

*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

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

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

#### ***CHAPTER 4 – ADDITIONAL SAFEGUARD: AUTHORISATIONS ETC and CHAPTER 6 – EXTENSION OF PERIOD OF CERTAIN AUTHORISATIONS***

Chapter 4 provides for further additional safeguards, including authorisation. This safeguard applies to four types of interventions under the Act. These are explained below. The authorisation process and the criteria for authorisation are set out in Schedules 1 and 2. Schedule 1 covers the authorisation of all interventions that require authorisation except short-term detention in hospital for examination of an illness which is dealt with in Schedule 2. Schedule 1 also makes provision for interim authorisations.

Where an authorisation has been granted under Schedule 1 (other than an interim authorisation), the authorisation can last for up to six months unless revoked. An interim authorisation can last for up to 28 days. An authorisation under Schedule 2 can also last for 28 days. However, the fact that an authorisation has been granted does not mean that the intervention can be carried out if the other safeguards and conditions in Part 2 are no longer met at the time of the intervention. Similarly, in the case of an ongoing intervention requiring authorisation, if the other safeguards or conditions cease to be met, the intervention must also cease.

Chapter 6 (including Schedule 3) provides for the extension of certain authorisations.

Provision is also made in these Chapters requiring new duties to be fulfilled where the person making an application for authorisation or an extension report is of the opinion that P is likely to lack capacity to apply to the Tribunal for a review of the authorisation made in respect of them. A statement to this effect must be made in the application/extension report and, on grant/making, the Attorney General must be notified of such cases so that a referral to the Tribunal under section 47 can be made if necessary. See paragraphs 6(2), 19(4) and 20(7) to Schedule 1, paragraphs 2(5) and 7(2) to Schedule 2, sections 39(3) and 43(6) and paragraphs 4(2) and 9(4) to Schedule 3. The duty also applies to interim

authorisations and at the six month point of extensions made under section 38 and Schedule 3 (yearly subsequent extensions) (see section 50). The purpose of these new duties is to ensure that a person's right to challenge their detention has practical effect where the person lacks or probably lacks capacity to decide whether to make an application to the Tribunal.

### ***Sections 19 – 23 - Treatment with serious consequences***

Section 19 provides that, in order for D to avail of the defence in section 9 in respect of an act that is, or is done in the course of, the provision to P of treatment with serious consequences (defined in section 21) where there is a reasonable objection from P's nominated person, the provision of the treatment must be authorised under Schedule 1 (unless the situation is an emergency). Importantly, it also provides that a further safeguard must be met - the prevention of serious harm condition. This applies even if the situation is an emergency and its meaning is set out in section 22. It requires D to be satisfied that failure to provide the proposed treatment would create a risk of serious harm to P or serious physical harm to others, and that carrying out the treatment is a proportionate response to the likelihood of harm to P, or the likelihood of physical harm to others, and the seriousness of that harm. The word 'proportionate' is important here because if treatment is provided which is not proportionate then D will not be protected from liability under section 9.

The authorisation of treatment with serious consequences is also required by virtue of section 20 where there is no objection from P's nominated person but, in prescribed circumstances, P is resisting the treatment, or the treatment is given while P is subject to an additional measure (i.e. where P is being detained in circumstances amounting to a deprivation of liberty; is subject to an attendance requirement; is subject to a community residence requirement; or where a supervision and assessment order is in force – see section 23 and sections 24-34 for further explanation of the interventions mentioned here). In such prescribed cases, the prevention of serious harm condition must also be met.

The criteria for authorisation required under sections 19 and 20 are set out in paragraph 9 of Schedule 1.

Section 21 defines 'treatment with serious consequences' in general terms and gives the Department a power to make regulations to specify what treatment would, or would not, fall under each of the four categories in paragraph (1). The wording reflects that a treatment which may be routine for one person could have a significant impact on another person. Section 21 also makes provision for the scenario in which an act is not anticipated to have serious consequences for P but turns out to be treatment with serious consequences. In these cases, provided D had a reasonable belief that the risk of this happening was negligible, the act is not to be treated as treatment with serious consequences.

### ***Sections 24 – 27 - Deprivation of liberty***

Sections 24-27 make provision in respect of an act or acts that together amount to a deprivation of liberty (defined in section 306 by reference to Article 5 of the ECHR so as to attract relevant case law). The Act aims to address the legislative gap in Northern Ireland for such deprivations of liberty of persons who lack capacity in relation to them, in a way that avoids many of the difficulties encountered in other jurisdictions and takes account of developments in ECHR and domestic case law. Section 24 provides that only certain kinds of deprivation of liberty can have the protection from liability afforded by section 9 and, even then, they must be authorised by either a HSC trust panel under Schedule 1 or by the making of a report under Schedule 2 (relating to a short term detention for examination) unless the situation is an emergency. The criteria for detention are set out in paragraph 10 to Schedule 1 and paragraph 2(3) to Schedule 2. The prevention of serious harm condition set out in section 25 – a further safeguard - must also be met. This applies even if the situation is an emergency.

There are three types of deprivation of liberty that may be authorised under Part 2. First, the detention of P in circumstances amounting to a deprivation of liberty in a place in which care or treatment is available for P. This is the main type of deprivation of liberty falling within the scope of Part 2.

