

*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 9 – Power of Police to Remove Person to Place of Safety

Part 9 of the Act sets out the police's powers to remove an individual from a public place, if that person appears to be in immediate need of care or control, and take them to a place of safety. Part 9 also includes powers for constables to detain persons at a place of safety or transfer persons between places of safety.

Section 139 - Power of police to remove person from public place to place of safety

This section provides constables with a power to remove persons from a public place to a place of safety. In order to do so, the person must appear to the constable to be in immediate need of care or control, and the constable must reasonably believe that a series of other conditions are satisfied.

The constable must reasonably believe that failing to remove the person could cause serious physical or psychological harm to that person or serious physical harm to other people. The constable must also reasonably believe that removing the individual is a proportionate measure in light of the seriousness and likelihood of that harm, and that the person is unable to decide for themselves if they should be removed to a place of safety due to an impairment in the functioning of their mind or brain. The decision to remove the person must also be in that person's best interests.

Section 140 - Information to be given on removal

This section provides that a person removed under section 139 to a place of safety must be informed that they have been, or are being, so removed as soon as practicable. This information must be provided either at the time of their removal, as soon as practicable after that time or, if necessary, upon arrival at the place of safety. This requirement does not have to be adhered to if the person escapes prior to the information being provided.

The section also provides that Article 30 of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE") – which provides that the police must provide arrested persons with certain information – does not apply in relation to a person removed to a place of safety.

Section 141 - Search of person on exercise of power to remove

This section provides that when a person is informed that they are to be (or are being) removed to a place of safety, he or she is considered to be arrested for the purposes of Article 34 of PACE. Article 34 of PACE provides constables with certain search powers when arresting a person. Even if it has not been practicable to inform the person of their removal to a place of safety, the person will be considered for the purposes of carrying out a search under Article 34 of PACE as being arrested at the time it was decided to remove them from the public place to the place of safety.

This section also provides for a modification of Article 34 of PACE so that it can apply in these circumstances.

Section 142 - Power of police to detain in hospital a person removed from a public place

This section provides the police with a power to detain a person who has been removed from a public place at a hospital. The purpose of detaining the individual there is to allow them to be examined by a medical practitioner and interviewed by an approved social worker. The person can only be detained if the constable reasonably believes that the “detention conditions” set out at section 144 are met, and if any of these conditions are no longer met at any time the person then must be discharged. Any period of detention can only last for a maximum of 24 hours beginning with the time of removal.

Section 143 - Power to detain in police station a person removed from a public place

This section provides that, when the “detention conditions” provided for by section 144 are met, a person removed from a public place may be detained in a police station. The purpose of the detention is to enable the person to be examined by a medical practitioner and interviewed by an approved social worker, and to prevent physical or psychological harm to that person or other people, whilst any necessary arrangements are made for the person’s care or treatment at another location.

The person can only be detained if the constable reasonably believes that the “detention conditions” set out at section 144 are met, and if any of these conditions are no longer met at any time the person then must be discharged. Any period of detention can only last for a maximum of 24 hours beginning with the time of removal.

Section 144 - Sections 142 and 143: the detention conditions

This section sets out the conditions which must be met for a person to be detained at a place of safety. The detention conditions include that failure to detain the person could create a risk of serious physical or psychological harm to that person or serious physical harm to other people. The detention must also be a proportionate measure in light of the likelihood and seriousness of that harm, and

the person must be unable to decide for themselves if they should be detained at a place of safety due to impairment in the functioning of their mind or brain. The detention must also be in that person's best interests.

Section 145 - Transfer from one place of safety to another

This section provides that a person may be transferred from one place of safety to another if certain conditions are met. There must be appropriate care or treatment available at the new place of safety that is not available at the current place of detention. Discharging rather than transferring the person would also have to cause a risk of serious physical or psychological harm to that person or serious physical harm to other people. The transfer must also be a proportionate measure in light of the likelihood and seriousness of that harm, and the person must be unable to decide for themselves if they should be transferred to another place of safety due to an impairment of or disturbance in the functioning of their mind or brain. The transfer must also be in that person's best interests.

