

*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 4 – Independent Mental Capacity Advocates

Section 86 – Independent mental capacity advocates

This section places a duty on each HSC trust to make arrangements to ensure that independent mental capacity advocates are available to be instructed as the Act requires, which may include arrangements for payment. In making these arrangements, HSC trusts must have regard to the principle that the advocate should be independent from the person who is responsible for carrying out the proposed act. The Department is also given a power to make regulations about these arrangements which may cover issues such as the qualifications, skills and training requirements that the advocate must have.

Section 87 – Functions of independent mental capacity advocates: provision of support, etc

This section provides a power to make regulations about the functions of independent mental capacity advocates, setting out a number of things the regulations may cover. This includes the steps the advocate should take in order to: determine P’s best interests; provide support to P; ascertain P’s past and present wishes and feelings and beliefs and values; and inform others of relevant information. The regulations could also provide for circumstances in which the advocate may challenge or assist a challenge of a relevant decision made on behalf of P.

Section 88 – Request for independent mental capacity advocate to be instructed

This section provides that the “appropriate healthcare professional” may request that the relevant HSC trust instructs an independent mental capacity advocate to represent and support P in the determination of whether an act would be in P’s best interests, in certain circumstances (see sections 35 and 55). Steps set out in section 89 must be taken so far as practicable before requesting that the HSC trust instruct an advocate (in a prescribed form).

Section 89 – Steps to be taken before independent mental capacity advocate may be requested

This section makes it clear that before the appropriate healthcare professional makes a request to the HSC trust to instruct an independent mental capacity advocate, P must be provided with prescribed information about independent mental capacity advocates. This includes notifying P that relevant information (including sensitive personal information) may necessarily have to be disclosed to the advocate. P must also be given an opportunity (if P has capacity to do so) to decide whether to make a declaration that he or she does not want an independent mental capacity advocate and then to make that declaration if he or she so wishes.

Section 90 – Right to declare that no independent mental capacity advocate to be instructed

This section makes further provision about such declarations. It provides that a declaration refusing an advocate must be in writing and meet the conditions set out in section 95. A declaration can be revoked at any time if P has the capacity to revoke it. Any revocation must also adhere to the same formalities as the declaration. The effect of the declaration is that no request can be made for an independent mental capacity advocate to be instructed and accordingly no instruction to act may be given.

Section 91 – Instruction of independent mental capacity advocate

This section places a duty on the relevant HSC trust to instruct an independent mental capacity advocate where it has received a request made under section 88 and no declaration refusing an advocate has been made.

Section 92 – Powers of independent mental capacity advocates

This section provides that the independent mental capacity advocate, in carrying out his or her functions, may at any reasonable time, visit and interview P in private, or request sight of, examine and make copies of P's health records or any other records relating to P's care, treatment or personal welfare, as the advocate considers necessary.

Section 93 – Right of person to discontinue involvement of independent mental capacity advocate

This section provides that where an independent mental capacity advocate has been instructed and P subsequently decides that he or she no longer wishes to continue to avail of the advocate's services, P can make a declaration saying as such, if he or she has capacity to do so. The HSC trust must then withdraw the instruction to the independent mental capacity advocate. P's declaration must be in writing and meet the conditions set out in section 95. The declaration can be revoked at any time by P if he or she has capacity to do so.

Section 94 – Continuing duty of trust in relation to independent mental capacity advocate

This section requires the HSC trust to instruct a new independent mental capacity advocate to represent and support P if for any reason an independent mental capacity advocate previously instructed is unable to do so (except where P has made a declaration under section 93).

Section 95 – Formalities for declarations under Part 4

The formalities for any declaration or revocation of a declaration relating to the independent mental capacity advocate are provided for in this section. The statement of declaration or revocation must be set out in a document and signed by P. P's signature must be witnessed by a person of a prescribed description and that person must also certify that P understands the effect of the declaration or revocation and that P has not been subjected to any undue pressure in making the declaration or revocation. Regulations may make provision for circumstances where a person making a declaration or revocation is physically unable to sign a document.

Section 96 – Power to adjust role of independent mental capacity advocate

This section provides a power to make regulations adjusting the role and functions of the independent mental capacity advocate and the obligation on the HSC trust to make arrangements.