

# **MENTAL CAPACITY BILL**

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## **EXPLANATORY AND FINANCIAL MEMORANDUM**

### **INTRODUCTION**

1. This Explanatory and Financial Memorandum has been prepared by the Department of Health, Social Services and Public Safety and the Department of Justice in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.
2. The Memorandum needs to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause or schedule does not seem to require an explanation or comment, none is given. Commentary on schedules has been included within the commentary on the main clauses.

### **BACKGROUND AND POLICY OBJECTIVES**

3. While mental capacity legislation has been introduced in other parts of the UK, mental capacity issues in relation to health and welfare interventions largely continue to be governed by the common law in Northern Ireland (case law which has been developed by the courts). That law, broadly speaking, provides for a presumption of capacity in persons aged 16 and over, a test of incapacity, and protection from liability when intervening in someone's life, provided it is reasonably believed that the person lacks capacity to consent to the intervention and it is in his or her best interests. This is known as the common law "doctrine of necessity".
4. These rules do not, however, apply to decisions governed by the Mental Health (Northern Ireland) Order 1986 ("the Mental Health Order") under which there are clear statutory powers to remove and detain people for the assessment and treatment of a mental disorder provided certain criteria are met, regardless of whether or not the person has capacity.
5. There are a number of factors that have driven the need for legislative change in this area of the law in Northern Ireland not least of which is, as mentioned above, we are currently out of step with other parts of the UK where mental capacity legislation has been on the statute books for some time now and their (albeit separate) mental health

legislation has also been reformed. There is currently no mental capacity legislation in Northern Ireland and, while the Mental Health Order has worked well, it is out of sync with the growing recognition of the right to personal autonomy.

6. This was highlighted in a report published in 2007 ‘A Comprehensive Legislative Framework’. It was one of a series of reports that came out of a review commissioned by the Department of Health, Social Services and Public Safety (hereafter referred to in this section as “the Department”) into the delivery of mental health and learning disability services in Northern Ireland and the policy and legislation underpinning those services. That review was known as the Bamford Review.
7. The key recommendation in the 2007 report was that: “There should be a single comprehensive legislative framework for the reform of mental health legislation and for the introduction of capacity legislation in Northern Ireland”. This, the report concluded, would help to reduce the stigma associated with having separate mental health legislation and provide an opportunity to enhance protections for persons who lack capacity and are unable to make a specific decision in relation to their health (mental or physical), welfare or finances, including those subject to the criminal justice system.
8. The report also recommended that this new single legislative framework should be based on agreed principles that have regard to the dignity of the person and provide equally for all circumstances in which a person’s autonomy might be compromised on health grounds. This reflected recommendations made in a separate Bamford Review report in 2006 on ‘Human Rights and Equality of Opportunity’.
9. The objective of extending a mental capacity approach to healthcare decisions to the criminal justice system is to comply with the recommendations of the Bamford Review. The Bamford Review recommended a legislative framework which integrates capacity and mental health legislation, to be applicable to all people in society including those in the criminal justice system. With this framework in mind, the Review made specific recommendations in respect of the various interfaces between the health and criminal justice system.
10. The Department of Justice therefore chose to draft criminal justice provisions on the basis of these recommendations. This meant the creation of a capacity-based approach to care, treatment and personal welfare in respect of those aged 16 or over who are subject to the criminal justice system. In addition, where possible the Department of Justice aimed to build a legislative model which did not contain potentially stigmatising references to “mental disorder”.
11. Taking account of the various interfaces between the mental health and criminal justice system, the Department of Justice also sought to retain the existing statutory

powers currently available within the system to transfer individuals to the health service for medical treatment. These powers include police powers to remove persons from a public place to a place of safety, court powers to impose particular healthcare disposals on offenders at remand, sentencing or following a finding of unfitness to plead, and Departmental powers to transfer prisoners for in-patient treatment in a hospital.

12. Whilst the Department of Justice wishes to retain these powers, it also sought to create provisions which respect the autonomy of individuals who retain capacity to make decisions about their medical treatment, whilst providing safeguards and protections for persons who lack the capacity to make those decisions.
13. The Department of Justice has also considered amendments to the civil law to take account of any introduction of capacity legislation. These changes include the introduction of a new Office of the Public Guardian, additional powers for the High Court, and restructuring of the Mental Health Review Tribunal.

## **CONSULTATION**

14. Considerable time and effort has been applied to developing this new legislative framework. It has benefited from extensive engagement with stakeholders. The Department conducted a public consultation on policy proposals in 2009 and a subsequent consultation on the equality impacts in 2010. In addition, following public consultation in 2012 by the Department of Justice, with an accompanying equality screening exercise, a decision was taken to include those subject to the criminal justice system within the scope of the proposed new framework in line with the vision set out in the Bamford Review.
15. A joint public consultation on the draft civil provisions, and policy proposals on the criminal justice aspects of the Bill, was launched on 27 May 2014. The consultation closed on 2 September 2014 and 121 formal responses were received. Easy read and child friendly versions of the Bill were also published during the consultation period. Five public events were held across Northern Ireland as well as approximately 40 additional meetings or events organised by key stakeholders.
16. The consultation documents and summary of responses on consultations can be accessed separately at [www.dhsspsni.gov.uk](http://www.dhsspsni.gov.uk), or individually via the links listed below. Copies of documents relating to the Department of Justice consultation from 2012 are available on request.

A Legislative Framework for Mental Capacity and Mental Health Legislation in Northern Ireland

Consultation document:

<https://www.dhsspsni.gov.uk/sites/default/files/consultations/dhssps/mental-capacity-consultation-document.pdf>

Summary of responses:

<https://www.dhsspsni.gov.uk/sites/default/files/consultations/dhssps/mental-capacity-consultation-summary.pdf>

Consultation on an Equality Impact Assessment for New Mental Capacity Legislation

<https://www.dhsspsni.gov.uk/sites/default/files/consultations/dhssps/mental-capacity-updated-equality-impact.pdf>

Consultation on Proposals for New Mental Capacity Legislation for Northern Ireland

Consultation document:

<https://www.dhsspsni.gov.uk/sites/default/files/consultations/dhssps/mental-capacity-consultation-document.pdf>

Summary of responses:

<https://www.dhsspsni.gov.uk/sites/default/files/consultations/dhssps/mental-capacity-consultation-summary.pdf>

## **OPTIONS CONSIDERED**

17. The Department initially took the view that the Bamford Review's legislative proposals could be delivered through separate mental health and mental capacity legislation but with an overarching set of human rights based principles. This was largely in line with the approach already taken in other parts of the UK and at the time was considered to be the only realistic way of delivering legislative reform within the 2007-2011 Assembly mandate. This formed the basis of the Department's policy consultation in January 2009.
18. However, the overwhelming view expressed in the responses to that consultation was that the Department should instead take the time to develop the single, comprehensive framework envisaged by the Bamford Review. Consequently, it was decided in September 2009, that the Department would fuse together mental capacity and mental health law into a single Bill, a ground breaking approach not yet attempted in any other jurisdiction.
19. In July 2012, the Department of Justice publically consulted on the basis of the existing criminal justice provisions within the Mental Health Order, and posed a series of questions to determine how the existing legislation could be revised to take

account of a capacity-based approach. Following this consultation exercise, the Department of Justice developed policy proposals on the basis of the responses received. These policy proposals were included in the joint consultation that was launched in May 2014. The criminal justice provisions within the Bill have been drafted in accordance with those proposals, taking account of the responses received to the joint public consultation exercise.

## **OVERVIEW**

20. Part 1 of the Bill sets out the key principles upon which the Bill is based. They include, and build upon, the existing common law presumption of capacity in persons aged 16 and over and the common law principle of best interests. Significantly, they place greater emphasis on the need to support people to exercise their capacity to make decisions where they can. If, on the other hand, it is established that a person lacks capacity to make a specific decision at a particular time, the Bill provides alternative decision making mechanisms.
21. People may lack capacity to make a decision for many reasons. It may be because of, for example, a stroke, an acquired brain injury, a learning disability or a mental illness and so the Bill has the potential to impact upon many people. In fact, the reality is that the Bill has the potential to affect everyone in society, as most people will at some point in their lives be directly involved with, or will know of, someone who lacks capacity. They could even potentially be an attorney who, through the new system provided for in the draft Bill, can be given the authority by someone else to make decisions on his or her behalf at a time in the future when he or she lacks capacity to do so. This new system will be known as Lasting Powers of Attorney.
22. If, however, such arrangements have not been put in place, the core of the Bill (Part 2) will apply to acts in connection with a person's care, treatment or personal welfare. This puts on a statutory footing the common law doctrine of necessity but, importantly, also provides persons who lack capacity with new safeguards that increase with the seriousness of the intervention being proposed. There are also ways in which, under the Bill, the court can make one-off decisions or appoint court deputies to make decisions on an ongoing basis.
23. Parts 9 and 10 of the Bill are concerned with criminal justice powers of the police, courts and the Department of Justice. These powers include police powers to remove persons from a public place to a place of safety, court powers to impose particular healthcare disposals on offenders at remand, sentencing or following a finding of unfitness to plead, and Departmental powers to transfer prisoners and others detained in a custodial environment for in-patient treatment in a hospital. These powers,

however, have been created in such a way as to respect the autonomy of an individual to make a decision about medical treatment.

24. The provisions of the draft Bill are divided into 15 Parts consisting of 309 clauses in total and 11 Schedules.

### **Part 1**

25. To emphasise their importance, the key principles appear in **Part 1** of the Bill. These enshrine and build upon aspects of the existing common law, such as the presumption of capacity unless established otherwise and the requirement to act in a person's best interests. Part 1 also takes account of developments following the Bamford Review, such as the ratification of the UN Convention on the Rights of Persons with Disabilities, by placing greater emphasis on the requirement to take steps to support people to take decisions for themselves before turning to the core provisions of the draft Bill. As they are key concepts in the draft Bill, Part 1 also defines what "lacks capacity" means and sets out the steps to be followed when determining what is in a person's best interests.

### **Part 2**

26. **Part 2** is the core of the Bill. Rather than give certain people statutory powers to intervene where necessary, Part 2 adopts a different approach by putting into statute the common law doctrine of necessity. This doctrine is currently relied on by many people who work with or care for people who lack capacity to make decisions for themselves. In broad terms, it provides protection against civil and criminal liability but only if you act in the person's best interests. Part 2 aims to do the same but, crucially, it requires additional safeguards to be put in place where the intervention is serious before the legal protection can be availed of. The general rule is that the more serious the intervention is for P, the more safeguards you need to put in place in line with the Bamford Review concept of reciprocity. However, for all interventions, it must first be properly established that the person lacks capacity in relation to the intervention and that the intervention is in the person's best interests. Additional safeguards include the requirement to carry out a formal assessment of the person's capacity and to put in place and consult with a nominated person. These apply in respect of all serious interventions. A second opinion is also required in respect of certain serious treatments. Authorisation (usually by a Health and Social Care Trust ("HSC trust") panel) and the requirement to put in place and consult with an independent mental capacity advocate are reserved for the most serious interventions, such as compulsory serious treatment and detention in circumstances amounting to a deprivation of liberty. The right to seek a review by a Tribunal in respect of an authorisation granted by a HSC trust is also provided for in Part 2 and is an important additional safeguard.

