

*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 10 – Criminal Justice

Chapter 8 – Rights of Review of Detention under Part 10

Section 225 - Right to apply to Tribunal

This section provides that a “qualifying person” (as defined in section 226) may apply to the Tribunal within six months of the making of an order or direction (“the initial period”) where a public protection order, or a hospital direction or hospital transfer direction is given.

The section also provides that if a public protection order without restriction is extended, a qualifying person may apply to the Tribunal within the period beginning with the date of extension and ending with the date on which the extension ends (“the extension period”).

Additionally, the section provides that where a public protection order with restrictions, a hospital direction or hospital transfer direction is in force, a qualifying person may apply to the Tribunal within 6 months following the initial period or within any 12 month period beginning with the anniversary of the date of the making of the order or direction.

Section 226 - Meaning of “a qualifying person”

This section defines a “qualifying person” as being the person who is liable to be detained under the public protection order, hospital direction or hospital transfer direction, or if the person is 16 years of age or more, their nominated person. If the person is under the age of 16, a “qualifying person” can also be a person with parental responsibility for the person.

The section also provides that if the person who is liable to be detained is 16 years of age or more and has capacity to make a decision about whether an application to the Tribunal should be made, the nominated person requires the consent of the person before he or she can make an application.

Section 227 - Applications: visiting and examination

For the purposes of advising whether an application to the Tribunal should be made or for providing information about a person's condition for such an application, this section provides that a medical practitioner who has been authorised by or on behalf of the person or, if the person is aged 16 or over by a nominated person, may visit the person and examine him or her in private. For the same purposes, and with the same authorisations, the medical practitioner may also require the production of and examine and take copies of, any health record and any other record that relates to the person's detention, care or treatment.

Section 228 - Power of certain persons to refer case to Tribunal

This section provides that a person's case can be referred to the Tribunal at any time by the Attorney General, the Department, or, on the direction of the High Court, the Master (Care and Protection). In relation to a person who is detained under a public protection order, the question to be referred to the Tribunal is whether the person should be discharged from detention. In relation to the hospital direction and hospital transfer direction, the question is whether the person should be transferred from hospital to the place where he or she would have been detained if the direction had not been given.

Provision is also made that for the purpose of providing information for the referral, a medical practitioner who has been authorised by or on behalf of the person who is being detained may visit the detained person and examine him or her in private, as well as requiring the production of, examine and take copies of, any health record and any other record that relates to the person's detention, care or treatment.

Section 229 - Duty of HSC trust to refer case to Tribunal

This section provides that the HSC trust in whose area the person is detained has a duty to refer the person's case to the Tribunal. The duty arises, if on a relevant date, the person is subject to a public protection order or is liable to be detained in a hospital under a hospital direction or hospital transfer direction; the order or direction have been in force throughout the relevant period; and the Tribunal has not considered the person's case at any time during that period. "Relevant period" is defined as meaning if the person is under 18, the period of one year ending with the relevant date or otherwise, the period of two years ending with the relevant date

"Relevant date" is defined as meaning, in relation to a public protection order without restrictions, a date on which the order is extended and in relation to a public protection order with restrictions, hospital direction or hospital transfer direction, the first day after the end of the period of 6 months beginning with the date of the order or direction or any anniversary of the date of the order or direction.

The section also provides that for the purpose of providing information for the reference, a medical practitioner who has been authorised by or on behalf of the person who is being detained may visit the detained person and examine him or her in private, as well as require the production of, and can examine and take copies of, any health record and any other record that relates to the person's detention, care or treatment.

Section 230 - Duty to notify the Attorney General

This section provides that the responsible medical practitioner must, as soon as practicable, give the Attorney General any prescribed information and notice of various matters. This duty arises if immediately after the end of a relevant period, a person is liable to be detained under a public protection order or is liable to be detained in hospital under a hospital direction or hospital transfer direction; no application or reference to the Tribunal was made during the relevant period; and the responsible medical practitioner is of the opinion that the person lacks or probably lacks capacity in relation to whether an application to the Tribunal under section 225 should be made.

“The relevant period” means the period of six months beginning with the date of the order or direction, and any period of six months immediately following another relevant period.

Section 231 - Powers of Tribunal as to public protection order without restrictions

This section makes provision for the powers that the Tribunal can exercise when an application or referral is made to it in relation to a person who is subject to a public protection order without restrictions. The Tribunal may discharge the person from being liable to be detained under the order or decide not to discharge the person from that liability. The Tribunal can only decide not to discharge the person if it is satisfied that the prevention of serious harm condition contained in section 233 is met.

Section 232 - Powers of Tribunal as to public protection order with restrictions

This section makes provision for the powers that the Tribunal can exercise when an application or referral is made it in relation to a person who is subject to a public protection order with restrictions. The Tribunal may discharge the person absolutely or conditionally, or decide not to discharge the person from liability to be detained under the order.

The section provides that a person must be discharged absolutely if it is not satisfied that releasing the individual would create a substantial risk to others and it is satisfied that it is inappropriate for the person to be liable to be recalled to hospital.

The section provides that a person must be discharged conditionally if it is not satisfied that releasing the individual would create a substantial risk to others,

but it is satisfied that it is appropriate for the person to be liable to be recalled to hospital.

