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2016 CHAPTER 18

PROSPECTIVE

PART 2

LACK OF CAPACITY: PROTECTION FROM LIABILITY, AND SAFEGUARDS

CHAPTER 1

PROTECTION FROM LIABILITY, AND GENERAL SAFEGUARDS

Protection from liability for acts in best interests of person lacking capacity

9.—(1) This section applies where—

- (a) a person (“P”) is 16 or over;
- (b) another person (“D”) does an act in connection with the care, treatment or personal welfare of P;
- (c) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter;
- (d) when doing the act, D reasonably believes—
 - (i) that P lacks capacity in relation to the matter; and
 - (ii) that it will be in P's best interests for the act to be done; and
- (e) D would have been liable in relation to the act if P had had capacity in relation to the matter and D had done the act without P's consent.

(2) D does not incur any liability in relation to the act, apart from such liability, if any, as D would have incurred in relation to it even if P—

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(a) had had capacity to consent in relation to the matter; and

(b) had consented to D's doing the act.

(3) But subsection (2) has effect subject to the additional safeguard provisions (each of which imposes a safeguard, additional to those in subsection (1)(c) and (d), and more than one of which may apply in a given case).

(4) The additional safeguard provisions are—

(a) section 12 (conditions for any act of restraint);

(b) sections 13 and 15 (formal assessment of capacity, and consultation of nominated person, required for serious interventions);

(c) sections 16 and 17 (second opinion required for certain treatment);

(d) sections 19, 20, 24, 26, 28 and 30 (authorisation required for serious treatment where there is objection from P's nominated person or compulsion, and for deprivations of liberty and certain other measures);

(e) section 35 (independent mental capacity advocate required for certain serious interventions).

(5) The principles in sections 1(3) to (5) and 5 (P not to be treated as lacking capacity on irrelevant grounds, or where practicable help and support not given) and section 7 (best interests) apply in particular for the purposes of determining whether a belief mentioned in subsection (1)(d) is reasonable.

(6) Where P is under 18, in subsection (1)(e) “without P's consent” is to be read as “without P's consent and without any consent that could be given by a parent or guardian of P”.

General limitations on section 9

10.—(1) Section 9 does not exclude—

(a) civil liability for loss or damage resulting from a person's negligence in doing an act; or

(b) criminal liability resulting from such negligence.

(2) Section 9 does not apply in relation to an act which is, or is done in the course of, psychosurgery.

(3) Section 9 does not apply in relation to an act that conflicts with a decision concerning the care, treatment or personal welfare of a person (“P”) which—

(a) is made in accordance with this Act by an attorney under a lasting power of attorney granted by P and is within the scope of the attorney's authority; or

(b) is made in accordance with this Act by a deputy appointed for P by the court and is within the scope of the deputy's authority.

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(4) Nothing in subsection (3) prevents a person from—

- (a) providing life-sustaining treatment, or
- (b) doing an act which the person reasonably believes to be necessary to prevent a serious deterioration in P's condition,

while a decision as respects any relevant issue is sought from the court.

(5) The Department may by regulations amend subsection (2) so as to extend the descriptions of treatment to which section 9 does not apply.

Advance decisions: effect on section 9

11.—(1) Section 9(2) (protection from liability) does not apply if—

- (a) the act mentioned in section 9(1) is the carrying out or continuation of treatment of P; and
- (b) carrying out or continuing that treatment conflicts with an effective advance decision to refuse treatment which has been made by P.

(2) In this section “an effective advance decision to refuse treatment” means a decision which, under the common law relating to advance decisions, has the same effect as if at the material time P—

- (a) refused consent to the treatment's being carried out or continued; and
- (b) had capacity to refuse that consent.

(3) In subsection (2) “the material time” means the time when the question arises whether the treatment should be carried out or continued.

(4) Nothing in this section prevents a person from—

- (a) providing life-sustaining treatment, or
- (b) doing an act which the person reasonably believes to be necessary to prevent a serious deterioration in P's condition,

while a decision as respects any relevant issue is sought from the court.

Acts of restraint: condition that must be met

12.—(1) This section applies where the act mentioned in section 9(1) (“the relevant act”) is—

- (a) an act restraining P; or
- (b) an act that consists of instructing or authorising another person to do an act restraining P.

(2) Section 9(2) (protection from liability) applies to the relevant act only if the restraint condition (as well as the conditions of section 9(1)(c) and (d), and any other conditions that apply under this Part) is met in relation to the relevant act.

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(3) The restraint condition is that at the time the relevant act is done, D reasonably believes—

- (a) that failure to do the relevant act would create a risk of harm to P; and
- (b) that the relevant act is a proportionate response to—
 - (i) the likelihood of harm to P; and
 - (ii) the seriousness of the harm concerned.

(4) In this section an “act restraining P” means an act which—

- (a) is intended to restrict P's liberty of movement, whether or not P resists; or
- (b) is a use of force or a threat to use force and is done with the intention of securing the doing of an act which P resists.

(5) This section does not apply to an act which in itself amounts to a deprivation of liberty (as to which see sections 24 and 25).

(6) Subsection (5) does not affect the application of this section to an act restraining P which is done while P is detained in circumstances amounting to a deprivation of liberty.

CHAPTER 2

ADDITIONAL SAFEGUARDS FOR SERIOUS INTERVENTIONS

Formal capacity assessments etc

Formal assessment of capacity

13.—(1) This section applies where—

- (a) section 9(1)(a) and (b) apply; and
- (b) the act mentioned there is, or is part of, a serious intervention (see section 63).

(2) Where this section applies—

- (a) the condition in section 9(1)(c) is to be regarded as met only if, before the act is done, a formal capacity assessment is carried out; and
- (b) a belief by D, at the time the act is done, that P lacks capacity in relation to the matter in question is not to be regarded as a reasonable belief if no statement of incapacity has been made.

(3) The formal capacity assessment must have been carried out, and the statement of incapacity made, recently enough before the act is done for it to be reasonable in all the circumstances to rely on them.

(4) This section does not apply where the situation is an emergency (see section 65).

(5) See section 14 for the meaning of “formal capacity assessment” and “statement of incapacity”.

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Section 13: formal capacity assessments and statements of incapacity

14.—(1) This section supplements section 13.

(2) A “formal capacity assessment” means an assessment carried out by a suitably qualified person (who may be D if D is suitably qualified) of whether P lacks capacity in relation to the matter in question.

(3) A “statement of incapacity” means a statement in writing, by the person who carried out the formal capacity assessment (“the assessor”)—

- (a) recording the fact that the assessment was carried out, by whom it was carried out and when;
- (b) certifying that, in the opinion of the assessor, P lacks capacity within the meaning of this Act in relation to the matter in question;
- (c) specifying which of the things mentioned in section 4(1)(a) to (d) P is, in the assessor's opinion, not able to do in relation to that matter because of an impairment of, or a disturbance in the functioning of, P's mind or brain; and
- (d) specifying any help or support that has been given to P, without success, to enable P to make a decision in relation to the matter.

(4) In this section references to a “suitably qualified” person are to a person of a prescribed description.

Nominated persons

Nominated person: need to have in place and consult

15.—(1) This section applies where the act mentioned in section 9(1) is, or is part of, a serious intervention (see section 63).

(2) Section 9(2) (protection from liability) applies to the act only if the nominated person conditions (as well as the conditions of section 9(1)(c) and (d), and any other conditions that apply under this Part) are met in relation to the act.

(3) The nominated person conditions are that—

- (a) a nominated person is in place for P when D determines whether the act would be in P's best interests; and
- (b) in making that determination, D consults and takes into account the views of the nominated person to the extent required by section 7(7) (duty to consult where practicable and appropriate and to take views into account).

(4) This section does not apply where the situation is an emergency (see section 65).

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(5) For the purposes of this section a nominated person “is in place for P” at a particular time if at that time there is someone who is P's nominated person (see section 69).