### **Remaining Parts**

27. **Part 3** makes further provision in relation to nominated persons: the appointment and revocation of nominated persons, the default mechanism and the Tribunal's powers to appoint or disqualify nominated persons.
28. **Part 4** of the Bill provides for the new independent advocacy safeguard. It provides for a new duty on HSC trusts to make arrangements to secure the availability of independent mental capacity advocates when required under Part 2 and also sets out procedures for instructing advocates to act. Regulation making powers are created to make further provision for the commissioning of independent advocacy services and the functions of independent mental capacity advocates under Part 2.
29. **Part 5** of the Bill provides for a new form of power of attorney, the lasting power of attorney (LPA).
30. **Part 6** of the Bill makes provision for High Court powers to make decisions and appoint deputies in respect of persons who lack capacity to make decisions in respect of their care, treatment, personal welfare, or their property and affairs. This Part makes provision for powers which can be exercised by the High Court in connection with these roles, as well as making provision for the various rules of court which may be made in respect of this Part of the Bill.
31. **Part 7** of the Bill makes provision for the creation of a Public Guardian and the functions to be performed by that officer, as well as imposing duties upon relevant authorities to notify the Public Guardian of certain events. This Part also provides a further power for the Department of Justice to appoint Court Visitors.
32. **Part 8** of the Bill puts in place new requirements and safeguards for intrusive research projects involving people who lack capacity to consent to taking part in that research.
33. **Part 9** of the Bill creates powers for police constables to remove a person from a public place, if that person appears to be in immediate need of care or control, and take them to a 'place of safety'. Part 9 also includes powers for constables to detain persons at a place of safety or transfer them between places of safety.
34. **Part 10** of the Bill creates court disposals to send persons on remand and convicted offenders to healthcare facilities for medical treatment. Part 10 also provides court powers for persons found unfit to plead, as well as a power for the Department of Justice to transfer prisoners to healthcare facilities for medical treatment. In addition, this Part includes the rights of review for persons detained under Part 10.
35. **Part 11** of the Bill provides for the transfer of persons detained in hospital, in circumstances amounting to deprivation of liberty, or subject to a criminal justice

disposal, between Northern Ireland and other UK jurisdictions. Regulation making powers are created to make further provision about transfers, including to and from jurisdictions outside the UK.

36. **Part 12** provides for additional safeguards for children subject to the Bill and the Mental Health Order. It also amends that Order so that in the main it will not apply to persons aged 16 or over when the Bill comes into operation.
37. **Part 13** sets out the offences specific to the Bill.
38. **Part 14** sets out miscellaneous provisions, including amendment of the Carers and Direct Payments Act (Northern Ireland) 2002; provision giving effect in Northern Ireland to the Convention on the International Protection of Adults; and matters that are excluded from the scope of the Bill.
39. **Part 15** makes provisions relating to codes of practice and other supplementary matters. Definitions, commencement and short title of the Bill are also included.

## **COMMENTARY ON CLAUSES**

### **PART 1 – PRINCIPLES**

#### **Clause 1 – Principles: capacity**

This clause sets out the guiding principles that must be complied with when a person is making a determination of whether a person aged 16 or over lacks capacity in relation to a particular matter for any purpose of the Bill.

It provides that a person is not to be treated as lacking capacity in relation to the matter unless it is established that the person lacks capacity (as defined in clause 3). It also makes clear that the question of whether or not a person is able to make a decision for him or herself is only to be determined by reference to the matter mentioned in clause 4. Whether the person has a particular condition, or any other characteristic, is irrelevant to the question of whether he or she has capacity in relation to the matter.

The drafting of this clause has been specifically altered as a result of consultation, although its effect remains the same. The purpose of the clause is to avoid any confusion around what it means in practice. The similar provision in the Mental Capacity Act 2005 (“the 2005 Act”) was heavily criticised in the House of Lords report last year because it seemed to cause confusion in practice.

To be clear it is important that a person who is thinking about carrying out an intervention in reliance on someone's consent does not misinterpret this clause as requiring them to assume that the person has capacity to consent. Rather what it seeks to achieve is the placing of the onus on a person intending to carry out an intervention under the Bill to have properly established that capacity is really lacking. This is so that no one finds him or herself in the position where they feel they are being asked to prove they have capacity to make the decision. It is not so as to prevent or obviate the need for proper checks to be made where there are doubts about a person's capacity to make a decision. Proceeding on the basis of a mere assumption that the person has capacity to consent could end in liability if in fact the person lacks capacity.

Clause 1 also provides that a person is not to be treated as unable to make a decision for him or herself unless all practicable help and support to enable the person to make the decision has been given without success. The practicable steps that must, in particular, be taken to ensure compliance with this principle are expressly set out in clause 5.

Clause 1 also provides that a person is not to be treated as lacking capacity to make a decision simply because he or she makes what others consider to be an unwise decision.

### **Clause 2 – Principle: best interests**

This clause provides for a further principle which requires any act done or decision made under the Bill on behalf of a person who is 16 or over and lacks capacity, to be in that person's best interests. This is expanded upon in clause 7.

### **Clause 3 – Meaning of “lacks capacity”**

This clause sets out the definition of “lacks capacity” for the purposes of the Bill. It provides that a person lacks capacity in relation to a matter if, at the material time, the person is “unable to make a decision” for him or herself about the matter (as defined in clause 4), *because of* an impairment of, or a disturbance in the functioning of, the mind or brain. The inability to make a decision must therefore be caused by an impairment of, or a disturbance in the functioning of the mind or brain.

The definition focuses on the particular time when a decision has to be made and on the particular matter to which the decision relates. It is not an assessment of a person's ability to make decisions generally. A person may lack capacity in relation to one matter but not in relation to another matter. The clause also makes it clear that a person can “lack capacity” even if the loss of capacity is only temporary. It also does not matter what the cause of the impairment or disturbance is. It may be caused by a disorder or disability but equally it may not.

#### **Clause 4 – Meaning of “unable to make a decision”**

This clause sets out the test for assessing whether a person is “unable to make a decision” about a matter. A person is unable to make a decision for him or herself if he or she is unable to do any one of the following: (a) understand the information relevant to the decision which includes information about the reasonably foreseeable consequences of deciding one way or another or failing to make the decision (or an appropriate explanation of such); (b) retain that information for the time required to make the decision; (c) appreciate the relevance of that information and use and weigh it as part of the decision making process; or (d) communicate his or her decision. The inclusion of the appreciation element in (c) will allow for things, such as lack of insight, delusional or distorted thinking to be taken into account when assessing someone’s ability to make a decision. Clause 4 also makes it clear that references in the Bill to enabling or helping a person to make a decision includes enabling or helping a person to do all or any one of the things listed in paragraphs (a) to (d) of subsection (1).

#### **Clause 5 – Supporting person to make decision**

This clause expressly sets out the sorts of steps that must, where practicable, be taken to ensure compliance with the principle in clause 1 which requires all practicable help and support to be given to a person to make a decision for themselves before it can be concluded that he or she is unable to do so.

The steps in this clause are not exhaustive but include providing the person with information relevant to the decision in an appropriate way, which includes information about the reasonably foreseeable consequences of deciding one way or another or failing to make the decision (or an appropriate explanation of such); ensuring the time and environment is as conducive as possible to the decision making process; and involving others likely to help and support the person to make their own decision.

Subsection 3A clarifies that, when providing the person with information (one of the steps listed in clause 5), it may be appropriate to use simple language or visual aids or to provide support to help with the communication of the information. Subsection 3B also clarifies that, when involving others in the decision making process (another step listed in clause 5), it may be appropriate to involve someone who can provide communication support. For example, a Speech and Language Therapist.

This is a significant clause in the Bill that fully aligns with the autonomy principle at the core of the Bamford Review recommendations and promotes a key message that the Bill aims to get across: that by far the best outcome is for decisions to be made on the basis of informed consent by the person themselves.

### **Clause 6 – Compliance with section 1(2)**

This clause provides that for any proceedings under the Bill (that is, court, Tribunal or HSC trust panel proceedings) or any other legislation, the standard of proof to be applied where a question arises about whether a person lacks capacity (as defined in clause 3), should be decided on the balance of probabilities. That is to say, it is more likely than not that the person lacks capacity in relation to the matter in question. It follows, therefore, that it is up to the person claiming lack of capacity to prove it on the balance of probabilities. Otherwise, where a question arises about whether a person lacks capacity (as defined in clause 3), compliance with clause 1(2) is achieved if the person reasonably believes that the person lacks capacity in relation to the matter (having taken reasonable steps to establish this) and in arriving at that belief, the principles in clause 1(3) to (5) and clause 5 must have been complied with.

This clause is the first occurrence in the Bill where the capital letter “P” is used to refer to a person who is 16 or over and lacks capacity. This is to make complex provisions easier to follow particularly where a number of different people are being referred to.

### **Clause 7 – Best interests**

Clause 7 makes further provision in relation to the best interests principle. It is not however defined given the wide range of acts and decisions the Bill covers. Instead, clause 7 provides a list of factors that are not intended to be exhaustive but must all be balanced in order to comply with the principle in clause 2.

Clause 7 makes it clear that determining what is in P’s best interests must not be based merely on his or her age, appearance, or any other characteristic of P including any condition P may have. Rather all relevant circumstances must be considered (that is to say, those which the person making the determination is aware of and which it is reasonable to regard as relevant). Consideration must also be given to whether P is likely to regain capacity at a future date in case the decision can be put off until P can make the decision for him or herself.

The clause goes on to list particular steps that must be taken. Importantly, the person determining best interests is required, so far as practicable, to encourage and help P to participate as fully as possible in assessing best interests following consultation. It also requires special regard to be had to P’s past and present wishes and feelings and, in particular, any relevant written statement made by P when he or she had capacity (sometimes referred to as an “advance statement”), P’s beliefs and values and any other factors likely to influence P’s decision if he or she had capacity, so far as they are reasonably ascertainable.

The person determining best interests must also (where practicable and appropriate) consult with “the relevant people” and take into account their views as to what would be in P’s best interests. This could include the nominated person, the independent mental capacity advocate, anyone named by P to be consulted on the matter, anyone engaged in P’s care or interested in his or her welfare, any attorney appointed under a lasting power of attorney or an enduring power of attorney and any deputy appointed by the court.

The person determining best interests must also have regard to any less restrictive alternatives to the intervention being proposed and whether failure to do an act is likely to result in harm to other persons which could ultimately have harmful consequences for P. Finally, this clause provides that where determining whether treatment that is necessary to sustain life is in the best interests of P, the decision maker must not be motivated by a desire to bring about P’s death.

