

THE NATURE OF THE ROLE OF A REVIEW TRIBUNAL EXPERIENCED 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 ground-breaking and 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 and considers their capacity to make decisions about their health, welfare or finances, and the safeguards that must be put in place if they lack the capacity to do so. 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).

It is the intention of the Department of Health (DoH), in agreement with the Department of Justice (DOJ), to partially commence provisions within the Mental Capacity (NI) Act 2016 (the Act) for the purposes of authorising Deprivation of Liberty (DoL) applications. This will be effective from 2 December 2019.

From this point, the Tribunal, currently known as the Mental Health Review Tribunal (MHRT) which, until 2 December 2019, only considers applications made by patients or their relatives for discharge from detentions in psychiatric hospitals or from compulsory guardianship under the 1986 Order, will be called the **Review Tribunal Northern Ireland**, and therefore, will also have responsibility for hearing appeals against authorisations of deprivations of liberty by HSC Trusts and the appointment or removal of nominated persons.

Currently there are 36 members of the Tribunal; 15 Legal members, (including the Chairman and Deputy Chairman), 11 Medical members and 10 Experienced Members.

As an Experienced member you will be required to consider applications and referrals under the **Mental Capacity Act (NI) 2016**, relating to appeals against authorisations of a deprivation

of liberty, mainly in residential care, supported living and nursing homes, where persons deprived of their liberty may have a wide range of conditions including dementia, acquired brain injury, learning disability, autism or stroke, and applications for the discharge of mentally disordered patients from psychiatric facilities or from compulsory guardianship under the **Mental Health (NI) Order 1986** (the Order).

Hearings dealt with under the Order

Hearings dealt with under **the Order** will generally take place in the hospital where the patient is being treated. The Tribunal is composed of three members, a legal member, a medical member and an experienced member. The legally qualified member presides over the hearing and is known as the President in accordance with the Rules. Unless patients request otherwise, hearings are held in private.

Prior to the hearing, panel members will receive papers relating to the case which will include a report from the Responsible Medical Officer (RMO) who is the psychiatrist looking after the patient and a social circumstances report from the Social Worker involved with the patient. In addition, earlier reports and relevant papers such as risk assessments and care plans may be provided. These papers are extremely sensitive. They contain sensitive personal information relative to the patient and their families. It is the responsibility of individual Tribunal members to store and keep papers safely and securely and to maintain complete confidentiality relative to any information received by them in connection with or during any hearing.

Before the hearing (usually on the morning of the hearing) the medical member of the panel will examine the patient, the patient's notes and records and will speak to nursing staff involved in the patient's care.

Hearings start at 2.00pm. The panel meets at 1.30pm when the medical member will report on their examination of the patient and bring to the attention of the panel any relevant information which does not appear in the furnished reports. The medical member will inform the panel of their preliminary opinion as to diagnosis and this information will be shared with the parties at the outset of the hearing. The legal and experienced member may seek

clarification from the medical member in relation to the medical report or other medical matters. Similarly, other panel members may seek guidance from the legal member in relation to legal or procedural matters at any stage of the proceedings.

It is for the relevant Trust, as the Responsible Authority, to show that continued detention is lawful and that the relevant criteria as set out in the Order are met. In almost all cases both the Trust and the Patient are legally represented. Under the Rules an application can be made to withhold certain evidence from the Patient. If there is such an application, it will be heard and determined before the Patient is admitted to the hearing.

Typically at hearing the panel hears from the RMO and the Social Worker both of whom are questioned by the patient's legal representative. In some cases the patient gives evidence and in all cases the Patient is given an opportunity to address the panel at the conclusion of the evidence.

