

*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 3 – Nominated Person

Section 69 – Nominated person

This section defines “nominated person” for the purposes of the Act by reference to the various sections in the Part that provide for different ways of becoming, and ceasing to be, a nominated person.

Section 70 – Appointment of nominated person

This section sets out the procedure to be followed where a person (aged 16 or over) wishes to appoint one person (aged 16 or over) to act as his or her nominated person under the Act and has capacity to do so. For the appointment to be valid it must be in writing and meet the conditions set out in section 79, and the person appointed must consent in writing to being the nominated person. Such an appointment will continue to have effect even if the person who made the appointment loses capacity to make decisions about his or her nominated person.

Section 71 – Revocation of appointment

The appointment of a nominated person can be revoked by the person who made the appointment provided he or she has capacity to do so. For the revocation to be valid, it must be in writing and meet the conditions set out in section 79. This section also provides that any new appointment of a nominated person automatically revokes any previous appointment.

Section 72 - Resignation

The person who is appointed nominated person may resign by giving notice in writing to the person who made the appointment.

Section 73 – Default nominated person

This section establishes a hierarchy of persons to assume the role of “default nominated person” of a person who is aged 16 or over, in circumstances where a nominated person has not been appointed either by the person themselves (under

section 70) or by the Tribunal (under section 81). Where there is only one person falling within the said list, that person will be the default nominated person. Where there is more than one person, the person highest up the list will be the default nominated person. Section 74 includes further provision regarding the list where more than one person is highest up the list.

Section 74 – Section 73: the list

This section further explains how the list in section 73 should be interpreted.

Section 75 – Section 73: persons to be disregarded

This section sets out who should be disregarded for the purposes of ascertaining the default nominated person.

Section 76 – Section 73: meaning of “carer”

Section 73 places P’s carer at the top of the hierarchy of persons to assume the role of default nominated person and section 76 defines “carer” for this purpose.

Section 77 – Declaration that particular person not to be nominated person

This section sets out the procedure to be followed where a person aged 16 or over wishes to make a declaration that a particular person(s) shall not be his or her nominated person under the Act and has capacity to do so. For the declaration to be valid it must be in writing and meet the conditions set out in section 79.

Where a declaration has been made the person(s) specified must be disregarded for the purposes of ascertaining the default nominated person and may not be appointed by the Tribunal (under section 81) unless there has been a change of circumstances in which the Tribunal’s opinion justifies appointing that person.

Such a declaration will continue to have effect even if the person who made it loses capacity to make decisions about his or her declaration. The declaration can be revoked at any time by the person who made it provided he or she has capacity to do so. For the revocation to be valid, it must be in writing and meet the conditions set out in section 79.

Section 78 – Notice declining to be a person’s nominated person

This section provides that a default nominated person can decline to act as such by giving notice in writing to P (but may also withdraw that notice).

Section 79 – Formalities for documents under Part 3

This section sets out conditions that must be met when drawing up documents containing appointments, declarations and revocations. Such documents must be signed by the person making them and the signature witnessed by a prescribed person who must certify that, in his or her opinion, the person understands the effect of the document and has not been subjected to undue pressure. In the case of an appointment, the witness must also certify that in his or her opinion,

the person making the appointment understands that information (including sensitive personal information) may be disclosed to the nominated person.

Regulations may make provisions for circumstances where a person making an appointment, declaration or revocation is physically unable to sign a document.

Section 80 – Application to Tribunal for appointment of nominated person

This section provides that certain persons may in certain circumstances make an application to the Tribunal to make an order (under section 81) appointing a nominated person for a person aged 16 or over.

Section 81 – Tribunal's power to appoint nominated person

This section gives the Tribunal power to make an order appointing a nominated person (aged 16 or over) for P, if satisfied that the conditions in section 80 are met. In doing so, the Tribunal must not appoint a person named in a declaration made by P under section 77, unless circumstances since the declaration have changed to such an extent that the Tribunal can justify appointing that person.

An appointment made by the Tribunal revokes any previous appointment of a nominated person whether made by the Tribunal (under this section) or by P (under section 70). The section also provides that a person who is appointed may resign as P's nominated person by giving notice in writing to P.

Section 82 – Tribunal's power to disqualify person from being default nominated person

Where the Tribunal makes an order (under section 81) appointing a nominated person on the ground that the previous nominated person was unsuitable, the Tribunal may make a further order that the unsuitable person must be disregarded if at any time in the future P requires a default nominated person.

Section 83 – Revocation of Tribunal's appointment where P regains capacity

If under section 81 the Tribunal has appointed a nominated person for P and P later regains capacity to make decisions about who should be his or her nominated person, P may at any time apply to the Tribunal to have the Tribunal's appointment revoked if he or she has capacity to do so. The Tribunal is required to revoke its previous appointment unless it is satisfied that P in fact lacks capacity to make decisions about who should be his or her nominated person. If it is the case that P lacks capacity but the Tribunal is satisfied that a different person should be appointed as P's nominated person, the Tribunal can make such an order under section 81.

Section 84 and 85 – Duties in relation to nominated person

The Act creates new duties to consult and take account of the views of P's nominated person in determining what would be in P's best interests. Section

84 applies where a person is subject to such a duty and subsection (2) applies. It deals with the very possible scenario where, despite reasonable steps having been taken to establish whether P has a nominated person or who P's nominated person is, it is uncertain who, if anyone, is the nominated person. In such a scenario, section 84, which needs to be read with section 85, aims to strike a balance between ensuring P's rights are protected and enabling necessary interventions to proceed.

Subsections (2) and (3) have the effect of giving protection to the person to whom such a duty applies who, having taken reasonable steps to establish who P's nominated person is, reasonably believes that a particular person is P's nominated person. What are "reasonable steps" for this purpose will depend on the circumstances, in particular the time available and the seriousness of the proposed intervention. Subsection (1) of section 85 then provides that, as long as the person does not have reason to believe that a power in Part 3 of the Act has been exercised, his or her belief as to who is P's nominated person can be based on the assumption that that Part 3 power has not been used. So, for example, if the person concerned knows that P has appointed a nominated person under Part 3 and has no reason to believe that P has revoked the appointment, he or she can assume that the appointment is still valid.

Subject to subsection (6), subsections (4) and (5) of section 84 give similar protection where the person has taken reasonable steps to establish who P's nominated person is and believes there is no nominated person (paragraph (a) of subsection (4)), and also where it has not been practicable to establish whether a person has a nominated person or who the nominated person is (paragraphs (b) and (c) of subsection (4)). However, subsection (3) of section 85 has the effect that, if it is practicable to come to a reasonable view that a particular person is P's nominated person, the case does not fall under subsection (4)(b) or (c) of section 84 and an application cannot be made under section 80 to the Tribunal on the basis that it cannot be established who the nominated person is.

Subsection (6) disapplies subsection (5) where the Act requires a nominated person to be in place before an intervention can proceed (i.e. the intervention is serious and the situation is not an emergency – see section 15). It is also disapplied where the Act requires a nominated person to be in place and consulted under section 54. In these cases, an application can be made to the Tribunal under section 80 to appoint a nominated person.