

COMMENCEMENT OF PROVISIONS
UNDER THE MENTAL CAPACITY ACT
(NORTHERN IRELAND) 2016 RELATING
TO ‘ACTS OF RESTRAINT’

CONSULTATION DOCUMENT

SEPTEMBER 2024



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Responding to this consultation

Topic of this consultation:

1. This consultation seeks stakeholder views on the commencement of sections 9(4)(a) and 12 of the [Mental Capacity Act \(Northern Ireland\) 2016](#) (MCA) in relation to 'Acts of Restraint', and an accompanying Code of Practice.

Scope of this consultation:

2. We are keen to hear the views of all MCA stakeholders, and particularly those who may be directly impacted by the commencing, or failure to, of sections 9(4)(a) and 12, including but not limited to:
 - Community and voluntary sector organisations;
 - people with lived experience and their families;
 - HSC sector;
 - Legal sector;
 - health bodies;
 - health professionals;
 - health and social care providers;
 - advocacy services;
 - judicial bodies;
 - PSNI;
 - academics; and
 - departmental officials and other agencies or arm's length bodies.

Geographical Scope:

3. The commencement of provisions within the Mental Capacity Act (Northern Ireland) 2016 falls within the remit of the devolved administration of Northern Ireland.

Body Responsible for the consultation:

4. This consultation is being undertaken by the Mental Capacity Act Unit within the Department of Health.

Duration of the consultation:

5. The consultation will run for 12 weeks from **9 September to 1 December 2024**.

Enquires:

6. For any enquires in relation to this consultation please email the Department at MCAimplementation@health-ni.gov.uk or write to:

Mental Capacity Act Unit
Department of Health
Room D2.10, Castle Buildings
Belfast
BT4 3SQ

How to Respond:

7. You can respond online by accessing the online survey at <https://consultations2.nidirect.gov.uk> or alternatively complete the consultation response document on the Department website and send via email or post to the addresses supplied above. Please note if posting responses must be received by 17.00 on 1 December 2024.
8. When responding we would be grateful if you could confirm whether you are replying as an individual, or submitting an official response on behalf of an organisation. Please include:
 - your name;
 - your position (if applicable);
 - the name of the organisation;
 - the organisation's address (including postcode); and
 - an email address.

Consultation Response:

9. Following the conclusion of the consultation we will consider all responses and publish a report on our findings on the Department of Health website.

Feedback on Consultation Process:

10. We value your feedback on how well we consult. If you have any comments about the consultation process, or suggestions on how we could improve this process please address them to the address or email address outlined at paragraph 6.

Equality Impact Assessment:

11. An Equality Impact Assessment was completed during the drafting of the Mental Capacity Bill in 2010 and found there to be an overall positive impact on those with caring responsibilities and that it was envisaged there would be no adverse impact on the grounds of having dependents. A further updated Equality Impact Assessment was completed in May 2014 and again found that the impact of the bill would be positive overall. These can be found at www.health-ni.gov.uk/sites/default/files/consultations/dhssps/equality-impact-mental-capacity.pdf and www.health-ni.gov.uk/sites/default/files/consultations/dhssps/mental-capacity-updated-equality-impact.pdf.

Human Rights Impact Assessment:

12. A Human Rights Impact Assessment was completed in 2015 during the drafting phase of the Bill and established that more than one right was engaged through this policy. This recommended legal advice be sought, following which the progression of the bill continued. It was widely acknowledged, during the drafting of the bill, that it was a significant and progressive piece of legislation in human rights terms. In line with the recommendations of the Bamford Review, the MCA is underpinned by principles that aim to protect and promote, on an equal basis, the dignity and autonomy of those who fall within its scope. These are:

1. No-one should be treated as lacking capacity unless proven they do;
2. No assumptions can be made;
3. Help and support must be provided;
4. No assumptions can be made because of unwise decisions; and
5. All acts and decisions must be made in the person's best interests.

Regulatory Impact Assessment:

13. A Regulatory Impact Assessment was completed during the drafting of the Mental Capacity Bill and found that it was recommended the Bill was proceeded with. A copy of this can be found at www.health-ni.gov.uk/sites/default/files/consultations/dhssps/mental-capacity-regulatory-impact-assessment.pdf.

Rural Needs Impact Assessment:

14. A Rural Needs Impact Assessment has been completed for the purposes of the commencement of sections 9(4)(a) and 12 of the MCA. This was not completed during the drafting of the Mental Capacity Bill as this was not a requirement to consider at this time. This can be reviewed as an Annex to this consultation document on the Department website.