When all the evidence has been presented the Tribunal retires to private session and the panel collectively deliberate on the case. Each gives their opinion, with reasons, as to whether the evidence presented meets the criteria for discharge as set out in the Order. The determination of the Tribunal is made by unanimous or majority decision. The panel is required, in all but exceptional cases, to give a summary decision on the day. The reasons for the panel's decision for continued detention or guardianship, or discharge under the Order 1986 must be provided in writing to the legal representatives and the patient within 14 days of the date of the hearing. The legal member is responsible for writing up the reasons for the decision as determined by the panel and the draft decision must be agreed by the medical and experienced member before it is issued.

Hearings dealt with under the Act

Hearings dealt with under **the Act** will take place in the Tribunal Hearing Centre at the Royal Courts of Justice. The Tribunal may be composed of two or three members, one of whom must be a legally qualified member. The Tribunal has the discretion to conduct these hearings

either orally, with witnesses attending, or on the papers, where the panel reach their decision on the written evidence alone.

Applications to authorise a deprivation of a person's (P) 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 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.

Papers, which will 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, will be provided prior to the hearing.

In these cases, the primary role of the Tribunal will be 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 detained under specific conditions; if detention is in their best interests; if failure to detain them in this way would create a risk of serious harm to themselves or others; if the nature of the detention 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 being detained. Upon reaching a decision the Tribunal may revoke the authorisation or decide to take no action in respect of the authorisation.

Hearing Administration

Hearings are arranged by the Secretariat. Panel members are asked on a regular basis and weeks in advance of hearings if they are available to sit on particular dates. However, they may be asked to sit at short notice. They will be advised of the venue for each hearing. 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 re-graded and discharged from detention, the hearing will not proceed. Unfortunately, this can happen very close to the scheduled date of the hearing.

The Role of the Experienced Member

The Experienced Member is actively involved at and in each stage of the Tribunal hearing and proceedings. This requires thorough reading of reports to become familiar with the details of the case prior to the hearing; seeking clarification on relevant matters from the medical and legal members; seeking further information or clarification from the RMO, Social Worker or patient during the hearing; actively participating in the decision making process; and, following the hearing, contributing to and agreeing the written decision as drafted by the legal member.

It is self-evident that hearings, where detention and the deprivation of liberty are considered, are daunting and emotionally charged experiences for patients and appellants who, by the very nature of proceedings, are often at their most vulnerable and/or ill. It is extremely challenging for the patient/appellant to listen over a protracted period of time as their personal details and life histories are examined and discussed in some detail. Members need to be alert for patients/appellants presenting with signs of emotional distress, confusion or tiredness. It is incumbent, therefore, on the Experienced member (and, indeed, all members) to be well-prepared in advance of the hearing, to have identified those matters which require clarification and to contribute to focusing the issues relevant to the case.

Experienced members also have a critical role to play in listening carefully to the evidence, making a good note of what has been said and eliciting further information

from witnesses as required. Oral hearings can often alter the understanding of a particular case which may have been gleaned from the papers alone.

When contributing to collective decision-making, Experienced members should always be able to provide an explanation as to why they have for instance, accepted the evidence of one expert and rejected that of another; how they have assessed and evaluated conflicting evidence/competing arguments; why they consider the burden of proof on the Trust to have been discharged or not.

As an Experienced member of the Tribunal, it is essential to be collegial, to challenge constructively and to work in a spirit of co-operation and mutual respect. Necessary attributes include the ability to address and build rapport with a wide range of professional and lay participants in hearings; to employ a careful and tactful selection of words and approaches; and to maintain the authority of, and respect for, the Tribunal, even in the face of challenging behaviours and intemperate outbursts.

In my experience, as a member of the Tribunal, a commitment to justice and fair treatment together with the exercise of integrity and independence of mind are critical qualities when considering and determining the fundamental question of deprivation of liberty.

The role of the Experienced member is challenging, stimulating and rewarding. For those interested in the work of the Tribunal who have the requisite skills, knowledge and experience, there is an extensive and detailed programme of induction regarding its jurisdiction and the legislative framework. Training in respect of legal developments is provided as required and professional learning opportunities are incorporated into the Annual General Meeting.

Ms Ruth Laird – MHRT Experienced Member

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