Given the scope of decisions to which it might apply, this provision in the Bill has been drafted in such a way as to allow it to operate in a wide range of situations, including for example an emergency or what might generally be a routine intervention, such as washing or dressing someone. This has been achieved by conditioning some of the requirements set out above around what is reasonable, practicable or appropriate.

#### **Clause 8 – Compliance with section 2**

This clause provides that where a person (other than the court) does an act or makes a decision on behalf of a person who is 16 or over and lacks capacity, he or she will be considered to have sufficiently complied with the best interests principle in clause 2 provided he or she reasonably believes the act or decision was in P’s best interests and he or she complied with the checklist in clause 7.

### **PART 2 – LACK OF CAPACITY: PROTECTION FROM LIABILITY, AND SAFEGUARDS**

Part 2 creates a new statutory decision making framework that operates where a decision needs to be made in respect of a person aged 16 or over who lacks capacity in relation to a particular matter and no other arrangements are in place that would allow that decision to be made. It provides in clause 9 for a general defence against liability for certain acts, subject to certain limitations. The availability of the defence depends on whether certain safeguards have been met. These are also referred to in clause 9. Subsequent clauses then set out when the safeguards apply and what they involve. Some key concepts are defined at the end of the Part.

## **CHAPTER 1 – PROTECTION FROM LIABILITY, AND GENERAL SAFEGUARDS**

### **Clauses 9 – 12**

Clause 9 is pivotal because it puts into statute what is referred to as the common law doctrine (or defence) of necessity. In broad terms, the defence in clause 9 can be availed of by a person “D” who does an act in connection with the care, treatment or personal welfare of another person “P” who is aged 16 or over and lacks capacity in relation to it. However, by virtue of clause 10, it does not apply to an act which is, or is done in the course of, psychosurgery. Such treatment can therefore only be given to a person who lacks capacity in relation to it with the authority of the court. Clause 10 also includes a regulation making power that allows the Department to expand the list of treatments to which clause 9 does not apply should it ever be deemed necessary or if new treatments are developed which are equally as serious as psychosurgery. The defence in clause 9 also does not apply to any act which conflicts with a decision made by an attorney under a lasting power of attorney made by P (see Part 5) or a deputy appointed for P by a court (see Part 6). However, in these situations, it is possible that disputes may arise. Clause 10 also therefore provides that life sustaining treatment or treatment which is necessary to prevent a serious deterioration in P’s condition can be provided by D without fear of liability while a decision is being sought from the court on a particular issue in this type of case.

Any act to treat P that conflicts with an effective advance decision under the common law will also not attract the defence in clause 9. To be valid, such decisions must meet a number of criteria such as: when making the advance decision, the person must be 18 or over and have the capacity to make the decision; the person must not have done anything since that clearly goes against their advance decision; the advance decision must not have been withdrawn; a power to make the decision has not subsequently been conferred to an attorney; and the person would not have changed their decision if they had known more about the current circumstances. Again, there is an important caveat to this general rule that when a decision of the court is being sought on a relevant issue, D will be protected from liability under clause 9 if he or she gives P life-sustaining treatment or treatment which he or she reasonably believes to be necessary to prevent a serious deterioration in P’s condition. The Code of Practice will expand further on advance decisions.

Clause 9 also provides that the act must be one in respect of which D would have incurred liability if P had had capacity but did not consent to it. This would exclude any act done in pursuance of a statutory power that does not require P’s consent. For the avoidance of doubt, clause 60 also sets out other circumstances in which the defence in clause 9 would not be relevant i.e. because another authority to do the act exists.

The general effect of clause 9 is that D is protected from any liability that he or she would have incurred if P had had capacity and consented to it (or, if P is under 18, that is either 16 or 17 years old, the reference to consent is taken to include any consent that could be given by his or her parent(s) or guardian(s)). As valid consent is a defence to a wide range of torts and crimes, this makes the protection from liability afforded to D under this clause significant. However, it also means that, as consent is not a defence to a claim in the tort of negligence, any liability arising from negligence on D's part is not covered by clause 9. This is expressly stated in clause 10.

Furthermore, clause 9 makes it clear that the defence it provides only applies if the general and, where applicable, additional safeguards mentioned in it have been met. For any act falling within the scope of clause 9, the general safeguards are that (1) before doing the act, D has taken reasonable steps to establish whether P lacks capacity and (2) when doing the act, D reasonably believes that P lacks capacity and that it will be in P's best interests for the act to be done. These general safeguards attract the principles around capacity (clauses 1 and 5) and best interests (clauses 2 and 7) and are framed in a flexible way so as to be workable on the ground. What is "reasonable" to expect D to do in a particular set of circumstances will be different from what is "reasonable" in another, such as in an emergency. This is recognised and accommodated within clause 9.

In addition to the general safeguards above, clause 12 provides that a further safeguard or condition must be met where the act is an act of restraint. The condition applies not only to an act by D restraining P but also to an instruction or an authorisation given by D to another person to restrain P. This includes any restriction of P's liberty of movement whether or not P resists or the threat or use of force where P is resisting. The condition is that the restraint is necessary to prevent harm to P and that it is proportionate both to the likelihood of harm and to its seriousness. Therefore, in all cases, the minimum amount of restraint must be used and if the level of risk diminishes, the level of restraint used must be reduced.

Some additional safeguards apply to all serious interventions; others only apply to more serious interventions, such as deprivations of liberty. "Serious intervention" is defined in clause 63. As it is a key concept in Part 2 of the Bill, it is suggested that the reader may wish to read the explanation of that clause (and the related clause 64) at this point. In addition, as most of the additional safeguards do not apply where the situation is an emergency, it is suggested that the reader may also wish to read the explanation of the meaning of "emergency" in clause 65 and clause 66.

## **CHAPTER 2 – ADDITIONAL SAFEGUARDS FOR SERIOUS INTERVENTIONS**

The additional safeguard provisions refer to acts. This is because clause 9 applies to individual acts. This does not mean, however, that every act that forms part of a larger, more complex intervention in P’s life, such as a deprivation of liberty, has to be considered separately. Any consideration of P’s case carried out before such an intervention should take account of the different acts. Additional safeguards apply in respect of serious interventions that make up the intervention and it will depend on the circumstances whether, as the intervention proceeds, a further process of consideration is required for the purposes of this clause in respect of a particular act.

### **Clauses 13 – 14 - Formal assessments of capacity**

Clause 13 provides that the formal assessment of capacity safeguard applies to an act that is, or is part of, a serious intervention. In these cases, a formal capacity assessment must be carried out and a statement of incapacity made, otherwise D will not be able to avail of the protection from liability under clause 9. The clause makes it clear that a belief by D that P lacks capacity in relation to such acts is not a reasonable one for the purposes of clause 9 if a formal capacity assessment has not been carried out where the Bill requires it. In addition, the formal capacity assessment must be carried out recently enough so as to be relevant and meaningful. This safeguard does not apply where the situation is an emergency (see clauses 65 and 66).

“Formal capacity assessment” is defined in clause 14 as an assessment carried out by a “suitably qualified person” to be defined in regulations. “Statement of incapacity” is also defined in clause 14. It means a statement in writing by the assessor, certifying that in the assessor’s opinion, P lacks capacity in relation to the serious intervention. The statement must also specify, among other things, which of the functional aspects of the capacity test set out in clause 4 P is not able to do because of an impairment or disturbance in the functioning of P’s mind or brain. Also, importantly, the statement must specify any help or support given to P, without success, to enable P to make the decision for him or herself.

### **Clause 15 – Nominated person: need to have in place and consult**

Clause 15 provides for a further additional safeguard - the nominated person safeguard. It replaces and improves upon the nearest relative provisions in the Mental Health Order. Like the formal assessment of capacity, it also applies to an act that is, or is part of, a serious intervention except where the situation is an emergency. In such cases, unless a nominated person has been put in place and, where practicable and appropriate, consulted and his or her views taken into account when D is determining whether the act is in P’s best interests, the defence in clause 9 will not

apply. Further provision about the appointment of nominated persons is made in Part 3 of the Bill.

### **CHAPTER 3 – ADDITIONAL SAFEGUARD: SECOND OPINION**

#### **Clauses 16 – 18**

The second opinion additional safeguard is based on a similar safeguard in the Mental Health Order. Clauses 16-18 set out when it applies and what it involves.

Clause 16 provides that, unless the situation is an emergency, a second opinion is required for the following types of treatment:

Electro-convulsive therapy;

Any treatment with serious consequences (defined in clause 20) prescribed for this purpose in regulations to be made under the Bill;

Any treatment with serious consequences (in circumstances to be prescribed in regulations) where the question of whether it is in the person's best interests is finely balanced.

In these cases the second opinion must have been obtained recently enough for it to be reasonable to rely on it.

In addition, clause 17 provides for another set of circumstances in which a second opinion is required, that is where medication that is treatment with serious consequences and of a prescribed description is given to P for any condition for a period of more than three months. This applies only where P is an in-patient or resident in a hospital, care home or other place to be prescribed in regulations or subject to an attendance requirement (see clause 28). The effect of this clause is that if medication falling within its scope is given to P at any time after the first three months of the intervention, a second opinion must have been obtained within the three months before it is given and recently enough for it to be reasonable to rely on it. The three month time limit is therefore a rolling one.

For the purposes of clause 16 and 17, "second opinion" means a 'relevant certificate' as defined in clause 18. It must include a statement in writing made by an "appropriate medical practitioner": someone who is qualified to undertake the assessment; is not connected with the person who lacks capacity; has been approved by the Regulation and Quality Improvement Authority (RQIA) for the purpose of providing second opinions and has been asked by the RQIA to provide the second opinion on whether the treatment is in P's best interests. When asking a medical practitioner to provide a second opinion certificate, the RQIA should have regard to

the desirability of asking someone who is independent of the medical practitioner providing treatment to P. The certificate must state that, in the medical practitioner's opinion, it is in P's best interests to have the proposed treatment. Once made, the medical practitioner must ensure that a copy of the medical certificate is immediately sent to the RQIA.

For the purpose of providing a second opinion, the appropriate medical practitioner can, at any reasonable time, visit and examine the person in private and obtain/examine relevant health records. A certificate may only be given if the medical practitioner has examined the person and any relevant health records; and consulted persons principally concerned with treating P.

#### **CHAPTER 4 – ADDITIONAL SAFEGUARD: AUTHORISATIONS ETC and CHAPTER 6 – EXTENSION OF PERIOD OF CERTAIN AUTHORISATIONS**

Chapter 4 provides for further additional safeguards, including authorisation. This safeguard applies to four types of interventions under the Bill. These are explained below. The authorisation process and the criteria for authorisation are set out in Schedules 1 and 2. Schedule 1 covers the authorisation of all interventions that require authorisation except the short-term detention in hospital for examination of an illness which is dealt with in Schedule 2. Schedule 1 also makes provision for interim authorisations.

