

*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 8 – Supplementary

Most of the following sections have been referred to where relevant in the commentary above. Further explanation, where necessary, is provided below.

Sections 54-56 – Medical reports: involvement of nominated person and independent mental capacity advocate

Sections 54 and 55 require that a nominated person and an independent mental capacity advocate must be in place and, where practicable and appropriate, consulted and their views taken into account when a person making a medical report, required for the purposes of an authorisation under Schedule 1 or 2 or the extension of a period of authorisation under section 37, section 38 or Schedule 3, is determining what would be in P's best interests. This safeguard does not apply when the situation is an emergency. This is defined in section 56 for the purposes of these sections and requires the person making the report to weigh up the risks involved in delaying the making of the report to put in place this safeguard or to check if it is in place, against the risks of proceeding without putting the safeguard in place or checking if it is in place. If the risks involved in delaying are greater, the situation is an emergency. However, an unreasonable failure to take the necessary steps to meet the safeguard will not satisfy this test. It must be assumed for the purposes of this section that they will be taken as soon as practicable.

Sections 57 and 58 – Provision of information

Section 57 is a general provision that enables the Department to make regulations about when information must be given for the purposes of Part 2. This is an important section and the regulations made under it will be extensive given the many occasions in which information will have to be provided in relation to acts covered by the Act and in respect of authorisations made under Schedule 1 and 2, both of which also contain further provisions requiring information to be given at various stages in the authorisation process. Specifically, section 57 makes it clear that these regulations must include

provision for P to be informed of the provisions in Part 2 under which he or she is detained and his or her rights in terms of having his or her case reviewed by the Tribunal, and for P to be informed in writing on discharge from detention.

Section 58 states that the way in which information is provided when required by any provision in Part 2 or by regulations made under Part 2 may also be detailed in regulations. This may include a requirement to provide information orally, as well as in writing.

Section 59 – Failure by person other than D to take certain steps

Section 59 provides a defence for D in circumstances where supportive steps (i.e. helping P to make a decision for themselves) that would be considered practicable were not taken but due to no fault of D. It also provides that “E” – D’s employer – can be held liable under Part 2 rather than D where another employee of E is responsible for the unreasonable failure to take such steps. For the purposes of this section, a failure to take practicable supportive steps is unreasonable unless at the time the person believes that the steps can be as effectively taken later and that not taking the step immediately is reasonable in the circumstances.

Section 60 – Part 2 not applicable where other authority for act

Section 60 clarifies that the defence in section 9 (protection from liability) is not applicable where a person already has authority to do an act that falls within its scope. This could be because the person has been given the power to do the act under another statute or under a lasting power of attorney. The person could also have been appointed as a deputy by the Court under Part 6 and given the power or duty to make the relevant decision on behalf of P. Section 60 also recognises that persons aged 16 or 17 are still children under the law even though they fall within the scope of Part 2 and, therefore, a parent or guardian may also have legal authority to act on behalf of such persons.

Section 61 – Power to make further provision

This section provides the Department with a regulation making power to modify any provisions of Part 2 for cases where a person is under 16 when a particular intervention is proposed, but will be over 16 when the intervention is carried out. It also gives the Department a power to make regulations for the rectification of authorisations, or other documents made under Part 2 that have been found to be incorrect or defective within a prescribed period.

Section 62 – Disregard of certain detention

Section 62 is the equivalent of Article 10 of the Mental Health Order. It applies to any person who has been detained in circumstances amounting to a deprivation of liberty under Part 2 of the Act apart from under Schedule 1 (in other words short-term detention for examination of an illness only) and does not subsequently become liable to be detained in hospital under that Schedule.

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In such cases, the effect of the section is that the detention does not have to be disclosed where information is being sought about the person's previous health other than in judicial proceedings. The detention or failure to disclose it can also not be used as grounds for dismissing or excluding the person from any office etc. or prejudicing the person in any way in any occupation or employment. Any disqualification, disability, prohibition or penalty relating to the fact that P has been detained under the Act also does not apply.