Section 146 - Maximum period of detention under Part 9

This section provides that a person removed to a place of safety cannot be detained after the end of a period of 24 hours, beginning at the time of the person's removal from a public place. The Department of Justice can amend the maximum period of detention by regulations.

Section 147 - Duty to inform certain persons where power of removal or transfer used

This section provides that where the power to take or transfer a person to a place of safety is used, the constable must ensure that certain information (contained in section 148) is provided as soon as practicable after the person ("R") arrives at a place of safety. This information must be given to the HSC trust in whose area that place of safety is located; an appropriate person; and, if the appropriate person does not live with R and it is practicable to give the information to a person who lives with R who is aged 16 or over, and is named by R as someone to whom the information should be given or who is engaged in caring for R or who is interested in his or her welfare, that person.

However, if it is not practicable to give the information to the appropriate person but it is practicable to give the information to a person who is aged 16 or over and is named by R as someone to whom the information should be given or is engaged in caring for R or interested in his or her welfare, the constable must instead ensure that that person is given the information as soon as practicable after R arrives at the place of safety.

The section defines "appropriate person" as any person who is R's nominated person if R is aged 16 or over, or if R is aged under 16, a person who has parental responsibility for R.

Section 148 - Section 147: meaning of “the required information”

This section makes provision for the information that is to be given when a person is taken to a place of safety under section 139 or section 145. This information includes the fact that the person has been taken to a place of safety, the person’s name and address, the address of the place of safety to which he or she has been taken, the date and time of the taking or transfer to a place of safety, and the circumstances which gave rise to the removal or transfer.

In situations where this section applies, Article 10 of the Criminal Justice (Children) (Northern Ireland) Order 1998 and Article 57 of PACE do not apply.

Section 149 - Record of detention to be kept

This section requires the “appropriate officer” (as defined in section 160) to make a written record of a person’s detention. The record must be made as soon as practicable after the decision to detain the person has been taken, and must be made in the presence of the detained person. If the person is incapable of understanding what is being said, is acting in a violent manner or is in urgent need of medical attention, then they do not have to be present when the written record is made.

Section 150 - Responsibilities of the appropriate officer

This section sets out the responsibilities of the appropriate officer. These include ensuring that the person detained at a place of safety is treated in accordance with the provisions of the Part or of PACE which relate to the treatment of detained persons, or any code of practice relating to either piece of legislation. The appropriate officer must also ensure that any written record required by this Part or PACE is completed.

Section 151 - Review of detention

This section provides that the detention of any person at a place of safety must be periodically reviewed to determine whether or not the detention conditions are met. The first review must be no later than six hours after the person arrives at the place of safety, and subsequent reviews should be at six hourly intervals. A review may be postponed if it is not practicable to complete one or if the appropriate officer is not available, but a review must be completed as soon as practicable after any delay. If there is any delay in conducting a review, that delay does not alter the requirement for a review at six hour intervals, beginning at the time of arrival.

Decisions to detain a person following review, or to postpone a review, must be recorded in writing. This should be done as soon as practicable after any such decision in the presence of the person. If the person is incapable of understanding what is being said, asleep, acting in a violent manner or is in urgent need of medical attention, then they do not have to be present when the written record is made.

References to periods of time in this section are to be treated as approximate only.

Section 152 - Access to legal advice

This section provides that any person detained under the Part is entitled to consult a solicitor privately at any time. If such a request is made then it should be facilitated as soon as is practicable. The request and the time it was made should be recorded in writing. Article 59 of PACE, which deals with access to legal advice when in police custody, does not apply in relation to persons detained at a place of safety under this Part.

