

MENTAL HEALTH (AMENDMENT) (NI) ORDER 2004

S.I. 2004 1272

EXPLANATORY MEMORANDUM

INTRODUCTION

1. The Mental Health (Amendment) (NI) Order 2004 (“the Order”) was made on 6th May 2004 under paragraph 1(1) of the Schedule to the Northern Ireland Act 2000 (c.1). It remedies an incompatibility of the Mental Health (NI) Order 1986 (NI 4) (“the 1986 Order”) with a right under the European Convention on Human Rights (“the Convention”).
2. This Explanatory Memorandum has been prepared by the Department of Health, Social Services and Public Safety (“the Department”) in order to assist the reader in understanding the Order. It does not form part of the Order.

BACKGROUND AND POLICY OBJECTIVES

3. The constitution and direction of the Mental Health Review Tribunal (The Tribunal) is an integral part of the 1986 Order. The Tribunal provides the vehicle by which persons who have been detained by virtue of the Order have access to an appeal regarding their detention. Articles 77 and 78 of the 1986 Order set out the procedure to follow, and the test which must be used by the Tribunal when deciding whether to discharge patients. The corresponding provisions in England and Wales are contained within sections 72 and 73 of the Mental Health Act 1983 (c. 20). These provisions are substantially the same as the Northern Ireland provisions.
4. [Article 5](#) of the Convention provides that everyone has the right to liberty and security. In the case of *H v Mental Health Review Tribunal North & East London Region (Secretary of State for Health Intervening)* (4 April 2001) the court made a declaration under section 4 of the Human Rights Act 1998 that –
‘Sections 72 (1) and 73 (1) of the Mental Health Act 1983 are incompatible with Articles 5(1) and 5(4) of the European Convention of Human Rights in that, for the Mental Health Review Tribunal to be obliged to order a patient’s discharge, the burden is placed upon the patient to prove that the criteria justifying his detention in hospital for treatment no longer exist; and that Articles 5(1) and 5(4) require the Tribunal to be positively satisfied that all the criteria justifying the patient’s detention in hospital for treatment continue to exist before refusing a patient’s discharge.’
5. The need to amend the 1986 Order arose because of the same incompatibility with the European Convention on Human Rights. Essentially the 2004 Order shifts the burden of proof to the Health and Social Services Trust that a patient should not be discharged, as opposed to the position within the 1986 Order where the burden of proof was on the patient that they should be released. The 2004 Order changed Articles 77 (1) and 78 of the 1986 Order to remove the incompatibility of those provisions with a Convention right.

*This Explanatory Memorandum refers to the
Mental Health (Amendment) (NI) Order 20041272*

6. This legislation had recently been challenged in the Northern Ireland courts and potential existed for future challenge. As the 1986 Order was subordinate legislation it was possible that the courts could strike down the incompatible articles within the 1986 Order, which could lead to the suspension of the operation of the Mental Health Review Tribunal.
7. The incompatibility needed to be remedied as soon as possible and ensured parity between the UK legislation and the NI legislative provision. It also ensured that the existence and practice of the Mental Health Review Tribunal were not impugned.

COMMENTARY ON ARTICLES

8. In order to remove the incompatibility with the Convention right, Article 3 of the Order amended Article 77 of the Mental Health (Northern Ireland) Order 1986 to provide that a Mental Health Review Tribunal shall direct the discharge of a patient if it is not satisfied that the criteria justifying detention in hospital for treatment continue to exist. Article 4 of the Order also made a similar amendment to Article 78 of the 1986 Order.

COMMENCEMENT

9. The Order came into force on 14 May 2004.