

*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 7 – Rights of Review of Authorisation

Section 45 – Right to apply to Tribunal

This section applies where an authorisation has been granted under paragraph 15 or paragraph 20 of Schedule 1, or under Schedule 2, or extended under Chapter 6 of Part 2 of the Act. If such an authorisation or extension has been made, a qualifying person can apply to the Tribunal.

If an authorisation has been granted under paragraph 15 of Schedule 1, the qualifying person can apply within the period of six months beginning with the date on which the authorisation was granted.

If an authorisation has been granted under paragraph 20 of Schedule 1, the qualifying person can apply within the period of 28 days beginning with the date on which the interim authorisation was granted.

If the authorisation was granted under Schedule 2, the qualifying person can apply within the period of 28 days beginning with the date on which a report is made under paragraph 11 of Schedule 2.

If the authorisation is extended under Chapter 6 of Part 2, the qualifying person can apply to the Tribunal within the period beginning with the date when the authorisation is extended, and ending with the end date of the period for which the authorisation is extended.

In this section, “qualifying person” means P, or P’s nominated person. However, if P has capacity to decide whether or not to apply to the Tribunal, the nominated person can only make the application with P’s consent.

Section 46 – Applications: visiting and examining

This section provides that for the purposes of advising whether an application should be made to the Tribunal under section 45, or for providing information about P’s condition for such an application, any medical practitioner who has been authorised by or on behalf of P or by P’s nominated person can visit and

examine P and require production of, examine and take copies of health or other records relating to his or her detention, care or treatment.

Section 47 – Power of certain persons to refer case to Tribunal

This section provides that when an authorisation under paragraph 15 or paragraph 20 of Schedule 1 or under Schedule 2 is in force, the Attorney General, the Department, or on the direction of the High Court, the Master (Care and Protection), may refer the question of whether the authorisation is appropriate to the Tribunal at any time.

The section also provides that for the purpose of providing information for the reference, any medical practitioner who has been authorised by or on behalf of a person to whom the authorisation relates can visit and examine him or her and require production of, examine and take copies of health or other records relating to his or her detention, care or treatment.

Section 48 – Duty of HSC trust to refer case to Tribunal

This section imposes a duty on a HSC trust to refer P's case to the Tribunal as soon as practicable if on any date, the period of authorisation under Schedule 1 is extended under section 38 or Schedule 3; the authorisation has been in force throughout the relevant period and the Tribunal has not considered the person's case at any time in that period. The relevant period is defined as one year ending with the extension date, if the person to whom the authorisation relates is under 18, or two years otherwise, ending with the date when the period of authorisation is extended. The section also provides that for the purposes of providing information for the reference, any medical practitioner who has been authorised by or on behalf of P can visit and examine P and require production of, examine and take copies of health or other records relating to his or her detention, care or treatment.

This section makes provision for identifying the HSC trust which will have this duty imposed upon it. Where the extension is wholly or partly for the purposes of continuing a person's detention, this duty will be imposed upon the HSC trust in whose area the place of detention is situated. Where the extension is wholly or partly for the purposes of continuing a person's treatment, or requiring him or her to attend for treatment and P is not detained, the duty will be imposed upon the HSC trust in whose area the treatment is provided. Where the extension is for the purposes of continuing a community residence requirement, and is not for the purposes of continuing treatment, attendance for treatment or detention, the HSC trust in whose area the person is required to live will have the duty imposed upon it.

Section 49 – References etc to Tribunal: persons formerly detained under the Mental Health Order

This section makes provision that if a person is liable to be detained under the Mental Health Order on the day before he or she turns 16 and on the day

that he or she turns 16, there is an authorisation in force under Schedule 1 which authorises detention of the individual in circumstances amounting to a deprivation of liberty, any application or reference of the person's case to the Tribunal under Part 5 of the Mental Health Order that has not been dealt with by the day that he or she turns 16 will include consideration of whether the authorisation is appropriate.

The section also provides that the relevant HSC Trust must refer to the Tribunal the question of whether an authorisation is appropriate as soon as practicable if, on any date when the person is under 17 the authorisation is extended and any authority under Part 2 of the Mental Health Order for detention of the person or an authorisation under the Act is in force throughout the period of one year ending with that date and the Tribunal has not considered the person's case at any time during that period.

Section 50 – Duty of HSC trust to notify the Attorney General

This section applies if the period of authorisation under Schedule 1 has been extended under section 38 or Schedule 3 for a period of one year; the authorisation authorises a deprivation of liberty or community residence requirement; and at the relevant time it appears to the HSC trust that P lacks or probably lacks capacity in relation to whether an application to the Tribunal should be made. In this case, the HSC trust must as soon as practicable give notice of these matters to the Attorney General, together with any prescribed information.

This section defines the “relevant time” as meaning the time six months after the beginning of the one year period mentioned above.

Section 51 – Powers of Tribunal in relation to authorisation under Schedule 1

This section makes provision for the powers of the Tribunal when an application or reference is made to it in relation to an authorisation under Schedule 1.

The Tribunal may revoke the authorisation; vary the authorisation by cancelling any provision which authorises a measure; or decide to take no action. For these purposes, the section defines “measure” as the provision of treatment; detention in a place in circumstances amounting to a deprivation of liberty; a requirement to attend for treatment, or a community residence requirement.

The section provides that the Tribunal may vary an authorisation made under paragraph 15 of Schedule 1 only if it is satisfied that the criteria for authorisation are met for each measure that will remain in force. The Tribunal may decide to take no action only if it is satisfied that the criteria for the authorisation of each measure are met.

The section also provides that the Tribunal may vary an authorisation under paragraph 20 of Schedule 1 only if it is satisfied that there is a good prospect of it being established that the criteria for authorisation are met for each measure

that will remain in force. The Tribunal may decide to take no action only if it is satisfied that there is a good prospect of it being established that the criteria for the authorisation of each measure are met.

Section 52 – Powers of Tribunal in relation to authorisation under Schedule 2

This section provides that where an application or reference is made to the Tribunal concerning an authorisation which has been granted under Schedule 2, the Tribunal must either revoke the authorisation or decide to take no action in respect of it. The Tribunal may decide to take no action only if it is satisfied that the condition in paragraph 12 of Schedule 2 is met.

Section 53 – Sections 51 and 52: additional powers of Tribunal

This section provides that where, under sections 51 or 52, the Tribunal decides to do anything other than revoke the authorisation, it can, with a view to facilitating the ending of a measure which is still authorised by an authorisation, recommend the taking of specified actions and further consider the case if those actions are not complied with. Where the Tribunal further considers the case, section 51 or as the case may be, section 52, will apply.