

*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 9 – Definitions for Purposes of Part 2

Most of the following sections have been referred to where relevant already as they relate to key concepts in Part 2 of the Act. Further explanations, where necessary, are provided below.

Sections 63 and 64 – “Serious intervention”

The definition of “serious intervention” for the purposes of Part 2 is intended to capture any intervention which has serious consequences (physical or non-physical) for P. Regulations may provide more detail as to what might fall under each of the four main categories listed in paragraph (1). However, for the avoidance of doubt, section 63 makes it clear that all interventions requiring authorisation under the Act (see Chapter 4 of Part 2) will always be a serious intervention for the purposes of Part 2. The provision of serious compulsory treatment (sections 19-23) is not mentioned because it is obvious from the definition of treatment with serious consequences in section 21 that it will also always be a serious intervention under Part 2.

As additional safeguards need to be put in place for serious interventions, it will be critical for D to consider whether what he or she is proposing for P is serious. However, section 63 recognises that there may be circumstances in which something that appears initially to be routine can turn out to be serious and D could not have been expected to foresee that it would turn out as such. In such cases, the intervention is to be treated as not being serious for the purposes of the Act if the risk of it being serious was a negligible one.

Section 64 makes it clear that any use or threat of force for the purposes of doing an act which a person is resisting is to be taken as being part of the same intervention as the act that is being resisted by P.

Sections 65 – 67 – Meaning of “emergency” in relation to safeguard provisions

In order to avail of the defence in section 9 of Part 2 of the Act, D needs to ensure that all of the applicable safeguards mentioned in that section and provided for in Part 2 are in place. However, the Act also recognises that there will not be time in every case to put in place the safeguards. This is why there is provision in each of the additional safeguard provisions in Part 2 saying that the safeguard does not apply where the situation is an emergency.

Sections 65 and 66 explain what this means. In practical terms, it means that D must weigh up the risks involved for P in delaying the act to put in place the safeguard or to check if it is in place against the risk of proceeding without the safeguard in place. This exercise has to be done for each safeguard as there may be time to put one or more of the safeguards in place but not others. If the risk involved in delaying is greater, the situation is an emergency and D can proceed without putting the safeguard in place or checking if it is in place.

However, an unreasonable failure to take the necessary steps to meet the safeguard will not satisfy this test, meaning that the person intervening may not be afforded the defence in section 9 in such cases. A failure by D at any time to take reasonable steps to put a safeguard in place by the time it is required to be in place under Part 2 is unreasonable unless D believes that the safeguard is not applicable; or that any delay in putting the safeguard in place is reasonable under the circumstances. By virtue of section 67, if the unreasonable failure is due to another employee of D’s employer “E” not D, E can be held liable for the act i.e. the emergency provisions will not apply in such circumstances. It must also be assumed for the purposes of this section that the steps necessary to ensure a safeguard is met or to check it is met will be taken as soon as practicable.

Section 65 also covers the situation in which D is not someone who could reasonably be expected to know about the safeguard provisions in the Act and does an act which he or she believes is necessary to prevent harm to P. In such cases, the situation is also an emergency for the purposes of the safeguard provisions.

Section 68 – Interpretation of Part 2: general

Section 68 signposts the reader to various provisions in the Act for definitions of key concepts in the Act, including the general interpretation sections (section 304 to 306) and also provides definitions of treatment that “might be” treatment with serious consequences, “reasonable objection”, “resisted by” and “requirement”. These are relevant to the safeguard provisions in Part 2.