberty in that place has been authorised under the Act (unless the situation is an emergency) and the prevention of serious harm condition as defined in section 25 has been met.

Sections 28 and 29 – Attendance requirements

An attendance requirement is a requirement to attend at a particular place at particular times or intervals for treatment that would, or might be, treatment with serious consequences. "Treatment with serious consequences" has the same meaning as that in section 21.

The effect of section 28 is that unless an authorisation has been granted in respect of such a requirement (and any other relevant conditions under Part 2 met), it cannot be lawfully imposed on P unless the situation is an emergency. In other words, D will not be protected from liability under section 9. Any act done to ensure that P complies with the requirement will also not be lawful unless the requirement itself has been authorised. The criteria for authorisation are set out in paragraph 11 of Schedule 1.

Section 28 also requires that a further safeguard is met before the requirement can be lawfully imposed: the "receipt of treatment condition". To meet this condition, D must reasonably believe that failure to impose the requirement would be more likely than not to result in P not receiving the treatment. This condition also applies to any act done to ensure that P complies with a requirement of this type.

Section 29 provides that where a requirement to attend for certain treatment has been authorised and imposed but it subsequently becomes apparent to the medical practitioner that any one of the conditions in subsection (2) is no longer met, the requirement must be revoked and another requirement cannot be imposed under the same authorisation.

Section 30 – 34 - Community residence requirements

A community residence requirement is defined in section 31 as a requirement imposed by a HSC trust for P to live at a particular place. A community residence requirement may also include a requirement to allow a healthcare professional access to P or a requirement to attend somewhere for training, education, occupation or treatment (other than treatment which would, or might be, treatment with serious consequences as such requirements are dealt with separately under section 28). The meaning of "healthcare professional" for the purposes of this section will be defined in regulations made under the Act.

The effect of section 30 is that, unless an authorisation has been granted under Schedule 1 in respect of the requirement (and any other relevant conditions under Part 2 met), it cannot be lawfully imposed on P. In other words, D will not be protected from liability under section 9. Any act done to ensure that P complies with the requirement will also not be lawful unless the requirement itself has been authorised. This includes acts done to ensure that P moves to, continues to live at, or resumes living at the place specified in the requirement; or to ensure that P complies with a provision in the requirement requiring P to attend a place, or allow a person access to P. The criteria for authorisation are set out in paragraph 12 to Schedule 1.

Section 30 also requires that a further safeguard is met before the requirement can be lawfully imposed: "the prevention of harm condition". To meet this condition, D must reasonably believe that failure to impose the requirement would be more likely than not to result in harm to P. This condition also applies to any act done to ensure that P complies with a requirement of this type.

Section 32 provides that where a community residence requirement has been authorised and imposed but it subsequently becomes apparent to the approved social worker in charge of P's case that any one of the conditions set out in subsection (2) is no longer met, the requirement must be revoked and another requirement cannot be imposed under the same authorisation. Section 33 provides the Department with a regulation making power to impose duties on HSC trusts regarding people who are subject to community residence requirements and their visitation.

Section 34 is intended to clarify for those working under the Act that community residence requirements are not to be regarded as a deprivation of liberty (or restraint) for the purposes of the Act. This is required to avoid any duplication in the authorisation process given that the case law around guardianship under the Mental Health Order (which community residence requirements are intended to replace) and whether it could be a deprivation of liberty or not remains unclear. The reference to restraint is to make it clear that the additional safeguard of authorisation applies to community residence requirements (it does not apply to acts of restraint).

Sections 37 – 44 - Extensions of period of authorisation

Sections 37 and 38 provide that, if the criteria for authorisation continue to be met, an authorisation granted under Schedule 1 can be extended initially for six months and yearly thereafter without referral back to the HSC trust panel. Such an extension is achieved by the making of a report. Section 39 requires this extension report to be made by an "appropriate medical practitioner" (also defined in section 39) within the last month before the initial authorisation ends for the first extension, and within the last 2 months for subsequent extension periods. The report must also contain a statement by "the responsible person" (to be defined in regulations - see section 42) that the criteria are met. Where the responsible person is not of the opinion that the criteria continue to be met, the matter must be referred to the HSC trust panel. The process for this referral is set out in Schedule 3.

Section 43 refers to requirements regarding the involvement of nominated persons and independent mental capacity advocates in extension reports (sections 54 to 56 provide more detail on this). These reports must also be given to the relevant HSC trust (as defined in section 43) as soon as practicable and the HSC trust must in turn give prescribed information to P and other persons and send a copy to the RQIA.