CHAPTER 3

ADDITIONAL SAFEGUARD: SECOND OPINION

Second opinion needed for certain treatment

16.—(1) This section applies where the act mentioned in section 9(1) is, or is done in the course of, the provision to P of any of the following treatment—

- (a) electro-convulsive therapy;
- (b) any treatment with serious consequences which is also treatment of a description specified for the purposes of this paragraph by regulations;
- (c) any treatment with serious consequences where, at the time of the act—
 - (i) the question whether it is in P's best interests to have the treatment is finely balanced; and
 - (ii) the circumstances are such as may be prescribed.

(2) Section 9(2) (protection from liability) applies to the act only if, at the time the act is done, a second opinion has been obtained (and the conditions of section 9(1)(c) and (d), and any other conditions that apply under this Part, are met in relation to the act).

(3) The second opinion must have been obtained recently enough before the act is done for it to be reasonable in all the circumstances to rely on it.

(4) This section does not apply where the situation is an emergency (see section 65).

(5) In this section a “second opinion” means a relevant certificate (as defined by section 18) in respect of the treatment mentioned in subsection (1).

(6) For the purposes of subsection (1)(c)(i) it does not matter whether the choice is between—

- (a) the treatment in question and no treatment; or
- (b) the treatment in question and another treatment.

(7) For the meaning of “treatment with serious consequences” see section 21.

Second opinion needed for continuation of medication

17.—(1) This section applies where—

- (a) the act mentioned in section 9(1) is, or is done in the course of, the provision to P of treatment which is medication for any condition;

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- (b) the medication is treatment with serious consequences and is of a description specified for the purposes of this paragraph by regulations;
- (c) medication for that condition has been provided to P, on more than an occasional basis, for at least the relevant period; and
- (d) at the time of the act P is, and for at least the relevant period has been, a qualifying person (see subsection (5)).

(2) Section 9(2) (protection from liability) applies to the act only if, at the time the act is done, a second opinion has been obtained (and the conditions of section 9(1)(c) and (d), and any other conditions that apply under this Part, are met in relation to the act).

(3) The second opinion must have been obtained—

- (a) recently enough for it to be reasonable in all the circumstances to rely on it; and
- (b) in any event, since the beginning of the relevant period.

(4) This section does not apply where the situation is an emergency (see section 65).

(5) For the purposes of this section—

- (a) a person is a “qualifying person” at any time when he or she—
 - (i) is an in-patient or resident in a hospital, care home or place of a prescribed description; or
 - (ii) is subject to a requirement to attend at a particular place and particular times or intervals for the purpose of being given treatment for the condition;
- (b) “the relevant period” is the period of 3 months ending immediately before the day on which the act is done;
- (c) “second opinion” means a relevant certificate (as defined by section 18) in respect of the treatment mentioned in subsection (1)(a).

(6) The Department may by regulations amend subsection (5)(b) so as to alter the period mentioned there.

Second opinion: relevant certificates

18.—(1) In this Chapter “relevant certificate” means a statement in writing which—

- (a) is made by an appropriate medical practitioner; and
- (b) certifies that, in that practitioner's opinion, it is in P's best interests to have the treatment.

(2) An appropriate medical practitioner may, for the purposes of exercising any function under subsection (1), at any reasonable time—

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- (a) visit P and examine him or her in private;
 - (b) require the production of and examine any health records relating to P that are relevant.
- (3) A medical practitioner may give a relevant certificate only if the medical practitioner has—
- (a) examined P;
 - (b) examined any health records relating to P that have been produced under subsection (2)(b) and appear to the practitioner to be relevant (having taken reasonable steps to require the production of relevant health records); and
 - (c) consulted such person or persons as appear to the practitioner to be principally concerned with treating P (generally).
- (4) A medical practitioner who gives a relevant certificate must immediately send a copy of it to RQIA.
- (5) For the purposes of this section “an appropriate medical practitioner” means a medical practitioner who—
- (a) is unconnected with P (see section 304);
 - (b) is approved for the purposes of this section by RQIA; and
 - (c) has been asked by RQIA, following a relevant request, to provide an opinion on whether it would be in P's best interests to have the treatment.
- (6) Where RQIA receives a relevant request and proposes to ask a medical practitioner to provide an opinion on whether it would be in P's best interests to have the treatment, it must (when considering who to ask) have regard to the desirability of asking a medical practitioner who is independent of any medical practitioner concerned with the provision to P of the treatment.
- (7) In this section a “relevant request” means a request, made by a person for the purposes of section 16 or 17, for RQIA to arrange for a medical practitioner to provide such an opinion.

CHAPTER 4

ADDITIONAL SAFEGUARD: AUTHORISATIONS ETC

Treatment with serious consequences

Treatment with serious consequences: objection from nominated person

- 19.—**(1) This section applies where—
- (a) the act mentioned in section 9(1) is, or is done in the course of, the provision to P of treatment which is treatment with serious consequences (see section 21); and

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(b) the treatment is carried out despite a reasonable objection from P's nominated person.

(2) Section 9(2) (protection from liability) applies to the act only if—

(a) the provision of the treatment to P is authorised; and

(b) the prevention of serious harm condition (as well as the conditions of section 9(1)(c) and (d), and any other conditions that apply under this Part) is met.

(3) Subsection (2)(a) does not apply where the situation is an emergency (see section 65).

(4) For the purposes of subsection (2)(a) the provision of the treatment to P is “authorised” if, at the time the act is done, there is in force an authorisation granted under Schedule 1 which authorises the provision of the treatment to P.

(5) See section 22 for the prevention of serious harm condition.

Treatment with serious consequences: resistance by P etc

20.—(1) This section applies where—

(a) the act mentioned in section 9(1) is, or is done in the course of, the provision to P of treatment which is treatment with serious consequences (see section 21);

(b) section 19 (objection from nominated person) does not apply;

(c) the act—

(i) is resisted by P (see section 68); or

(ii) is done while P is subject to an additional measure (see section 23);
and

(d) the circumstances are such as may be prescribed.

(2) Section 9(2) (protection from liability) applies to the act only if—

(a) the provision of the treatment to P is authorised; and

(b) the prevention of serious harm condition (as well as the conditions of section 9(1)(c) and (d), and any other conditions that apply under this Part) is met.

(3) Subsection (2)(a) does not apply where the situation is an emergency (see section 65).

(4) For the purposes of subsection (2)(a) the provision of the treatment to P is “authorised” if, at the time the act is done, there is in force an authorisation granted under Schedule 1 which authorises the provision of the treatment to P.

(5) See section 22 for the prevention of serious harm condition.

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Meaning of “treatment with serious consequences”

21.—(1) In this Part “treatment with serious consequences” means treatment which—

- (a) causes the person to whom it is given serious pain, serious distress, or serious side-effects;
- (b) is major surgery;
- (c) affects seriously the options that will be available to that person in the future, or has a serious impact on his or her day-to-day life; or
- (d) in any other way has serious consequences for that person, whether physical or non-physical.

(2) Regulations may provide that treatment of a specified description—

- (a) is to be regarded as treatment falling within a particular paragraph of subsection (1); or
- (b) is not to be regarded as such treatment.

(3) If—

- (a) the act mentioned in section 9(1) is, or is done in the course of, the provision to P of treatment which turns out to be treatment with serious consequences, but
- (b) at the time when the act is done D reasonably believes that the risk that the treatment will turn out to be treatment with such consequences is negligible,

the act is to be treated for the purposes of this Part as if the treatment were not treatment with serious consequences.

Sections 19 and 20: the prevention of serious harm condition

22.—(1) For the purposes of sections 19 and 20, the prevention of serious harm condition is that at the time the act mentioned in subsection (1)(a) of that section is done, D reasonably believes—

- (a) that failure to provide the treatment in question to P would create a risk of serious harm to P or of serious physical harm to other persons; and
- (b) that carrying out that treatment is a proportionate response to—
 - (i) the likelihood of harm to P, or of physical harm to other persons; and
 - (ii) the seriousness of the harm concerned.