Article 2 Screening:

15. In line with guidance, the commencement of sections 9(4)(a) and 12 of the MCA has been screened in relation to Article 2 of the Windsor Framework.

Privacy, Confidentiality and Access to Consultation Responses:

16. For this consultation, we may publish all responses except for those where the respondent indicated that they are an individual acting in a private capacity (i.e. a member of the public). All responses from organisations and individuals responding in a professional capacity may be published. When doing so, we will remove any email address and telephone numbers from these responses but apart from this we may publish them in full. For more information about what we do with personal data please see the link to our consultation privacy notice at paragraph 19.

17. Your response, and all other responses to this consultation, may also be disclosed on request in accordance with the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR); however all disclosures will be in line with the requirements of the General Data Protection Regulation (GDPR) (EU) 2016/679.

18. If you want the information that you provide to be confidential it would be helpful if you could explain to us why, so that it may be considered if the Department should receive a request for this information under the FOIA or EIR.

19. DoH is the data controller in respect of any personal data that you provide, and DoH's Privacy Notice, which gives you details of your rights in respect of the

handling of your personal data, can be found at [DoH Privacy Notice | Department of Health \(health-ni.gov.uk\)](#).

Background to the Mental Capacity Act (Northern Ireland) 2016

20. The Mental Capacity Act (Northern Ireland) 2016¹ (MCA), when fully commenced, will fuse together mental capacity and mental health law for those aged 16 years old and over within a single piece of legislation, as recommended by the Bamford Review of Mental Health and Learning Disability. The MCA provides a statutory framework for people who lack capacity to make a decision for themselves around their care, treatment and welfare and for those who now have capacity but wish to make preparations for a time in the future when they lack capacity. When the MCA is fully commenced the Mental Health (Northern Ireland) Order 1986² (MHO) will be repealed for anyone over the age of 16.
21. The original implementation plan, as agreed at the time of enactment in 2016, aimed for full commencement by April 2020. It soon became clear that this timescale for full MCA commencement would not be achievable. A decision was therefore taken in March 2019 to commence the MCA in a phased approach.
22. Phase One implementation took place between October and December 2019, with the introduction of provisions relating to Deprivation of Liberty (DoL) Safeguards, a new statutory process for deprivation of liberty, research and money & valuables.
23. Implementation of the remainder of the MCA will include commencing provisions relating to decisions regarding care, treatment and personal welfare, Lasting Powers of Attorney and Independent Mental Capacity Advocates. No decisions have yet been made in relation to full implementation of the MCA.
24. Since Phase One implementation of the MCA, the Department of Health has worked collaboratively with key partners to ensure consistent implementation of the commenced provisions.
25. While officials intend to develop an up-to-date MCA Implementation and Funding Plan that will inform future decisions on full MCA implementation, including resource need, cost and work required to deliver on all remaining MCA provisions, the Department has been made aware of immediate challenges being faced within Health and Social Care (HSC) Trusts as a result of phased commencement that require resolution.

¹ [Mental Capacity Act \(Northern Ireland\) 2016 \(legislation.gov.uk\)](#)

² [The Mental Health \(Northern Ireland\) Order 1986 \(legislation.gov.uk\)](#)

The need for consultation

Provisions relating to ‘Acts of Restraint’:

26. Section 9³ of the MCA introduces the concept of “protection from liability” and outlines the safeguards that must be in place for such protection. Protection from liability is a protection for a person (“D”) doing an act in relation to a person (“P”), aged 16 and over, who lacks capacity to consent to the act. The protection will only apply where all safeguards have been put in place to ensure that the rights and interests of P are preserved, except in emergencies.

Protection from liability for acts in best interests of person lacking capacity

9.—(1) This section applies where—

- (a) a person (“P”) is 16 or over;
- (b) another person (“D”) does an act in connection with the care, treatment or personal welfare of P;
- (c) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter;
- (d) when doing the act, D reasonably believes—
 - (i) that P lacks capacity in relation to the matter; and
 - (ii) that it will be in P’s best interests for the act to be done; and
- (e) D would have been liable in relation to the act if P had had capacity in relation to the matter and D had done the act without P’s consent.

(2) D does not incur any liability in relation to the act, apart from such liability, if any, as D would have incurred in relation to it even if P—

- (a) had had capacity to consent in relation to the matter; and
- (b) had consented to D’s doing the act.