Section 44 provides that any measure authorised by the authorisation but not specified in the extension report will be treated as cancelled.

Chapter 5 – Additional Safeguard: Independent Mental Capacity Advocate

Sections 35 and 36 – Independent mental capacity advocate

Sections 35 and 36 have the effect that, where Part 2 requires an intervention to be authorised or where, although not requiring authorisation, it is a serious compulsory intervention, the independent mental capacity advocate conditions must be met (and any other safeguards that apply) for the defence in section 9 to apply, unless the situation is an emergency, or P has made a declaration declining the services of the independent mental capacity advocate (explained further in Part 4 of the Act). The independent mental capacity advocate must be in place to represent and support P when the question of what is in P's best interests is being determined by D. Where practicable and appropriate, D must consult the independent mental capacity advocate and take account of the advocate's views in relation to what would be in P's best interests (see section 7(7)).

Chapter 7 – Rights of Review of Authorisation

Section 45 – Right to apply to Tribunal

This section applies where an authorisation has been granted under paragraph 15 or paragraph 20 of Schedule 1, or under Schedule 2, or extended under Chapter 6 of Part 2 of the Act. If such an authorisation or extension has been made, a qualifying person can apply to the Tribunal.

If an authorisation has been granted under paragraph 15 of Schedule 1, the qualifying person can apply within the period of six months beginning with the date on which the authorisation was granted.

If an authorisation has been granted under paragraph 20 of Schedule 1, the qualifying person can apply within the period of 28 days beginning with the date on which the interim authorisation was granted.

If the authorisation was granted under Schedule 2, the qualifying person can apply within the period of 28 days beginning with the date on which a report is made under paragraph 11 of Schedule 2.

If the authorisation is extended under Chapter 6 of Part 2, the qualifying person can apply to the Tribunal within the period beginning with the date when the authorisation is extended, and ending with the end date of the period for which the authorisation is extended.

In this section, "qualifying person" means P, or P's nominated person. However, if P has capacity to decide whether or not to apply to the Tribunal, the nominated person can only make the application with P's consent.

Section 46 – Applications: visiting and examining

This section provides that for the purposes of advising whether an application should be made to the Tribunal under section 45, or for providing information about P's condition for such an application, any medical practitioner who has

been authorised by or on behalf of P or by P's nominated person can visit and examine P and require production of, examine and take copies of health or other records relating to his or her detention, care or treatment.

Section 47 – Power of certain persons to refer case to Tribunal

This section provides that when an authorisation under paragraph 15 or paragraph 20 of Schedule 1 or under Schedule 2 is in force, the Attorney General, the Department, or on the direction of the High Court, the Master (Care and Protection), may refer the question of whether the authorisation is appropriate to the Tribunal at any time.

The section also provides that for the purpose of providing information for the reference, any medical practitioner who has been authorised by or on behalf of a person to whom the authorisation relates can visit and examine him or her and require production of, examine and take copies of health or other records relating to his or her detention, care or treatment.

Section 48 – Duty of HSC trust to refer case to Tribunal

This section imposes a duty on a HSC trust to refer P's case to the Tribunal as soon as practicable if on any date, the period of authorisation under Schedule 1 is extended under section 38 or Schedule 3; the authorisation has been in force throughout the relevant period and the Tribunal has not considered the person's case at any time in that period. The relevant period is defined as one year ending with the extension date, if the person to whom the authorisation relates is under 18, or two years otherwise, ending with the date when the period of authorisation is extended. The section also provides that for the purposes of providing information for the reference, any medical practitioner who has been authorised by or on behalf of P can visit and examine P and require production of, examine and take copies of health or other records relating to his or her detention, care or treatment.

This section makes provision for identifying the HSC trust which will have this duty imposed upon it. Where the extension is wholly or partly for the purposes of continuing a person's detention, this duty will be imposed upon the HSC trust in whose area the place of detention is situated. Where the extension is wholly or partly for the purposes of continuing a person's treatment, or requiring him or her to attend for treatment and P is not detained, the duty will be imposed upon the HSC trust in whose area the treatment is provided. Where the extension is for the purposes of continuing a community residence requirement, and is not for the purposes of continuing treatment, attendance for treatment or detention, the HSC trust in whose area the person is required to live will have the duty imposed upon it.