(2) Subsection (3) applies where there are one or more treatments (other than the treatment mentioned in subsection (1))—

- (a) that are available and would be appropriate in P's case; and
- (b) the provision of which would not involve the doing of acts to which section 19 or 20 applies.

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(3) In determining whether failure to provide the treatment mentioned in subsection (1) would create a risk of serious harm to P or of serious physical harm to other persons, it must be assumed that if that treatment were not provided, another treatment would be provided as soon as practicable.

Meaning of “subject to an additional measure”

23.—(1) For the purposes of this Part a person is “subject to an additional measure” at the time a particular act is done if—

- (a) the act is done at a time when the person is detained by virtue of this Act in circumstances amounting to a deprivation of liberty;
- (b) the act is, or is done in the course of, the provision of treatment and is done at a time when the person is subject to a requirement to attend at a particular place at particular times or intervals for the purpose of being given that treatment;
- (c) the act is done at a time when the person is subject to a community residence requirement; or
- (d) the act is done at a time when a supervision and assessment order (see Schedule 7) is in force in respect of the person.

(2) For further provision about the measures mentioned in subsection (1)(a) to (c), see sections 24 to 34.

Deprivation of liberty

Deprivation of liberty

24.—(1) This section applies where the act mentioned in section 9(1) amounts to, or is one of a number of acts that together amount to, a deprivation of P's liberty.

(2) Section 9(2) (protection from liability) applies to the act only if—

- (a) the deprivation of P's liberty consists of—
 - (i) the detention of P, in circumstances amounting to a deprivation of liberty, in a place in which care or treatment is available for P; or
 - (ii) related detention;
- (b) the detention in question is authorised; and
- (c) the prevention of serious harm condition (as well as the conditions of section 9(1)(c) and (d), and any other conditions that apply under this Part) is met.

(3) Subsection (2)(b) does not apply where the situation is an emergency (see section 65).

(4) See section 25 for—

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- (a) the meaning of “related detention” and of detention being “authorised”;
- (b) the prevention of serious harm condition.

(5) In this Part any reference to an act which is one of a number of acts that together amount to a deprivation of P's liberty includes (in particular) where P is detained in circumstances amounting to a deprivation of liberty, instructing another person to carry out or continue the detention.

Section 24: definitions

25.—(1) This section applies for the purposes of section 24.

(2) “Related detention” means—

- (a) the detention of P in circumstances amounting to a deprivation of liberty while P is being taken to a place in which care or treatment is available for P; or
- (b) the detention of P in circumstances amounting to a deprivation of liberty in pursuance of a condition imposed on P that relates to permission given to P to be absent from a relevant place (as defined by section 27).

(3) Detention is “authorised” if, at the time the act is done, there is in force an authorisation granted—

- (a) by a panel under Schedule 1, or
- (b) by the making of a report under paragraph 2 of Schedule 2 (authorisation of short-term detention for examination etc),

which authorises that detention.

(4) See paragraph 22 of Schedule 1 or paragraph 18 of Schedule 2 (as the case may be) for provisions about the scope of an authorisation.

(5) The prevention of serious harm condition is that at the time the act is done D reasonably believes—

- (a) that failure to detain P in circumstances amounting to a deprivation of liberty would create a risk of serious harm to P or of serious physical harm to other persons; and
- (b) that the detention in question is a proportionate response to—
 - (i) the likelihood of harm to P, or of physical harm to other persons; and
 - (ii) the seriousness of the harm concerned.

(6) References in this section to “the act” are to the act mentioned in section 24(1).

Taking person to a place for deprivation of liberty

26.—(1) This section applies where—

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- (a) the act mentioned in section 9(1) is, or is done in the course of, taking P to a place; and
 - (b) although taking P to that place does not itself involve a deprivation of liberty, it is done in order that P can be detained in circumstances amounting to a deprivation of liberty at that place.
- (2) Section 9(2) (protection from liability) applies to the act only if—
- (a) the detention that is to be carried out is authorised; and
 - (b) the prevention of serious harm condition (as well as the conditions of section 9(1)(c) and (d), and any other conditions that apply under this Part) is met.
- (3) Subsection (2)(a) does not apply where the situation is an emergency (see section 65).
- (4) In this section “authorised” and “the prevention of serious harm condition” have the same meaning as in section 25(3) and (5), but for this purpose references there to “the act” are to be read as the act mentioned in subsection (1)(a) of this section.

Permission for absence

27.—(1) For the avoidance of doubt, if—

- (a) by virtue of this Part a person (“P”) is detained in a relevant place,
- (b) P is given permission to be absent from the relevant place for a particular period or a particular occasion, and
- (c) a person does an act within subsection (2),

section 9(2) (protection from liability) applies to that act provided that the conditions of section 9(1)(c) and (d), and any other conditions that apply under this Part, are met in relation to that act.

(2) The acts within this subsection are—

- (a) imposing any condition on P in relation to the permission;
- (b) any act for the purpose of ensuring that P complies with such a condition;
- (c) recalling P to the relevant place.

(3) For the purposes of this section a place is a “relevant place” if—

- (a) P is detained in the place in circumstances amounting to a deprivation of liberty; and
- (b) care or treatment is available to P in the place.

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Requirements to attend for treatment with serious consequences

Requirements to attend for certain treatment

28.—(1) This section applies where the act mentioned in section 9(1) is—

- (a) the imposition on P of a requirement to attend at a particular place at particular times or intervals for the purpose of being given treatment that would or might be treatment with serious consequences (an “attendance requirement”); or
- (b) an act done for the purpose of ensuring that P complies with an attendance requirement.

(2) Section 9(2) (protection from liability) applies to the act only if—

- (a) the requirement is authorised; and
- (b) the receipt of treatment condition (as well as the conditions of section 9(1) (c) and (d), and any other conditions that apply under this Part) is met.

(3) Subsection (2)(a) does not apply where the situation is an emergency (see section 65).

(4) For the purposes of subsection (2)(a) the requirement is “authorised” if, at the time the act is done, there is in force an authorisation granted under Schedule 1 which permits that requirement to be imposed.

(5) The receipt of treatment condition is that at the time the act is done D reasonably believes that—

- (a) failure to impose the requirement, or
- (b) where the requirement is already imposed, failure to ensure that P complies with the requirement,

would be more likely than not to result in P's not receiving the treatment.

Duty to revoke requirement where criteria no longer met

29.—(1) If—

- (a) an attendance requirement has been authorised under Schedule 1 and has been imposed on a person, and
- (b) at any time after the imposition of the requirement, the medical practitioner in charge of the treatment considers that any of the conditions in subsection (2) is no longer met,

the requirement must be revoked.

(2) Those conditions are—

- (a) that the person lacks capacity in relation to whether he or she should attend at the place and times or intervals concerned for the purpose of being given the treatment;

Status: This version of this part contains provisions that are prospective.

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(b) that it is more likely than not that, without the attendance requirement, the person would not receive the treatment;

(c) that the attendance requirement is in the person's best interests.

(3) Nothing in subsection (1) limits the effect of section 28 (under which acts to ensure compliance with an attendance requirement are unlawful if certain conditions are not met).

(4) Where an attendance requirement is revoked in the circumstances mentioned in subsection (1)(b), another attendance requirement may not be imposed on the person by virtue of the same authorisation.

(5) In this section “attendance requirement” has the same meaning as in section 28.

Community residence requirements

Community residence requirements: authorisation etc

30.—(1) This section applies where the act mentioned in section 9(1) is—

- (a) the imposition on P of a community residence requirement (see section 31); or
- (b) an act done for the purpose of ensuring that P complies with a community residence requirement.

