

*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 1 – Protection from Liability, and General Safeguards

Sections 9 – 12

Section 9 is pivotal because it puts into statute what is referred to as the common law doctrine (or defence) of necessity. In broad terms, the defence in section 9 can be availed of by a person “D” who does an act in connection with the care, treatment or personal welfare of another person “P” who is aged 16 or over and lacks capacity in relation to it. However, by virtue of section 10, it does not apply to an act which is, or is done in the course of, psychosurgery. Such treatment can therefore only be given to a person who lacks capacity in relation to it with the authority of the court. Section 10 also includes a regulation making power that allows the Department to expand the list of treatments to which section 9 does not apply should it ever be deemed necessary, or if new treatments are developed which are equally as serious as psychosurgery. The defence in section 9 also does not apply to any act which conflicts with a decision made by an attorney under a lasting power of attorney made by P (see Part 5) or a deputy appointed for P by a court (see Part 6). However, in these situations, it is possible that disputes may arise. Section 10 also provides that life-sustaining treatment or treatment which is necessary to prevent a serious deterioration in P’s condition can be provided by D without fear of liability while a decision is being sought from the court on a particular issue in this type of case.

Any act to treat P that conflicts with an effective advance decision under the common law will also not attract the defence in section 9. To be valid, such decisions must meet a number of criteria such as: when making the advance decision, the person must be 18 or over and have the capacity to make the decision; the person must not have done anything since that clearly goes against their advance decision; the advance decision must not have been withdrawn; a power to make the decision has not subsequently been conferred on an attorney; and the person would not have changed their decision if they had known more about the current circumstances. Again, there is an important caveat to the general rule: when a decision of the court is being sought on a relevant issue,

D will be protected from liability under section 9 if he or she gives P life-sustaining treatment, or treatment which he or she reasonably believes to be necessary to prevent a serious deterioration in P's condition. The Code of Practice will expand further on advance decisions. The Act does not codify the law on advance decisions; common law currently provides sufficient clarity and flexibility for advance decisions to be determined on a case by case basis. However, in recognition that this is an evolving area of law, section 284 of the Act requires the Department to review the law relating to advance decisions within 3 years of section 284 coming into operation; and to lay a report of the conclusions of that review before the Assembly.

Section 9 also provides that the act must be one in respect of which D would have incurred liability if P had had capacity but did not consent to it. This would exclude any act done in pursuance of a statutory power that does not require P's consent. For the avoidance of doubt, section 60 also sets out other circumstances in which the defence in section 9 would not be relevant i.e. because another authority to do the act exists.

The general effect of section 9 is that D is protected from any liability that he or she would have incurred if P had had capacity and consented to it (or, if P is under 18, that is either 16 or 17 years old, the reference to consent is taken to include any consent that could be given by his or her parent(s) or guardian(s)). As valid consent is a defence to a wide range of torts and crimes, this makes the protection from liability afforded to D under this section significant. However, it also means that, as consent is not a defence to a claim in the tort of negligence, any liability arising from negligence on D's part is not covered by section 9. This is expressly stated in section 10.

Furthermore, section 9 makes it clear that the defence it provides only applies if the general and, where applicable, additional safeguards mentioned in it have been met. For any act falling within the scope of section 9, the general safeguards are that (1) before doing the act, D has taken reasonable steps to establish whether P lacks capacity and (2) when doing the act, D reasonably believes that P lacks capacity and that it will be in P's best interests for the act to be done. These general safeguards attract the principles around capacity (sections 1 and 5) and best interests (sections 2 and 7) and are framed in a flexible way so as to be workable on the ground. What is "reasonable" to expect D to do in a particular set of circumstances will be different from what is "reasonable" in another, such as in an emergency. This is recognised and accommodated within section 9.

In addition to the general safeguards above, section 12 provides that a further safeguard or condition must be met where the act is an act of restraint. The condition applies not only to an act by D restraining P but also to an instruction or an authorisation given by D to another person to restrain P. This includes any restriction of P's liberty of movement, whether or not P resists, or the threat or use of force where P is resisting. The condition is that the restraint is necessary to prevent harm to P and that it is proportionate both to the likelihood of harm and to its seriousness. Therefore, in all cases, the minimum amount of restraint

must be used and if the level of risk diminishes, the level of restraint used must be reduced.

Some of the additional safeguards apply to all serious interventions; others only apply to more serious interventions, such as deprivations of liberty. “Serious intervention” is defined in section 63. As it is a key concept in Part 2 of the Act, it is suggested that the reader may wish to read the explanation of that section (and the related section 64) at this point. In addition, as most of the additional safeguards do not apply where the situation is an emergency, it is suggested that the reader may also wish to read the explanation of the meaning of “emergency” in section 65 and section 66.