Section 49 – References etc to Tribunal: persons formerly detained under the Mental Health Order

This section makes provision that if a person is liable to be detained under the Mental Health Order on the day before he or she turns 16 and on the day that he or she turns 16, there is an authorisation in force under Schedule 1 which authorises detention of the individual in circumstances amounting to a deprivation of liberty, any application or reference of the person's case to the Tribunal under Part 5 of the Mental Health Order that has not been dealt with by the day that he or she turns 16 will include consideration of whether the authorisation is appropriate.

The section also provides that the relevant HSC Trust must refer to the Tribunal the question of whether an authorisation is appropriate as soon as practicable if, on any date when the person is under 17 the authorisation is extended and any authority under Part 2 of the Mental Health Order for detention of the person or an authorisation under the Act is in force throughout the period of one year ending with that date and the Tribunal has not considered the person's case at any time during that period.

Section 50 – Duty of HSC trust to notify the Attorney General

This section applies if the period of authorisation under Schedule 1 has been extended under section 38 or Schedule 3 for a period of one year; the authorisation authorises a deprivation of liberty or community residence requirement; and at the relevant time it appears to the HSC trust that P lacks or probably lacks capacity in relation to whether an application to the Tribunal should be made. In this case, the HSC trust must as soon as practicable give notice of these matters to the Attorney General, together with any prescribed information.

This section defines the "relevant time" as meaning the time six months after the beginning of the one year period mentioned above.

Section 51 – Powers of Tribunal in relation to authorisation under Schedule 1

This section makes provision for the powers of the Tribunal when an application or reference is made to it in relation to an authorisation under Schedule 1.

The Tribunal may revoke the authorisation; vary the authorisation by cancelling any provision which authorises a measure; or decide to take no action. For these purposes, the section defines "measure" as the provision of treatment; detention in a place in circumstances amounting to a deprivation of liberty; a requirement to attend for treatment, or a community residence requirement.

The section provides that the Tribunal may vary an authorisation made under paragraph 15 of Schedule 1 only if it is satisfied that the criteria for authorisation are met for each measure that will remain in force. The Tribunal may decide to

take no action only if it is satisfied that the criteria for the authorisation of each measure are met.

The section also provides that the Tribunal may vary an authorisation under paragraph 20 of Schedule 1 only if it is satisfied that there is a good prospect of it being established that the criteria for authorisation are met for each measure that will remain in force. The Tribunal may decide to take no action only if it is satisfied that there is a good prospect of it being established that the criteria for the authorisation of each measure are met.

Section 52 – Powers of Tribunal in relation to authorisation under Schedule 2

This section provides that where an application or reference is made to the Tribunal concerning an authorisation which has been granted under Schedule 2, the Tribunal must either revoke the authorisation or decide to take no action in respect of it. The Tribunal may decide to take no action only if it is satisfied that the condition in paragraph 12 of Schedule 2 is met.

Section 53 – Sections 51 and 52: additional powers of Tribunal

This section provides that where, under sections 51 or 52, the Tribunal decides to do anything other than revoke the authorisation, it can, with a view to facilitating the ending of a measure which is still authorised by an authorisation, recommend the taking of specified actions and further consider the case if those actions are not complied with. Where the Tribunal further considers the case, section 51 or as the case may be, section 52, will apply.

Chapter 8 – Supplementary

Most of the following sections have been referred to where relevant in the commentary above. Further explanation, where necessary, is provided below.

Sections 54-56 – Medical reports: involvement of nominated person and independent mental capacity advocate

Sections 54 and 55 require that a nominated person and an independent mental capacity advocate must be in place and, where practicable and appropriate, consulted and their views taken into account when a person making a medical report, required for the purposes of an authorisation under Schedule 1 or 2 or the extension of a period of authorisation under section 37, section 38 or Schedule 3, is determining what would be in P's best interests. This safeguard does not apply when the situation is an emergency. This is defined in section 56 for the purposes of these sections and requires the person making the report to weigh up the risks involved in delaying the making of the report to put in place this safeguard or to check if it is place, against the risks of proceeding without putting the safeguard in place or checking if it is in place. If the risks involved in delaying are greater, the situation is an emergency. However, an unreasonable failure to take the necessary steps to meet the safeguard will not satisfy this test. It must

be assumed for the purposes of this section that they will be taken as soon as practicable.