(2) Section 9(2) (protection from liability) applies to the act only if—

- (a) the community residence requirement is authorised; and
- (b) the prevention of harm condition (as well as the conditions of section 9(1) (c) and (d), and any other conditions that apply under this Part) is met.

(3) For the purposes of subsection (2)(a) the community residence requirement is “authorised” if, at the time the act is done, there is in force an authorisation granted under Schedule 1 which permits that community residence requirement to be imposed.

(4) The prevention of harm condition is that at the time the act is done D reasonably believes—

- (a) that failure to do the act would create a risk of harm to P; and
- (b) that the act is a proportionate response to—
 - (i) the likelihood of harm to P; and
 - (ii) the seriousness of the harm concerned.

Meaning of “community residence requirement”

31.—(1) In this Part a “community residence requirement”, in relation to a person (“P”), means a requirement imposed on P by an HSC trust for P to live

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at a particular place, whether or not the requirement also contains provision imposing one or more of the requirements mentioned in subsection (2).

(2) Those requirements are—

- (a) a requirement for P to allow a healthcare professional access to P at a place where P is living;
- (b) a requirement (or requirements) for P to attend at particular places and times or intervals for the purpose of training, education, occupation or treatment.

(3) In subsection (2)(a) “healthcare professional” means a person of a prescribed description.

(4) In subsection (2)(b) “treatment” does not include treatment that would or might be treatment with serious consequences (requirements to attend for which are dealt with by section 28).

(5) References in this Part to an act done for the purpose of ensuring that P complies with a community residence requirement are to an act done—

- (a) for the purpose of ensuring that P moves to, continues to live at or resumes living at the place required by the community residence requirement; or
- (b) for the purpose of ensuring that P complies with a provision of the community residence requirement that requires P to attend a place or allow a person access to P.

Duty to revoke community residence requirement where criteria no longer met

32.—(1) If—

- (a) a community residence requirement which is permitted by an authorisation under Schedule 1 to be imposed on a person has been imposed, and
- (b) at any time after the imposition of the requirement, the approved social worker in charge of the person's case considers that any of the conditions in subsection (2) is no longer met,

the requirement must be revoked.

(2) Those conditions are—

- (a) that the person lacks capacity in relation to the matters covered by the community residence requirement;
- (b) that revoking the community residence requirement would create a risk of harm to the person;
- (c) that keeping the requirement in place is a proportionate response to—
 - (i) the likelihood of harm to the person if the requirement were revoked; and

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(ii) the seriousness of the harm concerned;

(d) that the community residence requirement is in the person's best interests.

(3) Subsection (1) is without prejudice to section 30 (under which acts to ensure compliance with a community residence requirement are unlawful if criteria are not met).

(4) Where a community residence requirement is revoked in the circumstances mentioned in subsection (1)(b), another community residence requirement may not be imposed on the person by virtue of the same authorisation.

Duties in relation to people subject to community residence requirements

33. The Department may make regulations—

- (a) for imposing on HSC trusts such duties as the Department considers appropriate in the interests of people who are subject to community residence requirements;
- (b) requiring people subject to community residence requirements to be visited on prescribed occasions or at prescribed intervals.

Community residence requirements: further provision

34.—(1) For the avoidance of doubt, the imposition by an HSC trust of a community residence requirement is not to be regarded for the purposes of this Act—

- (a) as an act which in itself amounts to a deprivation of liberty; or
- (b) as an act within section 12(4) (acts of restraint).

(2) Subsection (3) applies if—

- (a) a person is detained in a place in circumstances which—
 - (i) amount to a deprivation of liberty; and
 - (ii) include a requirement for the person to live in the place; and
- (b) the detention of the person in the place in circumstances amounting to a deprivation of liberty is authorised under Schedule 1.

(3) Where this subsection applies, the requirement for the person to live in the place is not to be regarded for the purposes of section 30 or any other provision of this Act as a community residence requirement.

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CHAPTER 5

ADDITIONAL SAFEGUARD: INDEPENDENT MENTAL CAPACITY ADVOCATE

Independent mental capacity advocate: need to have in place and consult

35.—(1) This section applies where the act mentioned in section 9(1) is a relevant act (as defined by section 36).

(2) Section 9(2) (protection from liability) applies to the act only if the independent mental capacity advocate conditions (as well as the conditions of section 9(1)(c) and (d), and any other conditions that apply under this Part) are met.

(3) The independent mental capacity advocate conditions are that—

- (a) at the time when D determines whether the act would be in P's best interests, there is an independent mental capacity advocate who is instructed under section 91 to represent and provide support to P; and
- (b) in determining whether the act would be in P's best interests, D consults and takes into account the views of the independent mental capacity advocate to the extent required by section 7(7) (duty to consult where practicable and appropriate and to take views into account).

(4) This section does not apply if—

- (a) the situation is an emergency; or
- (b) at the time when D determines whether the act would be in P's best interests, P has made a declaration under section 90 or 93 (declarations declining services of an independent mental capacity advocate) in relation to the matter in question (and has not revoked the declaration).

Section 35: relevant acts

36.—(1) In section 35 “relevant act” means any of the following—

- (a) an act which amounts to a deprivation of P's liberty, or one of a number of acts that together amount to such a deprivation;
- (b) the imposition on P of a requirement to attend at a particular place at particular times or intervals for the purpose of being given treatment that would or might be treatment with serious consequences;
- (c) the imposition on P of a community residence requirement;
- (d) the provision of serious compulsory treatment;
- (e) a serious compulsory intervention not falling within paragraphs (a) to (d).

(2) For the purposes of subsection (1)(d) an act is “the provision of serious compulsory treatment” if—

- (a) it is, or is done in the course of, the provision to P of treatment with serious consequences; and

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(b) the treatment is carried out despite a reasonable objection from P's nominated person or subsection (4) applies.

(3) For the purposes of subsection (1)(e) an act is a “serious compulsory intervention” if—

- (a) it is, or is part of, a serious intervention; and
- (b) the intervention is carried out despite a reasonable objection from P's nominated person or subsection (4) applies.

(4) This subsection applies if—

- (a) the act—
 - (i) is resisted by P (see section 68); or
 - (ii) is done while P is subject to an additional measure (see section 23);
 and
- (b) the circumstances are such as may be prescribed.

CHAPTER 6

EXTENSION OF PERIOD OF CERTAIN AUTHORISATIONS

Extensions of period of authorisation

First extension of period of authorisation

37.—(1) This section applies where—

- (a) an authorisation has been granted (and has not been revoked); and
- (b) the initial period of the authorisation has not ended.

(2) The period of the authorisation may be extended for a period of 6 months beginning immediately after the end of the initial period, by the making of an extension report (see section 39).

(3) In this Chapter—

“authorisation” means an authorisation under paragraph 15 of Schedule 1;

“the initial period” of an authorisation means the period of 6 months beginning with the date the authorisation is granted (see paragraph 15(6) of Schedule 1);

“the period” of an authorisation means the period at the end of which the authorisation (unless previously revoked) expires.

Subsequent extensions

38.—(1) This section applies where—

- (a) an authorisation has been granted (and has not been revoked);

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(b) the period of the authorisation has been extended for a period (“the current extension period”) under a relevant provision; and

(c) the current extension period has not ended.

(2) The period of the authorisation may be further extended, for a period of one year beginning immediately after the end of the current extension period, by the making of an extension report (see section 39).

(3) In subsection (1)(b) “relevant provision” means—

(a) section 37 (first extension);

(b) this section (subsequent extensions); or

(c) paragraph 8(2) of Schedule 3 (extension where responsible person is not of the opinion that the criteria for continuation are met).

Sections 37 and 38: extension reports

39.—(1) This section applies for the purposes of this Chapter.