Where an authorisation has been granted under Schedule 1 (other than an interim authorisation) the authorisation can last for up to six months unless revoked. An interim authorisation can last for up to 28 days. An authorisation under Schedule 2 can also last for 28 days. However, the fact that an authorisation has been granted does not mean that the intervention can be carried out if the other safeguards and conditions in Part 2 are no longer met at the time of the intervention. Similarly, in the case of an ongoing intervention requiring authorisation, if the other safeguards or conditions cease to be met, the intervention must also cease.

#### **Chapter 6 (including Schedule 3) provides for the extension of certain authorisations.**

Provision is also made in these Chapters requiring new duties to be fulfilled where the person making an application for authorisation or an extension report is of the opinion that P is likely to lack capacity to apply to the Tribunal for a review of the authorisation made in respect of them. A statement to this effect must be made in the application/extension report and, on grant/making, the Attorney General must be notified of such cases so that a referral to the Tribunal under clause 47 can be made if necessary. See paragraphs 6(2), 19(4) and 20(7) to Schedule 1, paragraphs 2(5) and 7(2) to Schedule 2, clauses 39(3) and 43(6) and paragraphs 4(2) and 9(4) to Schedule

3. The duty also applies to interim authorisations and at the six month point of extensions made under clause 38 and Schedule 3 (yearly subsequent extensions) (see clause 50). The purpose of these new duties is to ensure that a person's right to challenge their detention has practical effect where the person lacks or probably lacks capacity to decide whether to make an application to the Tribunal. Clauses 19 – 23 - Treatment with serious consequences

Clause 19 provides that, in order for D to avail of the defence in clause 9 in respect of an act that is, or is done in the course of the provision to P of treatment with serious consequences (defined in clause 21) and there is a reasonable objection from P's nominated person, the provision of the treatment must be authorised under Schedule 1 (unless the situation is an emergency). Importantly, it also provides that a further safeguard must be met - the prevention of serious harm condition. This applies even if the situation is an emergency and its meaning is set out in clause 22. It requires D to be satisfied that failure to provide the proposed treatment would create a risk of serious harm to P or serious physical harm to others, and that carrying out the treatment is a proportionate response to the likelihood of harm to P, or the likelihood of physical harm to others, and the seriousness of that harm. The word 'proportionate' is important here because if treatment is provided which is not proportionate then D will not be protected from liability under clause 9.

The authorisation of treatment with serious consequences is also required by virtue of clause 20 where there is no objection from P's nominated person but, in prescribed circumstances, P is resisting the treatment, or the treatment is given while P is subject to an additional measure (i.e. where P is being detained in circumstances amounting to a deprivation of liberty; is subject to an attendance requirement; is subject to a community residence requirement; or where a supervision and assessment order is in force – see clause 23 and clauses 24-34 for further explanation of the interventions mentioned here). In such prescribed cases, the prevention of serious harm condition must also be met.

The criteria for authorisation required under clauses 19 and 20 are set out in paragraph 9 of Schedule 1.

Clause 21 defines 'treatment with serious consequences' in general terms and gives the Department a power to make regulations to specify what treatment would, or would not, fall under each of the 4 categories in paragraph (1). The wording reflects that a treatment which may be routine for A could have a significant impact on B. Clause 21 also makes provision for the scenario in which an act is not anticipated to have serious consequences for P but turns out to be treatment with serious consequences. In these cases, provided D had a reasonable belief that the risk of this happening was negligible, the act is not to be treated as treatment with serious consequences.

## **Clauses 24 – 27 - Deprivation of liberty**

Clauses 24-27 make provision in respect of an act or acts that together amount to a deprivation of liberty (defined in clause 306 by reference to Article 5 of the ECHR so as to attract relevant case law). There is currently no legislative provision in Northern Ireland for such acts in respect of people who lack capacity in relation to them. This is a significant gap that the Bill aims to address in a way that avoids many of the difficulties encountered in other jurisdictions and takes account of developments in ECHR and domestic case law. *HL v the United Kingdom 2004* led to a statutory scheme being put in place for deprivations of liberty in England and Wales in 2007. More recently, the judgment of the UK Supreme Court in the *Cheshire West* case and a House of Lords Select Committee report have prompted a review of that scheme which is being undertaken by the Law Commission in England and Wales. The timing of that judgment coincided with preparations for the consultation on the draft Bill last year. It has however informed a number of amendments to clauses 24-27 made subsequent to the consultation. Where appropriate, these are highlighted in the explanation of clauses below.

Clause 24 provides that only certain kinds of deprivation of liberty can have the protection from liability afforded by clause 9 and, even then, they must be authorised by either a HSC trust panel under Schedule 1 or by the making of a report under Schedule 2 (relating to a short term detention for examination) unless the situation is an emergency. The criteria for detention are set out in paragraph 10 to Schedule 1 and paragraph 2(3) to Schedule 2. The prevention of serious harm condition set out in clause 25 – a further safeguard - must also be met. This applies even if the situation is an emergency.

There are three types of deprivation of liberty that may be authorised under Part 2. First, the detention of P in circumstances amounting to a deprivation of liberty in a place in which care or treatment is available for P. This is the main type of deprivation of liberty falling within the scope of Part 2. It has a wider scope than that in the consultation version of the Bill which only referred to detention in a hospital or care home. It has been expanded to take account of the UK Supreme Court decision in the *Cheshire West* case and means that Part 2 can be used to authorise deprivations of liberty that would otherwise have required the authorisation of the court under Part 6.

The two remaining types of deprivation of liberty that can be authorised under Part 2 are set out in clause 25, namely detention while being taken to a place in which care or treatment is available and detention in pursuance of a condition imposed during a period of permitted absence from a relevant place (as defined in clause 27 and which that clause makes clear fall within the scope of clause 9). Paragraph 22 to Schedule 1 and paragraph 18 to Schedule 2 ensure that such detention is covered by an authorisation under those Schedules granted in respect of the detention of P in a

specified place in which care or treatment is available for P. In the case of the latter detention, however, only the detention of P in pursuance of such conditions lasting 7 days or less is covered by the authorisation.

Clause 26 deals with the scenario in which there is a need to take P to a place where P is to be detained in circumstances amounting to a deprivation of liberty, and the act of taking P there does not amount to a deprivation of liberty. In this case, clause 26 makes it clear that any act which is, or is done in the course of, taking P to such a place is only covered by clause 9 and therefore lawful under the Bill if the deprivation of liberty in that place has been authorised under the Bill and the prevention of serious harm condition as defined in clause 25 has been met.

### **Clauses 28 and 29 – Attendance requirements**

An attendance requirement is a requirement to attend at a particular place at particular times or intervals for treatment that would, or might be, treatment with serious consequences. “Treatment with serious consequences” has the same meaning as that in clause 20.

The effect of clause 28 is that unless an authorisation has been granted in respect of such a requirement (and any other relevant conditions under Part 2 met), it cannot be lawfully imposed on P unless the situation is an emergency. In other words, D will not be protected from liability under clause 9. Any act done to ensure that P complies with the requirement will also not be lawful unless the requirement itself has been authorised. The criteria for authorisation are set out in paragraph 11 to Schedule 1.

Clause 28 also requires that a further safeguard is met before the requirement can be lawfully imposed, the “receipt of treatment condition”. To meet this condition, D must reasonably believe that failure to impose the requirement would be more likely than not to result in P not receiving the treatment. This condition also applies to any act done to ensure that P complies with a requirement of this type.

Clause 29 provides that where a requirement to attend for certain treatment has been authorised and imposed but it subsequently becomes apparent to the medical practitioner that any one of the conditions in subsection (2) is no longer met, the requirement must be revoked and another requirement cannot be imposed under the same authorisation.

### **Clause 30 – 34 - Community residence requirements**

A community residence requirement is defined in clause 31 as a requirement imposed by a HSC trust for P to live at a particular place. A community residence requirement may also include a requirement to allow a healthcare professional access to P or a requirement to attend somewhere for training, education, occupation or treatment

(other than treatment which would, or might be, treatment with serious consequences as such requirements are dealt with separately under clause 28). The meaning of “healthcare professional” for the purposes of this clause will be defined in regulations made under the Bill.

The effect of clause 30 is that unless an authorisation has been granted under Schedule 1 in respect of the requirement (and any other relevant conditions under Part 2 met), it cannot be lawfully imposed on P. In other words, D will not be protected from liability under clause 9. Any act done to ensure that P complies with the requirement will also not be lawful unless the requirement itself has been authorised. This includes acts done to ensure that P moves to, continues to live at or resumes living at the place specified in the requirement or to ensure that P complies with a provision in the requirement requiring P to attend a place or allow a person access to P. The criteria for authorisation are set out in paragraph 12 to Schedule 1.

Clause 30 also requires that a further safeguard is met before the requirement can be lawfully imposed: “the prevention of harm condition”. To meet this condition, D must reasonably believe that failure to impose the requirement would be more likely than not to result in harm to P. This condition also applies to any act done to ensure that P complies with a requirement of this type.

Clause 32 provides that where a community residence requirement has been authorised and imposed but it subsequently becomes apparent to the approved social worker in charge of P’s case that any one of the conditions set out in subsection (2) is no longer met, the requirement must be revoked and another requirement cannot be imposed under the same authorisation. Clause 33 provides the Department with a regulation making power to impose duties on HSC trusts regarding people who are subject to community residence requirements and their visitation.

Clause 34 is intended to clarify for those working under the Bill that community residence requirements are not to be regarded as a deprivation of liberty (or restraint) for the purposes of the Bill. This is required to avoid any duplication in the authorisation process given that the case law around guardianship under the Mental Health Order (which community residence requirements are intended to replace) and whether it could be a deprivation of liberty or not remains unclear. The reference to restraint is to make it clear that the additional safeguard applies to such requirements (it does not apply to acts of restraint).

### **Clauses 37 – 44 - Extensions of period of authorisation**

Clauses 37 and 38 provide that, if the criteria for authorisation continue to be met, an authorisation granted under Schedule 1 can be extended initially for six months and yearly thereafter without referral back to the panel. Such an extension is achieved by

the making of a report. Clause 39 requires this extension report to be made by an “appropriate medical practitioner” (also defined in clause 39) within the last month before the initial authorisation ends for the first extension, and within the last 2 months for subsequent extension periods. The report must also contain a statement by “the responsible person” (to be defined in regulations - see clause 42) that the criteria are met. Where the responsible person is not of the opinion that the criteria continue to be met, the matter must be referred to the HSC trust panel. The process for this referral is set out in Schedule 3.

Clause 43 refers to requirements regarding the involvement of nominated persons and independent mental capacity advocates in extension reports. Clauses 54 to 56 provide more detail on this). These reports must also be given to the relevant HSC trust (as defined in clause 43) as soon as practicable and the HSC trust must in turn give prescribed information to P and other persons and send a copy to the RQIA.

Clause 44 provides that any measure authorised by the authorisation but not in the extension report will be treated as cancelled.