Sections 57 and 58 – Provision of information

Section 57 is a general provision that enables the Department to make regulations about when information must be given for the purposes of Part 2. This is an important section and the regulations made under it will be extensive given the many occasions in which information will have to be provided in relation to acts covered by the Act and in respect of authorisations made under Schedule 1 and 2, both of which also contain further provisions requiring information to be given at various stages in the authorisation process. Specifically, section 57 makes it clear that these regulations must include provision for P to be informed of the provisions in Part 2 under which he or she is detained and his or her rights in terms of having his or her case reviewed by the Tribunal, and for P to be informed in writing on discharge from detention.

Section 58 states that the way in which information is provided when required by any provision in Part 2 or by regulations made under Part 2 may also be detailed in regulations. This may include a requirement to provide information orally, as well as in writing.

Section 59 – Failure by person other than D to take certain steps

Section 59 provides a defence for D in circumstances where supportive steps (i.e. helping P to make a decision for themselves) that would be considered practicable were not taken but due to no fault of D. It also provides that "E" – D's employer – can be held liable under Part 2 rather than D where another employee of E is responsible for the unreasonable failure to take such steps. For the purposes of this section, a failure to take practicable supportive steps is unreasonable unless at the time the person believes that the steps can be as effectively taken later and that not taking the step immediately is reasonable in the circumstances.

Section 60 – Part 2 not applicable where other authority for act

Section 60 clarifies that the defence in section 9 (protection from liability) is not applicable where a person already has authority to do an act that falls within its scope. This could be because the person has been given the power to do the act under another statute or under a lasting power of attorney. The person could also have been appointed as a deputy by the Court under Part 6 and given the power or duty to make the relevant decision on behalf of P. Section 60 also recognises that persons aged 16 or 17 are still children under the law even though they fall within the scope of Part 2 and, therefore, a parent or guardian may also have legal authority to act on behalf of such persons.

Section 61 – Power to make further provision

This section provides the Department with a regulation making power to modify any provisions of Part 2 for cases where a person is under 16 when a particular intervention is proposed, but will be over 16 when the intervention is carried out. It also gives the Department a power to make regulations for the rectification of authorisations, or other documents made under Part 2 that have been found to be incorrect or defective within a prescribed period.

Section 62 – Disregard of certain detention

Section 62 is the equivalent of Article 10 of the Mental Health Order. It applies to any person who has been detained in circumstances amounting to a deprivation of liberty under Part 2 of the Act apart from under Schedule 1 (in other words short-term detention for examination of an illness only) and does not subsequently become liable to be detained in hospital under that Schedule. In such cases, the effect of the section is that the detention does not have to be disclosed where information is being sought about the person's previous health other than in judicial proceedings. The detention or failure to disclose it can also not be used as grounds for dismissing or excluding the person from any office etc. or prejudicing the person in any way in any occupation or employment. Any disqualification, disability, prohibition or penalty relating to the fact that P has been detained under the Act also does not apply.

Chapter 9 – Definitions for Purposes of Part 2

Most of the following sections have been referred to where relevant already as they relate to key concepts in Part 2 of the Act. Further explanations, where necessary, are provided below.

Sections 63 and 64 – "Serious intervention"

The definition of "serious intervention" for the purposes of Part 2 is intended to capture any intervention which has serious consequences (physical or non-physical) for P. Regulations may provide more detail as to what might fall under each of the four main categories listed in paragraph (1). However, for the avoidance of doubt, section 63 makes it clear that all interventions requiring authorisation under the Act (see Chapter 4 of Part 2) will always be a serious intervention for the purposes of Part 2. The provision of serious compulsory treatment (sections 19-23) is not mentioned because it is obvious from the definition of treatment with serious consequences in section 21 that it will also always be a serious intervention under Part 2.

As additional safeguards need to be put in place for serious interventions, it will be critical for D to consider whether what he or she is proposing for P is serious. However, section 63 recognises that there may be circumstances in which something that appears initially to be routine can turn out to be serious and D could not have been expected to foresee that it would turn out as such. In

such cases, the intervention is to be treated as not being serious for the purposes of the Act if the risk of it being serious was a negligible one.

Section 64 makes it clear that any use or threat of force for the purposes of doing an act which a person is resisting is to be taken as being part of the same intervention as the act that is being resisted by P.

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 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.

Section 68 – Interpretation of Part 2: general

Section 68 signposts the reader to various provisions in the Act for definitions of key concepts in the Act, including the general interpretation sections (section 304 to 306) and also provides definitions of treatment that "might be" treatment with serious consequences, "reasonable objection", "resisted by" and "requirement". These are relevant to the safeguard provisions in Part 2.