(2) An “extension report”, in relation to an authorisation in respect of a person (“P”), is a report in the prescribed form which—

(a) is made, within the reporting period, by an appropriate medical practitioner who has examined P within the reporting period and made the report as soon as practicable after that examination;

(b) specifies the authorised measure (or, if more than one, each authorised measure) that is proposed to be continued after the end of the current period;

(c) states that in the appropriate medical practitioner's opinion the criteria for continuation (see section 41) are met in respect of each specified measure;

(d) includes a statement in the prescribed form, by the responsible person (see section 42), that in that person's opinion the criteria for continuation are met in respect of each specified measure; and

(e) includes any prescribed information.

(3) If—

(a) the report specifies a measure within section 41(2)(b) or (d) (deprivation of liberty or community residence requirement), and

(b) the appropriate medical practitioner is of the opinion that P lacks (or probably lacks) capacity in relation to whether an application under section 45 (applications to Tribunal) should be made in respect of the authorisation,

the report must contain a statement of that opinion.

(4) In this section—

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“appropriate medical practitioner” means a medical practitioner who is unconnected with P and is permitted by regulations under section 300 to make the report;

“authorised measure” and “measure” have the meaning given by section 41;

“the current period” means—

- (a) in the case of an extension under section 37, the initial period;
- (b) in the case of an extension under section 38, the current extension period (within the meaning of that section);

“the reporting period” means—

- (a) in the case of an extension under section 37, the last month of the current period;
- (b) in the case of an extension under section 38, the last two months of the current period.

Extension of period where responsible person not of the requisite opinion

40. Schedule 3 makes provision for cases where it is proposed to make an extension under section 37 or 38 but the responsible person is not of the opinion that the criteria for continuation are met.

Supplementary provisions about extension

Meaning of “measure”, “authorised measure” and “the criteria for continuation”

41.—(1) In this Chapter, in relation to an authorisation—

“authorised measure” means a measure which is authorised by the authorisation and has begun; and

“measure” is to be read in accordance with subsection (2).

(2) Each of the following is a “measure” for the purposes of this Chapter—

- (a) the provision to P of particular treatment specified by the authorisation;
- (b) the detention of P in circumstances amounting to a deprivation of liberty in a place specified by the authorisation, for purposes so specified;
- (c) a requirement to attend at a particular place at particular times or intervals for the purpose of being given treatment specified by the authorisation;
- (d) a community residence requirement.

(3) In this Chapter “the criteria for continuation”, in relation to a measure, means the criteria for authorisation for that measure as set out in Part 3 of Schedule 1.

Status: This version of this part contains provisions that are prospective.

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(4) In paragraphs 11(a) and 12(a) and (b) of that Schedule as they apply for the purposes of this section, the references to imposing a requirement include continuing the requirement.

Meaning of “the responsible person”

42.—(1) In this Chapter “the responsible person” means a person prescribed by regulations.

(2) Regulations under this section may in particular provide that—

- (a) in prescribed circumstances the responsible person is the approved social worker in charge of P's case;
- (b) in prescribed circumstances, the responsible person is a person of a prescribed description who is designated by the managing authority of a hospital or care home in which P is an in-patient or resident as a person who may make statements under this Chapter;
- (c) in prescribed circumstances, the responsible person is a person of a prescribed description who is designated by an appropriate person (as defined by the regulations) as a person who may make statements under this Chapter.

Extension reports: further provision

43.—(1) This section contains further provision about extension reports.

(2) For the purposes of section 39 an extension report is made when the completed report is signed by the medical practitioner making it.

(3) See also sections 54 and 55 (involvement of nominated person and independent mental capacity advocate).

(4) A medical practitioner who makes an extension report must give it to the relevant trust as soon as practicable.

(5) Where an extension report is given to the relevant trust, that trust must as soon as practicable—

- (a) give prescribed information to P and any prescribed person; and
- (b) give RQIA a copy of the report.

(6) Regulations under subsection (5) must ensure that the Attorney General is given notice in any case where the report contains the statement mentioned in section 39(3) (statement that P lacks, or probably lacks, capacity in relation to making of Tribunal application).

(7) In this section “the relevant trust” means—

- (a) where the extension made by the report is wholly or partly for the purposes of continuing P's detention in a place, the HSC trust in whose area that place is situated;

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- (b) where the extension made by the report is wholly or partly for the purposes of continuing the provision to P of treatment specified by the authorisation or a requirement to attend for such treatment, and paragraph (a) does not apply, the HSC trust in whose area the treatment is provided;
- (c) where the extension made by the report is for the purposes of continuing a community residence requirement and paragraph (b) does not apply, the HSC trust in whose area the place where P is required by the community residence requirement to live is situated.

Effect of extension on authorisation where authorised measure unused etc

44.—(1) This section applies where—

- (a) an authorisation has been granted;
- (b) the period of the authorisation is extended under section 37 or 38; and
- (c) when the extension report is made, there is a measure authorised by the authorisation which is not specified by the report as a measure that is proposed to be continued after the end of the current period (as defined by section 39).

(2) From the time immediately after the end of the current period, the provision of the authorisation which authorises that measure is to be treated as cancelled.

(3) See section 41 for the meaning of “measure”.

CHAPTER 7

RIGHTS OF REVIEW OF AUTHORISATION

Applications to the Tribunal

Right to apply to Tribunal

45.—(1) Where an event mentioned in the first column of the following table occurs, a qualifying person may apply to the Tribunal within the period mentioned in the corresponding entry of the second column of the table.

<i>Event</i>	<i>Period for making application</i>
The grant of an authorisation under paragraph 15 of Schedule 1	The period of 6 months beginning with the date the authorisation is granted
The grant of an interim authorisation under paragraph 20 of that Schedule	The period of 28 days beginning with the date the interim authorisation is granted

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The grant of an authorisation under Schedule 2	The period of 28 days beginning with the date of admission (as defined by paragraph 14(3) of Schedule 2)
The extension under Chapter 6 of the period of an authorisation under paragraph 15 of Schedule 1	The period— (a) beginning with the date when the period of the authorisation is extended; and (b) ending with the end of the period for which the authorisation is extended

(2) In this section “a qualifying person” means—

- (a) the person to whom the authorisation relates (“P”); or
- (b) subject to subsection (3), a person who is P's nominated person.

(3) If P has capacity in relation to whether an application under this section should be made, P's nominated person may make an application only with P's consent.

(4) No application under this section may be made in respect of an authorisation that—

- (a) has ceased to be effective by virtue of section 29(4) or 32(4) or paragraph 23 of Schedule 1 (effect on authorisation of discharge from detention etc); or
- (b) for any other reason is no longer in force.

Applications: visiting and examination

46.—(1) A medical practitioner who is authorised—

- (a) by or on behalf of a person (“P”) to whom an authorisation under Schedule 1 or 2 relates, or
- (b) by P's nominated person,

may, for a purpose mentioned in subsection (2), do anything within section 275 (visiting etc powers) in relation to P.

(2) The purposes are—

- (a) the purpose of advising whether an application to the Tribunal under section 45 should be made by or in respect of P;
- (b) the purpose of providing information as to the condition of P for the purposes of an application.

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References to the Tribunal

Power of certain persons to refer case to Tribunal

47.—(1) At any time when an authorisation under Schedule 1 or 2 is in force, a person within subsection (2) may refer to the Tribunal the question whether the authorisation is appropriate.

(2) The persons are—

- (a) the Attorney General;
- (b) the Department;
- (c) the Master (Care and Protection), acting on the direction of the court.

(3) For the purpose of providing information for the purposes of a reference under this section, any medical practitioner authorised by or on behalf of the person to whom the authorisation relates may do anything within section 275 (visiting etc powers) in relation to the person.

Duty of HSC trust to refer case to Tribunal

48.—(1) Where—

- (a) on any date (“the extension date”), the period of an authorisation under Schedule 1 is extended under section 38 or Schedule 3,
- (b) the authorisation has been in force throughout the relevant period (see subsection (2)), and
- (c) the Tribunal has not considered the person's case at any time in that period,

the relevant trust must as soon as practicable refer the person's case to the Tribunal.