(3) But subsection (2) has effect subject to the additional safeguard provisions (each of which imposes a safeguard, additional to those in subsection (1)(c) and (d), and more than one of which may apply in a given case).

(4) **The additional safeguard provisions are—**

³ [Mental Capacity Act \(Northern Ireland\) 2016 \(legislation.gov.uk\)](http://legislation.gov.uk)

(a) section 12 (conditions for any act of restraint);

(b) sections 13 and 15 (formal assessment of capacity, and consultation of nominated person, required for serious interventions);

(c) sections 16 and 17 (second opinion required for certain treatment);

(d) sections 19, 20, 24, 26, 28 and 30 (authorisation required for serious treatment where there is objection from P's nominated person or compulsion, and for deprivations of liberty and certain other measures);

(e) section 35 (independent mental capacity advocate required for certain serious interventions).

(5) The principles in sections 1(3) to (5) and 5 (P not to be treated as lacking capacity on irrelevant grounds, or where practicable help and support not given) and section 7 (best interests) apply in particular for the purposes of determining whether a belief mentioned in subsection (1)(d) is reasonable.

(6) Where P is under 18, in subsection (1)(e) "without P's consent" is to be read as "without P's consent and without any consent that could be given by a parent or guardian of P".

27. Section 12⁴ of the MCA outlines the additional safeguard that must be met when carrying out an 'Act of Restraint' on a person who lacks capacity to make decisions around their care, treatment and welfare.

Acts of restraint: condition that must be met

12.—(1) This section applies where the act mentioned in section 9(1) ("the relevant act") is—

(a) an act restraining P; or

(b) an act that consists of instructing or authorising another person to do an act restraining P.

(2) Section 9(2) (protection from liability) applies to the relevant act only if the restraint condition (as well as the conditions of section 9(1)(c) and (d), and any other conditions that apply under this Part) is met in relation to the relevant act.

(3) The restraint condition is that at the time the relevant act is done, D reasonably believes—

(a) that failure to do the relevant act would create a risk of harm to P; and

(b) that the relevant act is a proportionate response to—

⁴ [Mental Capacity Act \(Northern Ireland\) 2016 \(legislation.gov.uk\)](http://legislation.gov.uk)

(i) the likelihood of harm to P; and

(ii) the seriousness of the harm concerned.

(4) In this section an “act restraining P” means an act which—

(a) is intended to restrict P’s liberty of movement, whether or not P resists; or

(b) is a use of force or a threat to use force and is done with the intention of securing the doing of an act which P resists.

(5) This section does not apply to an act which in itself amounts to a deprivation of liberty (as to which see sections 24 and 25).

(6) Subsection (5) does not affect the application of this section to an act restraining P which is done while P is detained in circumstances amounting to a deprivation of liberty.

28. Through engagement with key MCA stakeholders, the Department was made aware of significant challenges being faced by HSC staff as a result of sections 9(4)(a) and 12 of the MCA not yet being commenced. Currently, HSC Trust staff must seek a declaratory order from the High Court for patients who are subject to Deprivation of Liberty (DoL) Safeguards and have a Trust Panel Authorisation for same, but whose care plans include restraint / other restrictions / interventions.
29. The Declaratory Order process creates significant resource implications for both the Trust and the judicial system and is a lengthy one which can subject patients and their families to an often complex and stressful judicial process. It is in that context that the Department is seeking to commence sections 9(4)(a) and 12 as soon as possible to address such challenges.

The scope of this consultation

30. This consultation sets out the Department’s proposal to commence provisions relating to ‘Acts of Restraint’ within the MCA. In addition, it includes a draft Code of Practice on Acts of Restraint, attached as an Annex to this document on the Department website.
31. The Code offers guidance to those working with persons who lack, or may lack, capacity in relation to acts of restraint.
32. The Department is seeking stakeholder views on the commencement proposals and the draft Code of Practice to ensure the impact and implications of commencing these provisions, or indeed not, is fully understood.



33. It is important to outline that the proposed commencement of these provisions does not replace the Department's regional policy on the use of Restrictive Practices in Health and Social Care settings, found at [doh-regional-policy-restrictive-practices-hsc-nov-2023.pdf \(health-ni.gov.uk\)](https://www.health-ni.gov.uk/doh-regional-policy-restrictive-practices-hsc-nov-2023.pdf), which should be read in conjunction with sections 9(4)(a) and 12 of the MCA and the associated Acts of Restraint Code of Practice, if commenced.