

The Nature of the Role of a Review Tribunal Legal Member

Background

The Bamford Review of Mental Health and Learning Disability (2007) called for the development of a single legislative framework for the reform of the current Mental Health (NI) Order 1986 and the introduction of new mental capacity legislation in Northern Ireland. The Mental Capacity Act (NI) 2016 (the Act) is unique within the United Kingdom in combining mental health and capacity in one piece of legislation. It was passed by the Northern Ireland Assembly in May 2016. The Act applies to people aged 16 and over who may lack mental capacity to make decisions about their care needs, health, welfare or finances, and the safeguards that must be put in place if they lack the mental capacity for the relevant purpose. The Act provides a framework for decision making by Health and Social Trusts in respect of interventions in a person's (P's) life for example medical treatment, or a deprivation of their liberty (DoL).

The Department of Health (DoH), in agreement with the Department of Justice (DoJ), partially commenced provisions within the Mental Capacity (NI) Act 2016 (the Act) in December 2019 for the purposes of authorising DoL applications in Northern Ireland. The Tribunal, previously known as the Mental Health Review Tribunal, became the Review Tribunal and its jurisdiction was extended to the review of authorisations of deprivations of liberty by HSC Trusts and the appointment or removal of nominated persons.

Applications to authorise a deprivation of a person's liberty are made by a selection of qualified staff from the HSC Trust which has a caring responsibility for P and are considered by a HSC Trust Authorisation Panel in place in each of the HSC Trusts in NI.

A decision by a Trust Authorisation Panel to authorise a DoL can be appealed to the Review Tribunal. Applications can come to the Tribunal from P directly or from P's Nominated Person. This is a person that P has nominated to be consulted when the best interests of P are being considered or when a DoL is proposed. Throughout the period of the authorisation the Attorney General, the Department of Health and the Master (Care and Protection) may also refer a case to the Tribunal to consider if the authorisation is appropriate. The majority of cases currently coming before the Tribunal

are attorney General referrals. The Tribunal can also hear applications from specified persons seeking to appoint a Nominated P (NP) person for P if one is not in place or to replace an existing NP who is deemed to be unsuitable and can also hear an application from P to revoke the appointment of a NP.

The Role of a Legal Member (President)

As a legal member you will preside over a panel appointed to consider applications and referrals under the Act, relating to authorisations of a deprivation of liberty, mainly in residential care and nursing homes, where persons deprived of their liberty may have a wide range of conditions including dementia. You will also preside over applications and references for the discharge of mentally disordered patients from psychiatric facilities or from compulsory guardianship under the **Mental Health (NI) Order 1986** (the Order).

In hearings dealt with under the Act, which for the most part are conducted remotely, the Tribunal may be composed of two or three members, one of whom must be a legally qualified member. In the majority of cases, the panel is composed of three members, a legal member, a medical member and an experienced member. The Tribunal has the discretion to conduct DoL hearings either orally, with witnesses attending, or on the papers, where the panel reach their decision on the written evidence alone. Papers, which should include detailed information about P, their current medical conditions, medical treatment, bespoke arrangements within their locale, perhaps a care home, and the nature of the deprivation applied for, must be provided by the relevant Trust prior to the hearing.

In cases under the Act, the primary role of the Tribunal is to determine if the statutory criteria for authorising a deprivation of liberty have been met. This will include determining if the person to whom the application relates lacks capacity in relation to whether he or she should be deprived of their liberty under specific conditions; if restriction of liberty is in their best interests; if failure to restrict their liberty in this way would create a risk of serious harm to themselves or others; if the nature of the deprivation of liberty is proportionate to the likelihood of harm; and, whether the appropriate care and treatment is available in the place in which they are residing. Upon reaching a decision the Tribunal may revoke the DoL authorisation or decide to take no action in respect of the authorisation.

In hearings under the Order, which generally take place in the hospital where the patient is being treated, the Tribunal will be composed of three members, a legally qualified member, a medical member and an experienced member. Papers which will include a report from the Responsible Medical Officer who is the psychiatrist looking after the patient, a social circumstances report from the social worker involved with the patient and other relevant papers, will be provided prior to the hearing. On the morning of the hearing the medical member will conduct a mental state examination and will inform the panel of their preliminary view as to diagnosis. The role of the Tribunal will be to determine whether or not the patient should be discharged from detention or guardianship as the case may be based upon the evidence provided to them.

In all hearings, panel members may seek clarification from the medical member in relation to the medical report or other medical matters and other panel members may seek guidance from the President in relation to legal or procedural matters. It is the responsibility of the President to manage the hearing appropriately ensuring that it is conducted fairly and that all evidential and legal issues have been addressed and to ensure that panel members direct themselves clearly to the criteria to be met under the relevant legislation.

The panel is required to give a summary decision on the day. There is then a period of 14 days within which the reasoned decision must issue. It is for the President to draft the decision and to ensure that it properly addresses the evidence and the reasons for the decision. The decision is the decision of the panel and will be approved by the other panel members before being finalised and issued.

Hearings are arranged by the Review Tribunal secretariat. Panel members to include the legal member, will be asked in advance of hearings if they are available to sit on particular dates. However they may be asked to sit at short notice. On occasions, prior to a hearing, there may be an application for an adjournment or other considerations for determination by the legal member. If the patient is regraded and discharged from detention under the Order, or the period of deprivation of liberty ends, the hearing will not proceed.