(2) The “relevant period” is—

- (a) if the person to whom the authorisation relates (“the person”) is under 18, the period of one year ending with the extension date;
- (b) otherwise, the period of two years ending with the extension date.

(3) For the purpose of providing information for the purposes of a reference under this section, any medical practitioner authorised by or on behalf of the person may do anything within section 275 (visiting etc powers) in relation to the person.

(4) In this section—

“the person's case” means the question whether the authorisation is appropriate;

“the relevant trust” means—

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- (a) where the extension is wholly or partly for the purposes of continuing the person's detention in a place, the HSC trust in whose area that place is situated;
- (b) where the extension is wholly or partly for the purposes of continuing the provision to the person of treatment specified by the authorisation or a requirement to attend for such treatment and paragraph (a) does not apply, the HSC trust in whose area the treatment is provided;
- (c) where the extension is for the purposes of continuing a community residence requirement and paragraph (b) does not apply, the HSC trust in whose area the place where the person is required by the community residence requirement to live is situated.

(5) The Department may by regulations amend subsection (2) so as to alter any period mentioned there.

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

49.—(1) This section applies where—

- (a) immediately before the day a person reaches the age of 16 (“the relevant day”), the person is liable to be detained under Part 2 of the Mental Health Order; and
- (b) on that day, there is in force an authorisation under Schedule 1 to this Act (“the authorisation”) that authorises the detention of the person in circumstances amounting to a deprivation of liberty.

(2) If an application to the Tribunal by the person, or a reference of the person's case to the Tribunal, was made under Part 5 of the Mental Health Order before the relevant day but has not been dealt with by that day, the matters to be considered by the Tribunal include the question whether the authorisation is appropriate.

(3) If—

- (a) on any date when the person is under 17, the period of the authorisation is extended (under section 37 or 38 or Schedule 3),
- (b) a relevant authority has been in force throughout the period of one year ending with that date, and
- (c) the Tribunal has not considered the person's case at any time in that period,

the relevant trust must as soon as practicable refer to the Tribunal the question whether the authorisation is appropriate.

(4) In this section—

“the person's case”—

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- (a) in relation to any time when the person was under 16, has the same meaning as in Part 5 of the Mental Health Order;
 - (b) in relation to any time when the person is 16 or over, means the question whether the authorisation is appropriate;
- “relevant authority”—
- (a) in relation to any time when the person was under 16, means an authority under Part 2 of the Mental Health Order for the detention of the person;
 - (b) in relation to any time when the person is 16 or over, means the authorisation;
- “the relevant trust” has the same meaning as in section 48.

Duty of HSC trust to notify the Attorney General

50.—(1) This section applies if—

- (a) the period of an authorisation under Schedule 1 has been extended (under section 38 or Schedule 3) for a period of one year;
- (b) the authorisation authorises a measure within section 41(2)(b) or (d) (deprivation of liberty or community residence requirement); and
- (c) at the relevant time, it appears to the relevant trust that the person to whom the authorisation relates lacks (or probably lacks) capacity in relation to whether an application under section 45 (applications to Tribunal) should be made.

(2) The relevant trust must as soon as practicable give the Attorney General

- (a) notice of the matters mentioned in subsection (1)(a) to (c); and
- (b) any prescribed information.

(3) In this section—

“the relevant time” means the time 6 months after the beginning of the one year period mentioned in subsection (1)(a);

“the relevant trust” has the same meaning as in section 48.

Powers of the Tribunal

Powers of Tribunal in relation to authorisation under Schedule 1

51.—(1) Where an application or reference to the Tribunal is made under this Chapter in relation to an authorisation under Schedule 1, the Tribunal must do one of the following—

- (a) revoke the authorisation;

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(b) if the authorisation authorises more than one measure (as defined by subsection (4)), vary the authorisation by cancelling any provision of it which authorises a measure;

(c) decide to take no action in respect of the authorisation.

(2) In the case of an authorisation under paragraph 15 of Schedule 1, the Tribunal—

(a) may vary the authorisation only if satisfied that the criteria for authorisation are met in respect of each measure that will remain authorised by the authorisation;

(b) may decide as mentioned in subsection (1)(c) only if satisfied that the criteria for authorisation are met in respect of each measure that is authorised by the authorisation.

(3) In the case of an interim authorisation under paragraph 20 of Schedule 1, the Tribunal—

(a) may vary the authorisation only if satisfied that there is a good prospect of it being established that the criteria for authorisation are met in respect of each measure that will remain authorised by the authorisation;

(b) may decide as mentioned in subsection (1)(c) only if satisfied that there is a good prospect of it being established that the criteria for authorisation are met in respect of each measure that is authorised by the authorisation.

(4) For the purposes of this section each of the following is a “measure”—

(a) the provision to P of treatment specified by the authorisation;

(b) the detention of P in a place in circumstances amounting to a deprivation of liberty;

(c) a requirement to attend at a particular place at particular times or intervals for the purpose of being given treatment specified by the authorisation;

(d) a community residence requirement.

(5) In this section “the criteria for authorisation”, in relation to a measure, means the criteria for authorisation for that measure as set out in Part 3 of Schedule 1.

(6) In paragraphs 11(a) and 12(a) and (b) of that Schedule as they apply for the purposes of this section, the references to imposing a requirement include continuing the requirement.

Powers of Tribunal in relation to authorisation under Schedule 2

52.—(1) Where an application or reference to the Tribunal is made under this Chapter in relation to an authorisation under Schedule 2, the Tribunal must either—

(a) revoke the authorisation; or

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(b) decide to take no action in respect of the authorisation.

(2) The Tribunal may decide as mentioned in subsection (1)(b) only if it is satisfied that the condition in paragraph 12 of Schedule 2 is met.

Sections 51 and 52: additional powers of Tribunal

53.—(1) This section applies where, under section 51 or 52, the Tribunal decides to do anything other than revoke the authorisation.

(2) The Tribunal may, with a view to facilitating the ending at a future date of a measure still authorised by the authorisation—

- (a) recommend the taking of specified actions in relation to P; and
- (b) further consider P's case in the event of any recommendation not being complied with.

(3) Where the Tribunal further considers P's case under subsection (2)(b), section 51 or (as the case may be) section 52 applies.

CHAPTER 8

SUPPLEMENTARY

Medical reports: involvement of nominated person and independent mental capacity advocate

Medical reports: involvement of nominated person

54.—(1) A relevant medical report may be made only if—

- (a) a nominated person is in place for P at the time when the person making the report determines for the purposes of the report what would be in P's best interests; and
- (b) in making that determination, the person making the report consults and takes into account the views of the nominated person to the extent required by section 7(7) (duty to consult where practicable and appropriate and to take views into account).

(2) Subsection (1)—

- (a) does not apply where the situation is an emergency for the purposes of this section (see section 56); and
- (b) is without prejudice to section 55 (need to involve independent mental capacity advocate).

(3) For the purposes of this section a nominated person is “in place for P” at a particular time if at that time there is someone who is P's nominated person (see section 69).

(4) In this section “a relevant medical report” means—

Status: This version of this part contains provisions that are prospective.

Changes to legislation: Mental Capacity Act (Northern Ireland) 2016, PART 2 is up to date with all changes known to be in force on or before 15 September 2019. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes

- (a) a report under section 39;
- (b) a medical report under paragraph 7 of Schedule 1;
- (c) a medical report under paragraph 4, 11, 13 or 14 of Schedule 2; or
- (d) a medical report under paragraph 5 of Schedule 3.