## **CHAPTER 5 – ADDITIONAL SAFEGUARD: INDEPENDENT MENTAL CAPACITY ADVOCATE**

### **Clauses 35 and 36 – Independent mental capacity advocate**

Clauses 35 and 36 have the effect that, where Part 2 requires an intervention to be authorised or where, although not requiring authorisation, it is a serious compulsory intervention, the independent mental capacity advocate conditions must be met (and any other safeguards that apply) for the defence in clause 9 to apply unless the situation is an emergency or P has made a declaration declining the services of the independent mental capacity advocate (explained further in Part 4 of the Bill which makes further provision about independent mental capacity advocates). The independent mental capacity advocate must be in place to represent and support P when the question of what is in P’s best interests is being determined by D. Where practicable and appropriate, D must consult the independent mental capacity advocate and take account of the advocate’s views in relation to what would be in P’s best interests (see clause 7(7)).

## **CHAPTER 7 – RIGHTS OF REVIEW OF AUTHORISATION**

### **Clause 45 – Right to apply to Tribunal**

This clause 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 Bill. 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 when 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 of the period for which the authorisation is extended.

In this clause, “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.

#### **Clause 46 – Applications: visiting and examining**

This clause provides that for the purposes of advising whether an application should be made to the Tribunal under clause 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.

#### **Clause 47 – Power of certain persons to refer case to Tribunal**

This clause 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 clause 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.

#### **Clause 48 – Duty of HSC trust to refer case to Tribunal**

This clause 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 clause 38 or Schedule 3; the authorisation has been in force throughout the relevant period; an authorisation under Schedule 1 has been granted; the period of authorisation has been extended under clause 37, 38 or Schedule 3; and the Tribunal has not considered P’s case at any time during 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 clause 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 clause 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.

#### **Clause 49 – References etc to Tribunal: persons formerly detained under the Mental Health Order**

This clause 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 clause 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 Bill 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.

**Clause 50 – Duty of HSC trust to notify the Attorney General**

This clause applies if the period of authorisation under Schedule 1 has been extended under clause 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 clause defines the “relevant time” as meaning the time six months after the beginning of the one year period mentioned above.

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

This clause 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 clause 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 clause 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 clause 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.

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

This clause 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.

### **Clause 53 – Sections 51 and 52: additional powers of Tribunal**

This clause provides that where, under clauses 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, clause 51 or as the case may be, clause 52, will apply.

## **CHAPTER 8 – SUPPLEMENTARY**

Most of the following clauses have been referred to where relevant in the commentary above. Further explanation, where necessary, is provided below.

### **Clauses –54-56 – Medical reports: involvement of nominated person and independent mental capacity advocate**

Clauses 54 and 55 require that a nominated person and an independent mental capacity advocate must be in place and, where practicable and appropriate consulted and their views taken into account when a person making a medical report, required for the purposes of an authorisation under Schedule 1 or 2 or the extension of a period of authorisation under clause 39 or Schedule 3 is determining what would be in P's best interests. This safeguard does not apply when the situation is an emergency. This is defined in clause 56 for the purposes of these clauses and requires the person making the report to weigh up the risks involved in delaying the making of the report to put in place this safeguard or to check if it is in place, against the risks of proceeding without putting the safeguard in place or checking if it is in place. If the risks involved in delaying are greater, the situation is an emergency. However, an unreasonable failure to take the necessary steps to meet the safeguard will not satisfy this test. It must be assumed for the purposes of this clause that they will be taken as soon as practicable.

### **Clauses 57 and 58 – Provision of information**

Clause 57 is a general provision that enables the Department to make regulations about when information must be given for the purposes of Part 2. This is an important clause and the regulations made under it will be extensive given the many occasions in which information will have to be provided in relation to acts covered by the Bill and in respect of authorisations made under Schedule 1 and 2, both of which also contain further provisions requiring information to be given at various stages in the

authorisation process. Specifically, clause 57 makes it clear that these regulations must include provision for P to be informed of the provisions in Part 2 under which he or she is detained and his or her rights in terms of having his or her case reviewed by the Tribunal, and for P to be informed in writing on discharge from detention.

Clause 58 states that the way in which information is provided when required by any provision in Part 2 or by regulations made under Part 2 may also be detailed in regulations. This may include a requirement to provide information orally, as well as in writing.

#### **Clause 59 – Failure by person other than D to take certain steps**

Clause 59 provides a defence for D in circumstances where supportive steps (i.e. helping P to make a decision for themselves) that would be considered practicable were not taken but due to no fault of D. It also provides that “E” – D’s employer – can be held liable under Part 2 rather than D where another employee of E is responsible for the unreasonable failure to take such steps. For the purposes of this clause, a failure to take practicable supportive steps is unreasonable unless at the time the person believes that the steps can be as effectively taken later and that not taking the step immediately is reasonable in the circumstances.

#### **Clause 60 – Part 2 not applicable where other authority for act**

Clause 60 clarifies that the defence in clause 9 (protection from liability) is not applicable where a person already has authority to do an act that falls within its scope. This could be because the person has been given the power to do the act under another statute or under a lasting power of attorney. The person could also have been appointed as a deputy by the Court under Part 6 and given the power or duty to make the relevant decision on behalf of P. Clause 60 also recognises that persons aged 16 or 17 are still children under the law even though they fall within the scope of Part 2 and, therefore, a parent or guardian may also have legal authority to act on behalf of such persons.

#### **Clause 61 – Power to make further provision**

This clause provides the Department with a regulation making power to modify any provisions of Part 2 for cases where a person is under 16 when a particular intervention is proposed, but will be over 16 when the intervention is carried out. It also gives the Department a power to make regulations for the rectification of authorisations, or other documents made under Part 2 that have been found to be incorrect or defective within a prescribed period.

## **Clause 62 – Disregard of certain detention**

Clause 62 is the equivalent of Article 10 of the Mental Health Order. It applies to any person who has been detained in circumstances amounting to a deprivation of liberty under the Bill apart from under Schedule 1 (in other words short-term detention for examination of an illness only) and does not subsequently become liable to be detained in hospital under that Schedule. In such cases, the effect of the clause is that the detention does not have to be disclosed where information is being sought about the person's previous health other than in judicial proceedings. The detention or failure to disclose it can also not be used as grounds for dismissing or excluding the person from any office etc. or prejudicing the person in any way in any occupation or employment. Any disqualification, disability, prohibition or penalty relating to the fact that P has been detained under the Bill also does not apply.

## **CHAPTER 9 – DEFINITIONS FOR PURPOSES OF PART 2**

Most of the following clauses have been referred to where relevant already as they relate to key concepts in Part 2 of the Bill. Further explanations, where necessary, are provided below.

### **Clauses 63 and 64 – “Serious intervention”**

The definition of “serious intervention” for the purposes of Part 2 is intended to capture any intervention which has serious consequences (physical or non-physical) for P. Regulations will provide more detail of what might fall under each of the four main categories listed in paragraph (1). However, for the avoidance of doubt, clause 63 makes it clear that all interventions requiring authorisation under the Bill (see Chapter 4 of Part 2) will always be a serious intervention for the purposes of Part 2. The provision of serious compulsory treatment (clauses 19-23) is not mentioned because it is obvious from the definition of treatment with serious consequences in clause 21 that it will also always be a serious intervention under Part 2.

As additional safeguards need to be put in place for serious interventions, it will be critical for D to consider whether what he or she is proposing for P is serious. However, clause 63 recognises that there may be circumstances in which something that appears initially to be routine can turn out to be serious and D could not have been expected to foresee that it would turn out as such. In such cases, the intervention is to be treated as not being serious for the purposes of the Bill if the risk of it being serious was a negligible one.

Clause 64 makes it clear that any use or threat of force for the purposes of doing an act which a person is resisting is to be taken as being part of the same intervention as the act that is being resisted by P.

### **Clauses 65 – 67 – Meaning of “emergency” in relation to safeguard provisions**

In order to avail of defence in clause 9 of Part 2 of the Bill, D needs to ensure that all the applicable safeguards mentioned in that clause and provided for in Part 2 are in place. However, the Bill also recognises that there will not be time in every case to put in place the safeguards. This is why there is provision in each of the additional safeguard provisions in Part 2 saying that the safeguard does not apply where the situation is an emergency.

Clauses 65 and 66 explain what this means. In practical terms, it means that D must weigh up the risks involved for P in delaying the act to put in place the safeguard or to check if it is in place against the risk of proceeding without the safeguard in place. This exercise has to be done for each safeguard as there may be time to put one or more of the safeguards in place but not others. If the risk involved in delaying is greater, the situation is an emergency and D can proceed without putting the safeguard in place or checking if it is in place.

However, an unreasonable failure to take the necessary steps to meet the safeguard will not satisfy this test, meaning that the person intervening may not be afforded the defence in clause 9 in such cases. A failure by D at any time to take reasonable steps to put a safeguard in place by the time it is required to be in place under Part 2 is unreasonable unless D believes that the safeguard is not applicable; or that any delay in putting the safeguard in place is reasonable under the circumstances. By virtue of clause 67, if the unreasonable failure is due to another employee of D’s employer “E” not D, E can be held liable for the act i.e. the emergency provisions will not apply in such circumstances. It must also be assumed for the purposes of this clause that the steps necessary to ensure a safeguard is met or to check it is met will be taken as soon as practicable.

Clause 65 also covers the situation in which D is not someone who could reasonably be expected to know about the safeguard provisions in the Bill and does an act which he or she believes is necessary to prevent harm to P. In such cases, the situation is also an emergency for the purposes of the safeguard provisions.

### **Clause 68 – Interpretation of Part 2: general**

Clause 68 signposts the reader to various provisions in the Bill for definitions of key concepts in the Bill, including the general interpretation clauses (clause 304 to 306) and also provides definitions of treatment that “might be” treatment with serious consequences, “reasonable objection”, “resisted by” and “requirement”. These are relevant to the safeguard provisions in Part 2.

### **PART 3 – NOMINATED PERSON**

#### **Clause 69 – Nominated person**

This clause defines “nominated person” for the purposes of the Bill by reference to the various clauses in the Part that provide for different ways of becoming, and ceasing to be, a nominated person.

#### **Clause 70 – Appointment of nominated person**

This clause sets out the procedure to be followed where a person (aged 16 or over) wishes to appoint one person (aged 16 or over) to act as his or her nominated person under the Bill and has capacity to do so. For the appointment to be valid it must be in writing and meet the conditions set out in clause 79 and the person appointed must consent in writing to being the nominated person. Such an appointment will continue to have effect even if the person who made the appointment loses capacity to make decisions about his or her nominated person.

#### **Clause 71 – Revocation of appointment**

The appointment of a nominated person can be revoked by the person who made the appointment provided he or she has capacity to do so. For the revocation to be valid, it must be in writing and meet the conditions set out in clause 79. This clause also provides that any new appointment of a nominated person automatically revokes any previous appointment.