Section 153 - Searches of person following removal to place of safety

This section provides that if any person is detained or transferred to a police station under this Part, the person is to be treated as having been arrested elsewhere and brought to the station for the purposes of Article 55 of PACE, which provides constables with powers to search arrested persons at police stations. A constable can avail of these powers in respect of a person detained at a place of safety under this Part. This section also provides for a modification of Article 55 of PACE so that it can apply in these circumstances.

Section 154 - Searches and examination to ascertain identity

This section provides that a constable can avail of the powers of search and examination to ascertain identity under Article 55A of PACE in respect of a person detained at a place of safety under this Part. This section also provides for a modification of Article 55A of PACE so that it can apply in these circumstances.

Section 155 - Intimate searches

This section provides that a constable can avail of the power to perform intimate searches under Article 56 of PACE in respect of a person detained at a place of safety under this Part. This section also provides for a modification of Article 56 of PACE so that it can apply in these circumstances.

Section 156 - Annual records

This section provides that annual records must be kept by the police of the number of persons detained in hospital and the number of persons detained in police stations under this Part. The section further specifies that the police must keep specific records regarding children detained at hospitals and police stations under Part 9, as well as the final disposals in respect of those children. “Children” is defined for these purposes as any persons under the age of 18. Regulations may provide what records should be kept relating to each child who ceases to be detained under this Part.

This section also specifies that this information must be included within the annual reports published by the police under section 58(1) of the Police (Northern Ireland) Act 2000.

Section 157 - Principles applying for purposes of Part 9

This section sets out the principles that should be complied with when making certain determinations under this Part.

When a determination is to be made about whether or not a person is unable to make a decision for themselves, that determination cannot be made solely on the basis of whether or not the person can do the things mentioned in section 4(1) (a) to (d) of the Act. Certain other principles apply, including ensuring that all practicable help and support has been provided to help the person make the decision, as well as not determining that the person is unable to make a decision because that person makes an unwise decision. The section requires that a determination about someone's decision-making capability or best interests should not be made on the basis of their age or appearance, or any other condition that the person has which may lead to unjustified assumptions about their ability to make a decision for themselves.

This section also provides that when making a determination about a person's best interests, the decision maker must take account of all relevant circumstances and take a series of steps. These steps include encouraging the person to participate in the determination of their best interests, and taking account of the person's past and present wishes if possible. Where it is practicable the decision maker should also consult a "key person", as defined within the section.

This section provides that where any removal, transfer or detention is being considered, the relevant officer must have regard to whether the purpose for which that action would be carried out can be as effectively achieved in a way that is less restrictive of R's rights and freedom of action.

The principles within this section are specific to Part 9. Sections 1 to 3 and 5 to 8 of the Act do not apply for the purposes of this Part.

Section 158 - Reasonable belief etc

This section provides an explanation of the factors which must be considered when determining if certain decisions made under this Part have been made on the basis of a "reasonable belief". The factors to be considered include the place and circumstances in which the decision was made, and the availability or lack thereof of advice from a medical practitioner or approved social worker.

Section 159 - Power of constable to use reasonable force

This section provides that any constable exercising a power conferred by this Part may exercise reasonable force, if necessary.

Section 160 - Definition for purposes of Part 9

This section defines several key terms within Part 9 of the Act. The section also provides the Department of Justice with a power to amend the definition of a place of safety by regulations. The section provides that the Department of Justice may also amend other sections within Part 9 as necessary if the definition of a place of safety is changed.

The section also provides, for the purposes of sections 147 and 157, that where the age of the person is not known, it is to be taken to be the age that the person appears to be.

Section 161 - Relationship of Part 9 to other provisions

This section makes provision for the relationship between the powers available to a constable under this Part, and other powers available to a constable under other legislation, including within other parts of this Act. The section also provides that if a person is detained in or being taken to a place of safety and they are arrested for an offence, then the relevant provisions of PACE will apply and the provisions of this Part will cease to apply to that person.