Medical reports: involvement of independent mental capacity advocate

55.—(1) A relevant medical report may be made only if—

- (a) at the time when the person making the report determines for the purposes of the report what would be in P's best interests, there is an independent mental capacity advocate who is instructed under section 91 to represent and provide support to P; and
- (b) in determining what would be in P's best interests, the person making the report consults and takes into account the views of the independent mental capacity advocate to the extent required by section 7(7) (duty to consult where practicable and appropriate and to take views into account).

(2) Subsection (1)—

- (a) does not apply where the situation is an emergency for the purposes of this section (see section 56); and
- (b) is without prejudice to section 54 (need to involve nominated person).

(3) Subsection (1) does not apply if, at the time mentioned in subsection (1) (a), P has made a declaration under section 90 or 93 (declarations declining services of an independent mental capacity advocate) in relation to the matter in question (and has not revoked the declaration).

(4) In this section “a relevant medical report” has the same meaning as in section 54.

Sections 54 and 55: meaning of “emergency”

56.—(1) For the purposes of section 54 or 55 the situation is an “emergency” if, at the time when the person making the report determines what would be in P's best interests, that person—

- (a) knows that the safeguard in that section is not met, but reasonably believes that to delay the report until that safeguard is met would involve an unacceptable risk of harm to P; or
- (b) does not know whether the safeguard is met, but reasonably believes that to delay the report even until it is established whether the safeguard is met would involve an unacceptable risk of harm to P.

(2) For the purposes of this section—

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(a) the safeguard in section 54 is met when a nominated person is in place for P (within the meaning given by that section);

(b) the safeguard in section 55 is met when—

(i) an independent mental capacity advocate is instructed under section 91 to represent and provide support to P in the determination of what would be in P's best interests; or

(ii) P has made (and not revoked) a declaration under section 90 or 93 in relation to the matter.

(3) For the purposes of this section the risk of harm to P involved in delaying the report until a particular safeguard is met, or until it is established whether it is met, is an “unacceptable” risk if—

(a) the seriousness of the harm that could be caused to P by such delay, and

(b) the likelihood of the harm,

are such as to outweigh the risk of harm to P of making the report without that safeguard being met.

(4) In deciding for the purposes of this section when a safeguard would be met, or when it would be established whether a safeguard is met, it must be assumed that any necessary steps would be taken as soon as practicable.

Provision of information

Provision of information

57.—(1) Regulations may make provision requiring a prescribed person to give prescribed information to prescribed persons—

(a) where, after an authorisation has been granted under Schedule 1 or 2, a prescribed event occurs;

(b) in such other circumstances where an act has been done in pursuance of this Part as may be prescribed.

(2) The regulations may include provision as to when the information must be given.

(3) The information that may be prescribed by—

(a) regulations made under this section, or

(b) regulations made under any other provision of this Part which requires prescribed information to be given to a person,

includes a copy of a prescribed document.

(4) Regulations under this section must in particular include provision for the purposes of ensuring—

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- (a) that where a person is detained by virtue of this Part in circumstances amounting to a deprivation of liberty, the person is made aware as soon as practicable of—
 - (i) the provisions of this Part by virtue of which he or she is detained, and the effect of those provisions; and
 - (ii) what rights are available under Chapter 7 (review by the Tribunal);
- (b) that where a person who has been detained under this Part in circumstances amounting to a deprivation of liberty is discharged from detention, the person is informed in writing that he or she is discharged from detention.

Ways in which information must be provided

58.—(1) Regulations may make provision about the way in which relevant information must be given to prescribed persons.

(2) In this section “relevant information” means information which is—

- (a) required to be given by any provision of this Part or of regulations made under this Part; and
- (b) specified by the regulations under this section.

(3) Regulations under this section may in particular require information to be given orally as well as in writing.

Other supplementary provision

Failure by person other than D to take certain steps

59.—(1) This section applies if, in relation to an act done by a person (“D”) —

- (a) all the conditions for section 9 to apply are met, except that supportive steps that it would have been practicable to take were not taken;
- (b) the fact that those steps were not taken is not to any extent due to an unreasonable failure by D to take such steps; and
- (c) at the time of the act, it is no longer practicable for such steps to be taken.

(2) For the purposes of determining whether D is liable in relation to the act, section 9 is to be taken to apply to the act.

(3) But if—

- (a) D is an employee of a person (“E”), and
- (b) any other employee of E unreasonably failed to take supportive steps in relation to the matter at a time when it would have been practicable to take such steps,

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for the purposes of determining whether E is liable in relation to the act subsection (2) is to be disregarded.

(4) In this section “supportive steps” means steps to help or support the person to whom the act relates (“P”) to enable P to make a decision for himself or herself about the matter.

(5) For the purposes of this section a failure by a person at any time to take a supportive step that it would be practicable to take is unreasonable unless—

- (a) at the time in question the person reasonably believes that the step can be taken at a later time and still be as effective as it would be if taken immediately; and
- (b) not taking the step immediately is reasonable in the circumstances.

(6) Any person for whose acts another person may be vicariously liable is to be treated for the purposes of this section as an employee of that other person.

Part 2 not applicable where other authority for act

60.—(1) Section 9 does not apply in relation to an act—

- (a) which gives effect to a relevant decision; or
- (b) which a person has a power (or duty) to do under any other statutory provision (including any provision of this Act).

(2) In this section a “relevant decision” means a decision concerning the care, treatment or personal welfare of a person (“P”) which—

- (a) is made by the court on P's behalf under section 113(2)(a);
- (b) is made in accordance with this Act by an attorney under a lasting power of attorney granted by P and is within the scope of the attorney's authority;
- (c) is made in accordance with this Act by a deputy appointed for P by the court and is within the scope of the deputy's authority; or
- (d) where P is under 18, is a decision made by a parent or guardian of P which is effective under any rule of law.

Power to make further provision

61.—(1) The Department may by regulations make provision modifying any provision of this Part in relation to cases where—

- (a) an act is proposed to be done in respect of a person after that person has reached the age of 16, but
- (b) at the time the act is proposed, the person is under 16.

(2) The Department may by regulations make provision enabling prescribed relevant documents that are found to be incorrect or defective within a prescribed period from being made—

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- (a) to be rectified within a prescribed period, and
- (b) to have effect as if originally made as rectified.

(3) In subsection (2) “relevant document” means an authorisation, or other document, made for the purposes of this Part.

Disregard of certain detention

Disregard of certain detention

62.—(1) In this section a “person who has been subject to short-term detention” means a person who—

- (a) for any period, has been detained under this Part in a hospital in circumstances amounting to a deprivation of liberty otherwise than under an authorisation under Schedule 1; and
- (b) immediately after the end of that period, was not detained in a hospital in circumstances amounting to a deprivation of liberty under an authorisation under Schedule 1.

(2) In this section “the relevant detention” means the detention mentioned in subsection (1)(a).

(3) Where a question seeking information with respect to the previous health or circumstances of a person who has been subject to short-term detention is put to that or any other person, otherwise than in judicial proceedings—

- (a) the question is to be treated as not relating to the relevant detention and the answer may be framed accordingly; and
- (b) the person questioned is not to be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose the relevant detention in answering the question.

(4) An obligation imposed on a person (“A”) by any rule of law or by the provisions of any agreement or arrangement to disclose any matters does not extend to requiring disclosure of the relevant detention of a person who has been subject to short-term detention (whether A or another person).

(5) The fact that a person who has been subject to short-term detention has been subject to the relevant detention, or any failure to disclose that fact, is not a proper ground for dismissing or excluding the person from any office, profession, occupation or employment, or for prejudicing the person in any way in any occupation or employment.

(6) Any disqualification, disability, prohibition or other penalty which, by virtue of any rule of law or statutory provision other than this Act, attaches to or is imposed on any person by reason of the fact that the person has been detained in circumstances amounting to a deprivation of liberty under this Act

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is not to attach to a person merely because he or she is a person who has been subject to short-term detention.

