

*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

OVERVIEW

14. [Part 1](#) of the Act sets out the key principles upon which the Act is based. They include, and build upon, the common law presumption of capacity in persons aged 16 and over and the common law principle of best interests. Significantly, they place greater emphasis on the need to support people to exercise their capacity to make decisions where they can. If, on the other hand, it is established that a person lacks capacity to make a specific decision at a particular time, the Act provides alternative decision making mechanisms.
15. People may lack capacity to make a decision for many reasons. It may be because of, for example, a stroke, an acquired brain injury, a learning disability or a mental illness, and so the Act has the potential to impact upon many people. In fact, the reality is that the Act has the potential to affect everyone in society, as most people will at some point in their lives be directly involved with, or will know of, someone who lacks capacity. They could even potentially be an attorney who, through the new system provided for in the Act, can be given the authority by someone else to make decisions on his or her behalf at a time in the future when he or she lacks capacity to do so. This new system will be known as Lasting Powers of Attorney.
16. If, however, such arrangements have not been put in place, the core of the Act (Part 2) will apply to acts in connection with a person's care, treatment or personal welfare. This puts on a statutory footing the common law doctrine of necessity but, importantly, also provides persons who lack capacity with new safeguards that increase with the seriousness of the intervention being proposed. There are also ways in which, under the Act, the court can make one-off decisions or appoint court deputies to make decisions on an ongoing basis.
17. [Parts 9](#) and [10](#) of the Act are concerned with powers of the police, courts and the Department of Justice. These powers include police powers to remove persons from a public place to a place of safety, court powers to impose particular healthcare disposals on offenders at remand, sentencing or following a finding of unfitness to plead, and Departmental powers to transfer prisoners and others detained in a custodial environment for in-patient treatment in a hospital. These powers, however, have been created in such a way as to respect the autonomy of an individual to make a decision about medical treatment.

18. The provisions of the Act are divided into 15 Parts consisting of 308 sections in total, and 11 Schedules.

Part 1

To emphasise their importance, the key principles appear in **Part 1** of the Act. These enshrine and build upon aspects of the common law, such as the presumption of capacity unless established otherwise and the requirement to act in a person's best interests. Part 1 also takes account of developments following the Bamford Review, such as the ratification of the UN Convention on the Rights of Persons with Disabilities, by placing greater emphasis on the requirement to take steps to support people to take decisions for themselves. As they are key concepts in the Act, Part 1 also defines what "lacks capacity" means and sets out the steps to be followed when determining what is in a person's best interests.

Part 2 is the core of the Act. Rather than giving certain people statutory powers to intervene where necessary, Part 2 adopts a different approach by putting into statute the common law doctrine of necessity. This doctrine is currently relied upon by many people who work with or care for people who lack capacity to make decisions for themselves. In broad terms, it provides protection against civil and criminal liability, but only if the act is in the person's best interests. Part 2 aims to do the same but, crucially, it requires additional safeguards to be put in place where the intervention is serious, before the legal protection can be availed of. The general rule is that the more serious the intervention is for the person lacking capacity to make the decision, the more safeguards need to be put in place. However, for all interventions, it must first be properly established that the person lacks capacity in relation to the intervention and that the intervention is in the person's best interests. Additional safeguards include the requirement to carry out a formal assessment of the person's capacity and to put in place and consult with a nominated person. These apply in respect of all serious interventions. A second opinion is also required in respect of certain serious treatments. Authorisation (usually by a Health and Social Care Trust ("HSC trust") panel), and the requirement to put in place and consult with an independent mental capacity advocate, are reserved for the most serious interventions, such as compulsory serious treatment and detention in circumstances amounting to a deprivation of liberty. The right to seek a review by a Tribunal in respect of an authorisation granted by a HSC trust is also provided for in Part 2 and is an important additional safeguard.

Remaining Parts

Part 3 makes further provision in relation to nominated persons: the appointment and revocation of nominated persons, the default mechanism and the Tribunal's powers to appoint or disqualify nominated persons.

Part 4 of the Act provides for the new independent advocacy safeguard. It provides for a new duty on HSC trusts to make arrangements to secure the availability of independent mental capacity advocates when required under Part 2, and also sets out procedures for instructing advocates to act. Regulation

making powers are created to make further provision for the commissioning of independent advocacy services and the functions of independent mental capacity advocates under Part 2.

Part 5 of the Act provides for a new form of power of attorney, the lasting power of attorney (LPA).

Part 6 of the Act makes provision for High Court powers to make decisions and appoint deputies for persons who lack capacity to make decisions in respect of their care, treatment, personal welfare, or their property and affairs. This Part makes provision for powers which can be exercised by the High Court in connection with these roles, as well as making provision for the various rules of court which may be made in respect of this Part of the Act.

Part 7 of the Act makes provision for the creation of a Public Guardian and the functions to be performed by that officer, as well as imposing duties upon relevant authorities to notify the Public Guardian of certain events. This Part also provides a further power for the Department of Justice to appoint Court Visitors.

Part 8 of the Act puts in place new requirements and safeguards for intrusive research projects involving people who lack capacity to consent to taking part in that research.

Part 9 of the Act creates powers for police constables to remove a person 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 them between places of safety.

Part 10 of the Act creates court disposals to send persons on remand and convicted offenders to healthcare facilities for medical treatment. Part 10 also provides court powers for persons found unfit to plead, as well as a power for the Department of Justice to transfer prisoners to healthcare facilities for medical treatment. In addition, this Part includes the rights of review for persons detained under Part 10.

Part 11 of the Act provides for the transfer of persons detained in hospital, in circumstances amounting to deprivation of liberty, or subject to a criminal justice disposal, between Northern Ireland and other UK jurisdictions. Regulation making powers are created to make further provision about transfers, including to and from jurisdictions outside the UK.

Part 12 provides for additional safeguards for children subject to the Act and the Mental Health Order. It also amends that Order so that it will not apply to persons aged 16 or over when the Act comes into operation.

Part 13 sets out the offences specific to the Act.

Part 14 sets out miscellaneous provisions, including amendment of the Carers and Direct Payments Act (Northern Ireland) 2002; provision giving effect in Northern Ireland to the Convention on the International Protection of Adults; and matters that are excluded from the scope of the Act.

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Part 15 makes provisions relating to codes of practice and other supplementary matters. Definitions, commencement and short title of the Act are also included.