Where the Tribunal makes an order discharging the person conditionally, the section provides that the order can take effect from a date in the future if the Tribunal considers that arrangements need to be made to give effect to the conditions.

Section 233 - Sections 231 and 232: the prevention of serious harm condition

This section defines the prevention of serious harm condition that must be considered by the Tribunal when considering the discharge of persons who are subject to public protection orders, with or without restrictions.

The condition is that there is an impairment, or disturbance in the functioning of, the person's mind or brain; releasing the person from detention would create a risk, linked to the impairment or disturbance, of serious physical or psychological harm to other persons; and the likelihood and seriousness of the harm are such that detaining the person is a proportionate response.

Section 234 – Sections 231 and 232: additional powers of Tribunal etc

This section provides that where the Tribunal decides under section 231 or 232 not to discharge a person, it may, with a view to facilitating the discharge of the person at a later date, recommend the taking of specified actions and further consider the case where those actions have not been complied with. Where the Tribunal further considers the case, section 231 or as the case may be, section 232, applies.

A discharge of a person under Chapter 8 does not prevent that person from being detained in circumstances amounting to a deprivation of liberty by virtue of Part 2 of the Act or under Part 2 of the Mental Health Order.

Section 235 - Effect of conditional discharge

This section provides that if a person who is liable to be detained under a public protection order with restrictions is conditionally discharged by the Tribunal, the Department of Justice has a power to recall the person to hospital. The section also provides that the person must comply with all conditions that are imposed by the Tribunal upon discharge, or imposed later by the Department of Justice. Provision is also made for the Department of Justice to vary any conditions that have been imposed.

The section provides that if the person is subject to a public protection order with restrictions for a specified period only and that period ends whilst the person is conditionally discharged and has not been recalled to hospital, then the person is to be regarded as absolutely discharged and is no longer liable to be detained under the order.

Section 236 - Application and references to Tribunal where person recalled

This section makes provision for the Department of Justice to make a reference to the Tribunal within one month from the date of the person's return to hospital where he or she has been recalled from being conditionally discharged from being liable to be detained under a public protection order with restrictions. The person, his or her nominated person (if he or she is aged 16 or over), or an individual who has parental responsibility for the person if he or she is aged under 16, may also apply to the Tribunal within 6 months of the date of the return to hospital, within the 6 months following that period or within any 12 month period beginning with an anniversary of the date of the arrival of the person in hospital. No application under section 225 may be made in respect of the order.

Section 237 - Applications to Tribunal where person has not been recalled

This section applies where a person who has been conditionally discharged from liability to be detained from a public protection order with restrictions has not been recalled. In these circumstances the person, his or her nominated person (if he or she is aged 16 or over) or an individual who has parental responsibility for the person if he or she is aged under 16, may apply to the Tribunal within a 12 month period beginning with the date on which the person was conditionally discharged and within any period of 12 months beginning with an anniversary of that date. If such an application is made, the Tribunal may vary any condition, impose any condition, discharge the individual from liability to be detained under the public protection order, or take no action.

Section 238 - Powers of Tribunal as to hospital directions and hospital transfer directions

This section applies where an application or reference is made to the Tribunal in relation to a person who is liable to be detained under a hospital direction or hospital transfer direction.

The Tribunal must decide if it is satisfied that the prevention of serious harm condition is met, and must notify the Department of Justice whether it is so satisfied.

In this section, the "prevention of serious harm condition" is that the person has the disorder in respect of which the direction was given; effective treatment for the disorder can be given to the person in the hospital where he or she is detained; and it is more likely than not that, if the person was transferred to prison, serious physical or psychological harm to that person or serious physical harm to other persons would result from the person ceasing to receive treatment for the disorder as an in-patient. In this section, "prison" is to read as a reference to a place where the person would have been liable to be detained had the direction not been made.

Section 239 – Section 238: additional powers of Tribunal

Where under section 239, the Tribunal notifies the Department of Justice that it is satisfied that the prevention of serious harm condition is met, it may, with a view to facilitating the transfer of the person at a future date, recommend the taking of specified actions and further consider the case in the event of those actions not being complied with. Where the Tribunal further considers the case, section 238 applies.

Section 240 – Section 238: procedure where prevention of serious harm condition is not met

This section provides that where the Tribunal notifies the Department of Justice that it is not satisfied that the prevention of serious harm condition is met in respect of a person who is liable to be detained in hospital, then the Department of Justice must by warrant direct that the person is removed to any prison in which the person might have been detained if the direction had not been given.

The direction will cease to have effect on the person's arrival in prison. In this section, "prison" is to read as a reference to a place where the person would have been liable to be detained had the direction not been made.

The section also provides that the Department of Justice does not have to direct that the person is removed to prison and that the direction will not cease to have effect on the person's arrival in prison, if the Department of Justice instead directs that, with effect from a specified date the person is to be treated as if he or she had been removed to hospital under section 16(2) of the Prison Act (Northern Ireland) 1953, or paragraph 3 of Schedule 2 to the Criminal Justice (Children) (Northern Ireland) Order 1998, and also directs that the relevant direction is to cease to have effect.