

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

Mental Capacity Act (Northern Ireland) 2016

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

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

Chapter 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.