#### **Clause 72 - Resignation**

The person who is appointed nominated person may resign by giving notice in writing to the person who made the appointment.

#### **Clause 73– Default nominated person**

This clause establishes a hierarchy of persons to assume the role of “default nominated person” of a person who is aged 16 or over, in circumstances where a nominated person has not been appointed either by the person themselves (under clause 70) or by the Tribunal (under clause 81). Where there is only one person falling within the said list, that person will be the default nominated person. Where there is more than one person, the person highest up the list will be the default nominated person.

#### **Clause 74 – Section 73: the list**

This clause further explains how the list in clause 73 should be interpreted.

**Clause 75 – Section 73: persons to be disregarded**

This clause sets out who should be disregarded for the purposes of ascertaining the default nominated person.

**Clause 76 – Section 73: meaning of “carer”**

Clause 73 places P’s carer at the top of the hierarchy of persons to assume the role of default nominated person and clause 76 defines “carer” for this purpose.

**Clause 77 – Declaration that particular person not to be nominated person**

This clause sets out the procedure to be followed where a person aged 16 or over wishes to make a declaration that a particular person(s) shall not be his or her nominated person under the Bill and has capacity to do so. For the declaration to be valid it must be in writing and meet the conditions set out in clause 79.

Where a declaration has been made the person(s) specified is to be disregarded for the purposes of ascertaining the default nominated person and may not be appointed by the Tribunal (under clause 81) unless there has been a change of circumstances in which the Tribunal’s opinion justifies appointing that person.

Such a declaration will continue to have effect even if the person who made it loses capacity to make decisions about his or her declaration. The declaration can be revoked at any time by the person who made it provided he or she has capacity to do so. For the revocation to be valid, it must be in writing and meet the conditions set out in clause 79.

**Clause 78 – Notice declining to be a person’s nominated person**

This clause provides that a default nominated person can decline to act as such by giving notice in writing to P (but may also withdraw that notice).

**Clause 79 – Formalities for documents under Part 3**

This clause sets out conditions that must be met when drawing up documents containing appointments, declarations and revocations. Such documents must be signed by the person making them and the signature witnessed by a prescribed person who must certify that, in his or her opinion, the person understands the effect of the document and has not been subjected to undue pressure. In the case of an appointment, the witness must also certify that in his or her opinion, the person making the appointment understands that information (including sensitive personal information) may be disclosed to the nominated person.

Regulations may make provisions for circumstances where a person making an appointment, declaration or revocation is physically unable to sign a document.

**Clause 80 – Application to Tribunal for appointment of nominated person**

This clause provides that certain persons may in certain circumstances make an application to the Tribunal to make an order (under clause 81) appointing a nominated person for a person aged 16 or over.

**Clause 81 – Tribunal’s power to appoint nominated person**

This clause gives the Tribunal power to make an order appointing a nominated person (aged 16 or over) for P, if satisfied that the conditions in clause 80 are met. In doing so, the Tribunal must not appoint a person named in a declaration made by P under clause 77, unless circumstances since the declaration have changed to such an extent that the Tribunal can justify appointing that person.

An appointment made by the Tribunal revokes any previous appointment of a nominated person whether made by the Tribunal (under this clause) or by P (under clause 70). The clause also provides that a person who is appointed may resign as P’s nominated person by giving notice in writing to P.

**Clause 82 – Tribunal’s power to disqualify person from being default nominated person**

Where the Tribunal makes an order (under clause 81) appointing a nominated person on the ground that the previous nominated person was unsuitable, the Tribunal may make a further order that the unsuitable person must be disregarded if at any time in the future P requires a default nominated person.

**Clause 83 – Revocation of Tribunal’s appointment where P regains capacity**

If under clause 81 the Tribunal has appointed a nominated person for P and P later regains capacity to make decisions about who should be his or her nominated person, P may at any time apply to the Tribunal to have the Tribunal’s appointment revoked if he or she has capacity to do so. The Tribunal is required to revoke its previous appointment unless it is satisfied that P in fact lacks capacity to make decisions about who should be his or her nominated person. If it is the case that P lacks capacity but the Tribunal is satisfied that a different person should be appointed as P’s nominated person, the Tribunal can make such an order under clause 81.

### **Clause 84 and 85 – Duties in relation to nominated person**

The Bill creates new duties to consult and take account of the views of P's nominated person in determining what would be in P's best interests. Clause 84 applies where a person is subject to such a duty as well as those mentioned in subsection (2). It deals with the very possible scenario where, despite reasonable steps having been taken to establish whether P has a nominated person or who P's nominated person is, it is uncertain who if anyone is the nominated person. In such a scenario, clause 84, which needs to be read with clause 85, aims to strike a balance between ensuring P's rights are protected and enabling necessary interventions to proceed.

Subsections (2) and (3) have the effect of giving protection to the person to whom such a duty applies who, having taken reasonable steps to establish who P's nominated person is, reasonably believes that a particular person is P's nominated person. What are "reasonable steps" for this purpose will depend on the circumstances, in particular the time available and the seriousness of the proposed intervention. Subsection (1) of clause 85 then provides that, provided the person does not have reason to believe that a power in Part 3 of the Bill has been exercised, his or her belief as to who is P's nominated person can be based on the assumption that that Part 3 power has not been used. So, for example, if the person concerned knows that P has appointed a nominated person under Part 3 and has no reason to believe that P has revoked the appointment, he or she can assume that the appointment is still valid.

Subject to subsection (6), subsection (4) and (5) of clause 84 give similar protection where the person has taken reasonable steps to establish who P's nominated person is and believes there is no nominated person (paragraph (a) of subsection (4)), and also where it has not been practicable to establish whether a person has a nominated person or who the nominated person is (paragraphs (b) and (c) of subsection (4)). However, subsection (3) of clause 85 has the effect that, if it is practicable to come to a reasonable view that a particular person is P's nominated person, the case does not fall under subsection (4)(b) or (c) of clause 84 and an application cannot be made under clause 80 to the Tribunal on the basis that it cannot be established who the nominated person is.

Subsection (6) disapplies subsection (5) where the Bill requires a nominated person to be in place before an intervention can proceed (i.e. the intervention is serious and the situation is not an emergency – see clause 15). It is also misapplied where the Bill requires a nominated person to be in place and consulted under clause 54. In these cases, an application can be made to the Tribunal under clause 80 to appoint a nominated person.

## **PART 4 – INDEPENDENT MENTAL CAPACITY ADVOCATES**

### **Clause 86 – Independent mental capacity advocates**

This clause places a duty on each HSC trust to make arrangements to ensure that independent mental capacity advocates are available to be instructed as the Bill requires, which may include arrangements for payment. In making these arrangements, HSC trusts must have regard to the fact that the advocate should be independent from the person who is responsible for carrying out the proposed act. The Department is also given a power to make regulations about these arrangements which may cover issues such as the qualifications, skills and training requirements that the advocate must have.

### **Clause 87 – Functions of independent mental capacity advocates: provision of support, etc**

This clause provides a power to make regulations about the functions of independent mental capacity advocates, setting out a number of things the regulations may cover. This includes the steps the advocate should take in order to: determine P's best interests; provide support to P; ascertain P's past and present wishes and feelings and beliefs and values; and inform others of relevant information. The regulations could also provide for circumstances in which the advocate may challenge or assist a challenge of a relevant decision made on behalf of P.

### **Clause 88 – Request for independent mental capacity advocate to be instructed**

This clause provides that the "appropriate healthcare professional" may request that the relevant HSC trust instructs an independent mental capacity advocate to represent and support P in the determination of whether an act would be in P's best interests, in certain circumstances (see clauses 35 and 55). Steps set out in clause 89 must be taken so far as practicable before requesting that the HSC trust instruct an advocate (in a prescribed form).

### **Clause 89 – Steps to be taken before independent mental capacity advocate may be requested**

This clause makes it clear that before the appropriate healthcare professional makes a request to the HSC trust to instruct an independent mental capacity advocate, P must be provided with prescribed information about independent mental capacity advocates. This includes notifying P that relevant information (including sensitive personal information) may necessarily have to be disclosed to the advocate. P must also be given an opportunity (if P has capacity to do so) to decide whether to make a declaration that he or she does not want an independent mental capacity advocate and then to make that declaration if he or she so wishes.

**Clause 90 – Right to declare that no independent mental capacity advocate to be instructed**

This clause makes further provision about such declarations. It provides that a declaration refusing an advocate must be in writing and meet the conditions set out in clause 95. A declaration can be revoked at any time if P has the capacity to revoke it. Any revocation must also adhere to the same formalities as the declaration. The effect of the declaration is that no request can be made for an independent mental capacity advocate to be instructed and accordingly no instruction to act may be given.

**Clause 91 – Instruction of independent mental capacity advocate**

This clause places a duty on the relevant HSC trust to instruct an independent mental capacity advocate where it has received a request made under clause 88 and no declaration refusing an advocate has been made.

**Clause 92– Powers of independent mental capacity advocates**

This clause provides that the independent mental capacity advocate, in carrying out his or her functions, may at any reasonable time, visit and interview P in private, or request sight of, examine and make copies of P's health records or any other records relating to P's care, treatment or personal welfare, as the advocate considers necessary.

**Clause 93 – Right of person to discontinue involvement of independent mental capacity advocate**

This clause provides that where an independent mental capacity advocate has been instructed and P subsequently decides that he or she no longer wishes to continue to avail of the advocate's services, P can make a declaration saying as such, if he or she has capacity to do so. The HSC trust must then withdraw the instruction to the independent mental capacity advocate. P's declaration must be in writing and meet the conditions set out in clause 95. The declaration can be revoked at any time by P if he or she has capacity to do so.

**Clause 94 – Continuing duty of trust in relation to independent mental capacity advocate**

This clause requires the HSC trust to instruct a new independent mental capacity advocate to represent and support P if for any reason an independent mental capacity advocate previously instructed is unable to do so (except where P has made a declaration under clause 93).

#### **Clause 95 – Formalities for declarations under Part 4**

The formalities for any declaration or revocation of a declaration relating to the independent mental capacity advocate are provided for in this clause. The statement of declaration or revocation must be set out in a document and signed by P. P's signature must be witnessed by a person of a prescribed description and that person must also certify that P understands the effect of the declaration or revocation and that P has not been subjected to any undue pressure in making the declaration or revocation. Regulations may make provisions for circumstances where a person making a declaration or revocation is physically unable to sign a document.

#### **Clause 96 – Power to adjust role of independent mental capacity advocate**

This clause provides a power to make regulations adjusting the role and functions of the independent mental capacity advocate and the obligation on the HSC trust to make arrangements.

### **PART 5 – LASTING POWERS OF ATTORNEY**

#### **CHAPTER 1 - LASTING POWERS OF ATTORNEY**

A power of attorney is a formal arrangement by which one person (the donor) gives another person (the attorney) authority to make decisions for him or her or on his or her behalf. At common law, such authority would cease if the donor later lost capacity but the Enduring Powers of Attorney (NI) Order 1987 ("the 1987 Order") allows attorneys to continue to act after the donor lost capacity, in certain circumstances.