(7) In subsection (3) “judicial proceedings” includes, in addition to proceedings before any of the ordinary courts of law, proceedings before any tribunal, body or person that has power—

- (a) by virtue of any statutory provision, law, custom or practice,
- (b) under the rules governing any association, institution, profession, occupation or employment, or
- (c) under any provision of an agreement providing for arbitration with respect to questions arising under the agreement,

to determine any question affecting the rights, privileges, obligations or liabilities of any person, or to receive evidence affecting the determination of any such question.

CHAPTER 9

DEFINITIONS FOR PURPOSES OF PART 2

Meaning of “serious intervention”

“Serious intervention”

63.—(1) In this Part “serious intervention” means an intervention in connection with the care, treatment or personal welfare of P which (or any part of which)—

- (a) consists of or involves major surgery;
- (b) causes P serious pain, serious distress, or serious side-effects;
- (c) affects seriously the options that will be available to P in the future, or has a serious impact on P's day-to-day life; or
- (d) in any other way has serious consequences for P, whether physical or non-physical.

(2) Without prejudice to subsection (1), and to avoid any doubt, each of the following is a serious intervention for the purposes of this Part—

- (a) any deprivation of liberty;
- (b) the imposition of a requirement mentioned in section 28(1)(a) (requirements to attend at particular times or intervals for certain treatment);
- (c) the imposition of a community residence requirement (see section 31).

(3) Regulations may provide that a prescribed intervention (except one mentioned in subsection (2))—

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(a) is to be regarded as an intervention falling within a particular paragraph of subsection (1); or

(b) is not to be regarded as such an intervention.

(4) If—

(a) the act mentioned in section 9(1) is, or is part of, an intervention which turns out to be a serious intervention, but

(b) at the time the act is done D reasonably believes that the risk that the intervention will turn out to be a serious intervention is negligible,

that act is to be treated for the purposes of this Part as if the intervention were not a serious intervention.

Acts that are “part of” serious interventions

64.—(1) This section applies where, for any purpose of this Part, a question arises whether a particular act is part of an intervention which is a serious intervention.

(2) Where an act is done which—

(a) is a use of force or a threat to use force, and

(b) is done with the intention of securing the doing of another act in connection with the care, treatment or personal welfare of a person which that person resists,

the act mentioned in paragraph (a) is to be taken to be part of the same intervention as the act mentioned in paragraph (b).

(3) Nothing in this section limits the acts that are to be regarded as part of a particular intervention.

Meaning of “emergency”

Meaning of “emergency” in relation to safeguard provisions

65.—(1) This section applies in relation to sections 13, 15, 16, 17, 19, 20, 24, 26, 28 and 35 (provisions which contain additional safeguards, and which require a determination of whether the situation is an “emergency”).

(2) For the purposes of any one of those sections, the situation is an “emergency” if at the relevant time—

(a) D knows that the safeguard in that section is not met, but reasonably believes that to delay until that safeguard is met would create an unacceptable risk of harm to P; or

(b) D does not know whether that safeguard is met, but reasonably believes that to delay even until it is established whether it is met would create an unacceptable risk of harm to P.

Status: This version of this part contains provisions that are prospective.

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(3) But the situation is not an “emergency” by virtue of falling within subsection (2) if the fact that the safeguard in question is not met by the relevant time is to any extent due to an unreasonable failure by D to take a step that it would have been practicable to take for the purposes of ensuring that the safeguard is met by the relevant time.

(4) Subsections (2) and (3) are to be read in accordance with section 66.

(5) For the purposes of any section mentioned in subsection (1), the situation is also an “emergency” if, at the time when the act mentioned in that section is done, D—

- (a) does not know of the effect of that section;
- (b) is not a person with expertise such that he or she could reasonably be expected to know of its effect; and
- (c) reasonably believes that it is necessary to do the act without delay to prevent harm to P.

Section 65: definitions etc

66.—(1) For the purposes of section 65(2) and (3) and this section—

- (a) the safeguard in section 13 is met when a formal capacity assessment has been carried out and a statement of incapacity made;
- (b) the safeguard in section 15 is met when a nominated person is in place for P;
- (c) the safeguard in section 16 or 17 is met when a second opinion is obtained;
- (d) the safeguard in section 19, 20, 24, 26 or 28 is met where the provision of treatment, detention or requirement mentioned in that section is authorised;
- (e) the safeguard in section 35 is met when—
 - (i) an independent mental capacity advocate is instructed under section 91 to represent and provide support to P in the determination of what would be in P's best interests; or
 - (ii) P has made (and not revoked) a declaration under section 90 or 93 in relation to the matter.

(2) In section 65(2) and (3) and this section “the relevant time” means—

- (a) in relation to section 15 or 35, the time when D determines that the act mentioned in that section would be in P's best interests;
- (b) in relation to any other section mentioned in section 65(1), the time when the act mentioned in that section is done.

Status: This version of this part contains provisions that are prospective.

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(3) For the purposes of section 65(2), the risk of harm to P created by delaying until a particular safeguard is met, or until it is established whether it is met, is an “unacceptable” risk if—

- (a) the seriousness of the harm that could be caused to P by such delay, and
- (b) the likelihood of the harm,

are such as to outweigh the risk of harm to P of not complying with the safeguard.

(4) In determining for the purposes of section 65(2) and this section when a safeguard would be met, or when it would be established whether a safeguard is met, it must be assumed that any necessary steps would be taken as soon as practicable.

(5) For the purposes of section 65(3), a failure by D at any time (“the time in question”) to take a practicable step for the purposes of ensuring that the safeguard is met by the relevant time is unreasonable unless, at the time in question—

- (a) he or she reasonably believes that (ignoring any provision of this Act relating to emergency situations) the matter is not one to which the safeguard will apply; or
- (b) he or she reasonably believes that that step does not have to be taken immediately in order for the safeguard to be met in time, and not taking that step immediately is reasonable in the circumstances.

(6) Expressions used in a paragraph of subsection (1) and in the section mentioned in that paragraph have the same meaning in that paragraph as in that section.

Failure by persons other than D to take steps to ensure safeguard met

67.—(1) This section has effect in relation to section 65(2) in a case where D is an employee of a person (“E”).

(2) For the purposes of determining whether E is liable in relation to an act done in a situation falling within section 65(2), any reference in section 65(3) or 66(5) to “D” includes any other employee of E.

(3) Any person for whose acts another person may be vicariously liable is to be treated for the purposes of this section as an employee of that other person.

Other definitions for purposes of Part 2

Interpretation of Part 2: general

68.—(1) For the purposes of this Part—

“community residence requirement” has the meaning given by section 31;

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“emergency”—

- (a) in sections 54 to 56, has the meaning given by section 56;
- (b) otherwise, has the meaning given by section 65;

“reasonable objection”: an act is done “despite” a reasonable objection from a person's nominated person if the nominated person—

- (a) has reasonably objected to the proposal to do the act; and
- (b) has not, by the time the act is done, withdrawn that objection (by any means);

“requirement”: a requirement for a person (“P”) to do a thing is imposed on P by a person if that person tells P (by any means and in any words) that if P does not do that thing, further action will or may be taken in respect of P;

“resisted by”: an act is resisted by a person if the doing of the act is secured by the use of force or a threat to use force;

“serious intervention” is to be read in accordance with section 63;

“subject to an additional measure” has the meaning given by section 23;

“treatment with serious consequences” has the meaning given by section 21;

treatment that “might be” treatment with serious consequences: references to such treatment are to treatment where the risk of the treatment turning out to be treatment with serious consequences is more than negligible.

- (2) See also sections 304 to 306 (definitions for purposes of Act).

Status:

This version of this part contains provisions that are prospective.

Changes to legislation:

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Changes and effects yet to be applied to the whole Act associated Parts and Chapters:

Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 288(1)(a)-(c)s. 288(1)(e)(i)(2)-(8) coming into force by [S.R. 2019/163](#) art. 2(3)Sch. Pt. 3