The two remaining types of deprivation of liberty that can be authorised under Part 2 are set out in section 25, namely detention while being taken to a place in which care or treatment is available, and detention in pursuance of a condition imposed during a period of permitted absence from a relevant place (as defined in section 27 and which that section makes clear fall within the scope of section 9). Paragraph 22 to Schedule 1 and paragraph 18 to Schedule 2 ensure that such detention is covered by an authorisation under those Schedules granted in respect of the detention of P in a specified place in which care or treatment is available for P. In the case of the latter detention, however, only the detention of P in pursuance of such conditions lasting 7 days or less is covered by the authorisation.

Section 26 deals with the scenario in which there is a need to take P to a place where P is to be detained in circumstances amounting to a deprivation of liberty, and the act of taking P there does not amount to a deprivation of liberty. In this case, section 26 makes it clear that any act which is, or is done in the course of, taking P to such a place is only covered by section 9, and therefore lawful under the Act, if the deprivation of liberty in that place has been authorised under the Act (unless the situation is an emergency) and the prevention of serious harm condition as defined in section 25 has been met.

### ***Sections 28 and 29 – Attendance requirements***

An attendance requirement is a requirement to attend at a particular place at particular times or intervals for treatment that would, or might be, treatment with serious consequences. “Treatment with serious consequences” has the same meaning as that in section 21.

The effect of section 28 is that unless an authorisation has been granted in respect of such a requirement (and any other relevant conditions under Part 2 met), it cannot be lawfully imposed on P unless the situation is an emergency. In other words, D will not be protected from liability under section 9. Any act done to ensure that P complies with the requirement will also not be lawful unless the requirement itself has been authorised. The criteria for authorisation are set out in paragraph 11 of Schedule 1.

Section 28 also requires that a further safeguard is met before the requirement can be lawfully imposed: the “receipt of treatment condition”. To meet this condition, D must reasonably believe that failure to impose the requirement would be more likely than not to result in P not receiving the treatment. This condition also applies to any act done to ensure that P complies with a requirement of this type.

Section 29 provides that where a requirement to attend for certain treatment has been authorised and imposed but it subsequently becomes apparent to the medical practitioner that any one of the conditions in subsection (2) is no longer met, the requirement must be revoked and another requirement cannot be imposed under the same authorisation.

### ***Section 30 – 34 - Community residence requirements***

A community residence requirement is defined in section 31 as a requirement imposed by a HSC trust for P to live at a particular place. A community residence requirement may also include a requirement to allow a healthcare professional access to P or a requirement to attend somewhere for training, education, occupation or treatment (other than treatment which would, or might be, treatment with serious consequences as such requirements are dealt with separately under section 28). The meaning of “healthcare professional” for the purposes of this section will be defined in regulations made under the Act.

The effect of section 30 is that, unless an authorisation has been granted under Schedule 1 in respect of the requirement (and any other relevant conditions under Part 2 met), it cannot be lawfully imposed on P. In other words, D will not be protected from liability under section 9. Any act done to ensure that P complies with the requirement will also not be lawful unless the requirement itself has been authorised. This includes acts done to ensure that P moves to, continues to live at, or resumes living at the place specified in the requirement; or to ensure that P complies with a provision in the requirement requiring P to attend a place, or allow a person access to P. The criteria for authorisation are set out in paragraph 12 to Schedule 1.

Section 30 also requires that a further safeguard is met before the requirement can be lawfully imposed: “the prevention of harm condition”. To meet this condition, D must reasonably believe that failure to impose the requirement would be more likely than not to result in harm to P. This condition also applies to any act done to ensure that P complies with a requirement of this type.

Section 32 provides that where a community residence requirement has been authorised and imposed but it subsequently becomes apparent to the approved social worker in charge of P's case that any one of the conditions set out in subsection (2) is no longer met, the requirement must be revoked and another requirement cannot be imposed under the same authorisation. Section 33 provides the Department with a regulation making power to impose duties on HSC trusts regarding people who are subject to community residence requirements and their visitation.

Section 34 is intended to clarify for those working under the Act that community residence requirements are not to be regarded as a deprivation of liberty (or restraint) for the purposes of the Act. This is required to avoid any duplication in the authorisation process given that the case law around guardianship under the Mental Health Order (which community residence requirements are intended to replace) and whether it could be a deprivation of liberty or not remains unclear. The reference to restraint is to make it clear that the additional safeguard of authorisation applies to community residence requirements (it does not apply to acts of restraint).

#### ***Sections 37 – 44 - Extensions of period of authorisation***

Sections 37 and 38 provide that, if the criteria for authorisation continue to be met, an authorisation granted under Schedule 1 can be extended initially for six months and yearly thereafter without referral back to the HSC trust panel. Such an extension is achieved by the making of a report. Section 39 requires this extension report to be made by an "appropriate medical practitioner" (also defined in section 39) within the last month before the initial authorisation ends for the first extension, and within the last 2 months for subsequent extension periods. The report must also contain a statement by "the responsible person" (to be defined in regulations - see section 42) that the criteria are met. Where the responsible person is not of the opinion that the criteria continue to be met, the matter must be referred to the HSC trust panel. The process for this referral is set out in Schedule 3.

Section 43 refers to requirements regarding the involvement of nominated persons and independent mental capacity advocates in extension reports (sections 54 to 56 provide more detail on this). These reports must also be given to the relevant HSC trust (as defined in section 43) as soon as practicable and the HSC trust must in turn give prescribed information to P and other persons and send a copy to the RQIA.

Section 44 provides that any measure authorised by the authorisation but not specified in the extension report will be treated as cancelled.