Part 5 of the Bill provides for a new form of power of attorney, the lasting power of attorney ("LPA"). This new scheme will operate alongside the existing Enduring Power of Attorney ("EPA") scheme. The Bamford Review recommended that provisions on LPAs in the 2005 Act should be mirrored in this jurisdiction and accordingly the clauses detailed below largely reflect corresponding sections in the 2005 Act.

#### **Clause 97 – Lasting powers of attorney**

This clause sets out the key features of LPAs. The LPA gives authority to an attorney to make certain decisions when the donor has lost capacity to do so him or herself. Unlike an EPA which only applies to decisions regarding property and affairs, LPAs can additionally apply to care, treatment and personal welfare decisions. The decision-making authority may relate to those areas generally or to specified matters concerning them, as long as this is specified in the LPA.

The clause explains that for a LPA to be created it must first meet the Bill's requirements in respect of who can be an attorney, as set out in clause 101 and that the instrument (that is, the formal legal document setting up the LPA) must be made and registered with the Office of the Public Guardian (OPG) in accordance with the formalities laid down in Schedule 4. The registration may be done straight away or it may be left for some time, but the LPA may not be used until it is registered. The donor must be aged 16 or over at the time he or she makes the instrument and must have capacity to do so.

The attorney is subject to the provisions of the Bill, in particular the principles of the Bill and the best interests test must be followed. Any conditions or restrictions that the donor may wish to include in the LPA instrument must be respected by the attorney.

### **Clause 98 – Restrictions on scope of lasting power of attorney**

LPAs covering care, treatment and personal welfare decisions can only be used where the donor lacks capacity or the attorney reasonably believes that the donor lacks capacity. So if the donor has capacity to make a decision relating to his or her care, treatment or personal welfare at the relevant time, then the decision must be made by him or her, even if he or she has appointed a LPA to deal with that issue.

LPAs are also subject to effective advance decisions made by the donor, to the extent provided for in clause 99, noted below. LPAs for care, treatment and personal welfare decisions may include authority to give or refuse consent to health care treatments, subject to any conditions or restrictions in the LPA instrument; however, giving or refusing consent to life-sustaining treatment is only permitted where the LPA instrument expressly says so.

Restraint can only be used by the attorney to prevent harm to the donor who lacks capacity and in that case, the restraint must be proportionate to the seriousness and likelihood of the harm occurring. LPAs do not authorise an attorney to deprive the donor of his or her liberty nor does the attorney have the right to consent to psychosurgery on behalf of the donor (and regulations may specify other treatments which the attorney cannot authorise).

Clause 98 also provides that, an LPA executed before the donor has reached the age of 18 has the same effect as an LPA executed by a donor aged 18 or over, except that while the donor is under the age of 18, the attorney will have no greater power to make decisions than the donor him or herself would have had, if he or she had retained capacity.

**Clause 99 – Relationship between advance decisions and lasting powers of attorney**

Any LPA that gives the attorney authority to give or refuse consent to treatment is subject to any effective advance decision made at the same time or after the LPA is made. So if the LPA gives authority to the attorney to consent or refuse treatment and then the donor makes an advance decision refusing consent to such treatment, that later personal choice prevails. If an effective advance decision regarding treatment is already in place, the clause provides that the advance decision is withdrawn by the making of a LPA which gives the attorney authority to consent or refuse the relevant treatment.

**Clause 100 – Scope of lasting powers of attorney: gifts**

An attorney acting under a LPA may only make gifts on behalf of the donor to his or her relations or associates, on customary occasions such as birthdays, the birth of a child, a marriage, civil partnership or anniversary, or any other occasion associated with giving presents. Gifts to charities supported by the donor are also permitted. However, the monetary value of any such gift must be reasonable in relation to the circumstances and in particular, to the size of the donor's estate. This power to make gifts is subject to any conditions or restrictions in the LPA instrument.

**Clause 101 – Appointment of attorneys: requirements as respects attorneys**

This clause is about the appointment and authority of attorneys. A person appointed as an attorney must be an individual aged 18 or over or, where the power relates only to property and affairs, an individual (aged 18 or over) or a trust corporation. However a person who is bankrupt may not be appointed as an attorney for property and affairs.

**Clause 102 – Appointment of two or more attorneys**

The donor can create a LPA naming two or more persons as attorney. The instrument may appoint them to act jointly: that is they must all act together, as a unit, in making decisions and any failure by one attorney to comply with the appointment and registration processes for attorneys invalidates the LPA instrument. Alternatively, they may be appointed to act jointly and severally, which means that they may all act together or each of them may act separately, independently of the others. Here a failure by one attorney to comply with the appointment and registration processes only invalidates that attorney's ability to act (the other attorneys can continue to act on any matters deemed 'jointly and severally'). As a third possibility, they may be appointed to act jointly in respect of some matters and jointly and severally in respect of other matters. But where this is not specified it is assumed they will act jointly.

### **Clause 103 – Appointment of replacement attorneys**

This clause enables the donor to provide for replacement attorneys in the LPA instrument. An attorney may not be given the power to appoint a substitute or successor but the donor, in the LPA instrument, may appoint someone to step into the attorney role if a “terminating event” occurs which prevents the original attorney from acting as attorney. Terminating events are defined in clause 107 and 110 and include, for example, the death of an attorney.

Where there is provision for a replacement attorney, the LPA instrument may not go further and appoint someone to replace that replacement, should a terminating event occur in respect of the attorney appointed as a replacement.

Where the LPA appoints two or more attorneys, the instrument can provide for two or more replacement attorneys. The instrument can specify the order in which the replacement attorneys are to be appointed; or it can specify which attorney the donor wants to replace a particular attorney who can no longer act due to a terminating event occurring.

The requirements for attorneys, as set out in clause 101, also apply to the replacement attorney(s); however, if the replacement attorney does not meet these requirements (or those in Part 1 or 2 of Schedule 4 regarding the making of LPA instruments), the LPA can still be made. So for example, if a replacement attorney has not reached the age of 18 at the time the LPA instrument is made and therefore does not meet the requirements for attorneys in clause 101, the LPA can still be created, as long as the acting attorney meets the requirements.

### **Clause 104 – Appointment of two or more replacements for a single initial appointee**

An instrument creating a LPA and appointing two or more replacement attorneys may determine how those replacement attorneys are to act, i.e. jointly, jointly and severally or jointly in some areas and jointly and severally in other areas. Where no such provision is made, the default position is that the replacement attorneys must act jointly. Where at least one, but not all, of the replacement attorneys do not meet the requirements for attorneys as set out in clause 101 (or Part 1 or 2 of Schedule 4) but the LPA instrument has appointed them to act jointly, the appointment is not valid and the attorneys cannot act. Where the same applies but the replacement attorneys have been appointed to act jointly and severally, only the attorney who meets the requirements can be appointed.

**Clause 105 – Replacement attorneys: position where two or more initial appointees**

This clause sets out how replacement attorneys are to act in circumstances where there are two or more “initial” attorneys appointed and one is replaced by a replacement attorney. The clause then refers to the acting attorneys as “relevant appointees” who must act as the LPA originally prescribed i.e. jointly, jointly and severally, or jointly in some areas and jointly and severally in other areas, even though one of the initial attorneys has been replaced. However, where a terminating event occurs that prevents one of the relevant attorneys from acting in respect of the donor’s property and affairs, that attorney can continue to act in respect of other matters (care, treatment and personal welfare) along with the other attorney, as prescribed by the LPA instrument i.e. jointly, jointly and severally, or jointly in some areas and jointly and severally in other areas.

**Clause 106 – Revocation of lasting power etc by donor or on donor’s bankruptcy**

This clause provides that a donor may revoke a LPA instrument or a registered LPA at any time he or she has capacity to do so.

In addition certain events may automatically terminate a LPA. If the LPA instrument has been made but not registered and the donor is bankrupt, the property and affairs part of the LPA instrument is automatically revoked. However, the LPA instrument will still apply unaffected to any care, treatment and personal welfare issues that it covers.

Where the donor is bankrupt because of an interim bankruptcy restrictions order, the property and affairs LPA is suspended for the duration of the interim restrictions order. Again, the LPA instrument will still continue to apply unaffected to any care, treatment and personal welfare issues that it covers.

**Clause 107 – Revocation etc: events relating to the attorney**

This clause details the events that can terminate the appointment of an attorney and revoke the LPA instrument or power. These are called “terminating events”. However, the LPA instrument or power will not be revoked by a terminating event if the attorney is one of two or more attorneys appointed by the LPA to act jointly and severally (in which case, the other attorney(s) can continue to act) or if the LPA instrument or power provides for replacement attorneys, who will then take over.

The terminating events include a disclaimer of appointment by the attorney. Also, the attorney may die or become bankrupt or, in the case of a trust corporation, be wound up or dissolved. Bankruptcy will not terminate an attorney’s appointment in so far as the appointment relates to the donor’s care, treatment and personal welfare.

Furthermore, if the bankruptcy is a result of an interim bankruptcy restrictions order, suspension of the attorney's appointment and power to make decisions regarding the donor's property and affairs is only for as long as the interim bankruptcy restrictions order has effect.

Further terminating events are the dissolution, annulment or judicial separation of a marriage or civil partnership between the donor and the attorney but these do not revoke the instrument or power if the instrument or power states that it should not have that effect.

And finally the lack of capacity of the attorney terminates the appointment. Unless there is provision for replacement or at least one remaining attorney able to act, this will also revoke the instrument or power.

**Clause 108 – Protection of attorney and others if no power created or power revoked**

This clause sets out the legal consequences when a registered LPA turns out to be invalid for any reason, for example, failure to comply with the Bill's requirements, or a subsequent cancellation of the LPA's registration. Both the person acting as attorney and any third party dealing with him or her or dealing subsequent to his or her involvement are given protection from liability if they were unaware that the LPA was defective.

Any transactions between the person acting as an attorney and another person ("Y") are valid unless at the time of the transaction Y knows that the LPA was not created or is aware of circumstances that have terminated the authority of the attorney under the LPA.

If the interest of a purchaser depends on whether a transaction between the person acting as attorney and Y was valid, it is conclusively presumed in favour of the purchaser that the transaction was valid if the transaction was completed within 12 months of the date on which the LPA instrument was registered; or if there is any statutory declaration by Y before or within 3 months of completion of the purchase stating that Y had no reason at the time of the transaction to doubt the authority of the person acting as attorney to dispose of the property which was the subject of the transaction.

Section 4 of the Powers of Attorney Act (NI) 1971 regarding protection where power is revoked, also applies where that power relates to matters in addition to the donor's property and affairs; and references to revocation include the cessation of the power in relation to the donor's property and affairs.

**Clause 109 – Reliance on authority of attorney in relation to treatment etc**

If a person (“D”) does an act in connection with the care, treatment or personal welfare of a person (“P”) based on the consent of an attorney purportedly acting under P’s LPA but it subsequently emerges that either the attorney did not have the authority to provide the consent, or that the person acting as attorney is not actually an attorney under the LPA; as long as D has taken reasonable steps to check that the attorney has been appointed by P’s LPA and that the attorney has authority to consent to the matter in question, D will not incur any liability in relation to the act.

**Clause 110 – Powers of court as to lasting powers of attorney**

This clause and the next one delineate the powers of the court in respect of LPAs. The court referred to here is the High Court. These court powers apply where an instrument has been made with a view to creating a LPA, or where a person has purported to do so, or where a LPA instrument has been registered.

The court has jurisdiction to determine any question about whether the requirements for the valid creation of a LPA have been met and whether the power has been revoked or otherwise ended. Where the court is satisfied that there is fraud, or undue pressure placed on a person to create a LPA or execute it; or it may be that the attorney has behaved in a way, or is proposing to behave in a way, that goes contrary to the authority granted by the LPA or is not in the best interests of the donor, the court has power to direct that the instrument should not be registered by the Public Guardian, or it may revoke the instrument or the LPA if the donor does not have capacity to do so him or herself.

**Clause 111 – Powers of court as to operation of lasting powers of attorney**

This clause gives more powers to the court. It sets out that the court may determine any question as to the meaning or effect of a LPA or an instrument purporting to create a LPA. The court may give directions regarding decisions that an attorney under the LPA has authority to make where the donor lacks capacity to make them; and the court may give consent or authorise an act which an attorney would have to obtain from the donor if the donor had capacity to give consent. In addition, the court has a number of powers available. These are powers to give directions to the attorney to render reports, accounts and records, to supply information, or produce documents or other items in his or her possession as attorney. The court may give directions about the attorney’s remuneration or expenses. The court may also relieve the attorney of liability for breach of a duty as attorney. Finally the court may authorise the attorney to make gifts outside the limited scope permitted by clause 100.

## **PART 6 – HIGH COURT POWERS: DECISIONS AND DEPUTIES**

Part 6 of the Bill makes provision for High Court powers to make decisions and appoint deputies in respect of individuals who lack capacity to make decisions in respect of their care, treatment, personal welfare, property and affairs, as well as making provision for the various rules of court which may be made in respect of this Part of the Bill.

### **Clause 112 – The court’s power to make declarations**

This clause provides that the High Court has a power to make declarations in relation to persons aged 16 or over regarding whether that person has or lacks capacity to make a certain decision; whether the person has or lacks capacity to make decisions relating to certain matters; and the lawfulness of any act done, or yet to be done, in relation to the person.

### **Clause 113 – The court’s powers to make decisions and appoint deputies: general**

This clause applies if P lacks capacity to make decisions about a matter or matters concerning his or her care, treatment or personal welfare or property and affairs.

If P lacks capacity to make such decisions, the High Court may, by order, make a decision or decisions on P’s behalf in relation to those matters or appoint a deputy to make decisions on P’s behalf in relation to those matters.

The clause provides that the powers of the High Court are subject to the provisions of the Bill, in particular clauses 1, 2, 5 and 7 (principles and best interests).

When the court is deciding whether to appoint a deputy, the clause provides that the court, as well as having regard to P’s best interests, must have regard to the principles that a decision by the court is the preferred option and the powers that are conferred to a deputy should be as limited as possible in terms of scope and duration.

The clause also provides that the court may make further orders or give directions or impose or confer powers and duties on a deputy as it considers appropriate. Any order of the court may be varied or discharged by a subsequent order and may in particular revoke the appointment of a deputy or vary the powers conferred on him or her, if the deputy has behaved, is behaving, or proposes to behave in a way which is out-with the deputy’s powers or not in P’s best interests.

### **Clause 114 – Section 113 powers: care, treatment and personal welfare**

This clause provides that the powers created in clause 113 extend in particular to decisions about where P is to live; deciding what contact P has with particular

persons; giving or refusing consent to treatment; and giving a direction that someone takes over responsibility for P's healthcare. The clause also provides that these powers are subject to clause 117 which makes provision for restrictions about matters that can be delegated to deputies.

### **Clause 115 – Section 113 powers: property and affairs**

This clause provides that the High Court's powers under clause 113 as they relate to P's property and affairs extend in particular to a number of areas, for example, control and management of P's property, carrying out a contract entered into by P; discharging P's debts and executing a will for P. However, a will cannot be executed unless P has reached the age of 18. The clause also provides that any powers regarding P's property and affairs, except the power to execute a will, can be exercised even though P is not yet aged 16, if the court considers that it is likely that P will still lack capacity to make decisions about that issue when he or she reaches 18 years of age.

The clause also provides that these powers are subject to clause 117 which makes provision for restrictions about matters that can be delegated to deputies.

Schedule 5 makes provision for the execution of a will on behalf of P under clause 115. It provides that a will may make any provision which could be made by a will which was executed by P if he or she had capacity to do so.

The Schedule also provides that any will executed in pursuance of a court order or direction must state that it is signed by the authorised person on behalf of P; be signed by the authorised person with P's name and the authorised person's name in the presence of two or more witnesses who are present at the same time; be attested and subscribed by those witnesses in the presence of the authorised person and must be sealed with the official seal of the court.

Where a will is executed in accordance with the Schedule, the Wills and Administration Proceedings (Northern Ireland) Order 1994 will have effect, subject to modifications to references in the Order to formalities for executing a will. The will has the same effect as if P had capacity to make a valid will and that will had been executed in accordance with the Order. However, a will executed in accordance with the Schedule will not have effect in so far as it disposes of immovable property outside Northern Ireland, nor will it have effect in so far as it relates to any property or matter other than immovable property if P is domiciled outside of Northern Ireland when the will is executed and the question of P's testamentary capacity would fall to be determined in accordance with the law of a place outside Northern Ireland.

The Schedule also provides that if, under clause 115, provision is made for the settlement of any of P's property or the exercise of P's power to appoint trustees or

retire from a trust, the court can also make a consequential vesting order or such other order as may be required.

Additionally, the Schedule makes provision for the court to vary or revoke a settlement in various circumstances if a settlement has been made under clause 115 and to transfer stock or dividends in certain circumstances.

The Schedule also provides that an individual who would have benefitted from P's property under a will or intestacy, but the property has been disposed of under clause 115, that individual can take the same interest, in so far as possible, in the property that represents the property that was disposed of. Provision is also made that where the court has ordered or directed the expenditure of money for carrying out permanent improvements on P's property or for the permanent benefit of the property, the court may order that all the expenditure or part of it can be a charge on the property. However, any such charge does not confer a right of sale or foreclosure during the lifetime of P.

#### **Clause 116 – Appointment of deputies**

This clause provides that a deputy who has been appointed by the court must be aged 18 or over and in relation to property and affairs can wither be such a person, or a trust corporation. A person cannot be appointed as a deputy without his or her consent.

The clause also provides that the court may appoint two or more deputies to act jointly, jointly and severally; or jointly in some matters and severally in others. When appointing deputies, the court may also appoint one or more other persons to replace them in specified circumstances or for a certain period of time.

A deputy is to be treated as P's agent and he or she is entitled to be reimbursed from P's property for reasonable expenses incurred in discharging his or her functions and if the court directs, to remuneration for discharging those functions.

The clause provides that the court may confer powers on the deputy to take possession and control of all or part of P's property and exercise all or specified powers in relation to it, including powers of investment as determined by the court. The court may require a deputy to give the Public Guardian such security as the court considers is appropriate for the proper performance of his or her functions and to submit reports to the Public Guardian.

#### **Clause 117 – Restrictions on deputies**

This clause provides that a deputy does not have power to make a decision on behalf of P unless P lacks capacity to make that decision, or the deputy reasonably believes

that P lacks capacity. The deputy is subject to the provisions of the Bill, in particular provisions relating to principles (clauses 1, 2 and 5) and best interests (clause 7).

The clause provides that a deputy is not permitted to be given power to prohibit a person from having contact with P or to direct that a different person takes over responsibility for P's healthcare. A deputy is also not permitted to be given powers relating to the settlement P's property, the execution of a will for P or the exercise of a power vested in P whether beneficially or as a trustee or otherwise. Additionally, a deputy may not be given a power to make a decision on behalf of P which is inconsistent with a decision that was made by an attorney under a lasting power of attorney or an enduring power of attorney. Also, a deputy cannot refuse consent to life sustaining treatment for P or deprive him or her of his or her liberty. A deputy cannot restrain P unless the court has given the deputy scope to do so and the deputy reasonably believes that P lacks capacity in relation to the matter; there is a risk of harm to P if the deputy does not carry out or authorise the act of restraint; and that carrying out or authorising the act is a proportionate response to the likelihood of harm to P and the seriousness of the harm concerned. Finally, a deputy cannot authorise psychosurgery for P.

The clause provides that the Department may, by regulations, extend the types of treatment in respect of which the deputy cannot give consent.

#### **Clause 118 – Reliance on authority of deputy in relation to treatment etc**

This clause provides protection from liability for a person where he or she does an act in connection with P's care, treatment or personal welfare with the consent of a person purporting to be P's deputy ("C") and C is, in fact, either not P's deputy or the giving of consent to the matter in question is not within the scope of C's authority.

In those circumstances, the person will not be liable if, before doing the act, he or she had taken reasonable steps to establish whether C was P's deputy and it was within the scope of C's authority to consent to the matter in question and the person reasonably believed, when doing the act, that C was P's deputy and had authority to consent.

#### **Clause 119 – Interim orders and directions**

This clause allows the Court to make orders or give directions pending any determination of an application that has been made to it if there is reason for the Court to believe that the person lacks capacity in respect of a particular matter; that matter is one which falls within the court's powers to consider and it is in his or her best interests for the Court to act without delay.

### **Clause 120 – Power to call for reports**

This clause provides that the court may require reports about P to be made to it by the Public Guardian or by a Court Visitor and may require a HSC trust, the Regional Board or the RQIA to arrange for a report to be made by its officers or such other persons as may be appropriate. The report must deal with such matters relating to P as the court may direct.

### **Clause 121 - Powers of Public Guardian or Court Visitor in respect of reports under section 120(2)**

This clause sets out the powers of the Public Guardian or Court visitor in respect of reports made under clause 120(2).

The clause provides that in order to comply with the court's wishes, the Public Guardian or a Court Visitor may at all reasonable times require the production of, examine and take copies of any health record, any court record or any record relating to P's care, treatment or personal welfare which is held by a HSC trust, the Regional Board or the RQIA, a Northern Ireland Department, or the managing authority of an independent hospital or care home.

If the Public Guardian or a Court Visitor is visiting P in the course of compiling a report for the court, he or she may interview P in private. The clause also provides that if a Court Visitor is also a Special Visitor, he or she may, if the court directs, carry out in private a medical, psychiatric or psychological examination of P's capacity and condition.

### **Clause 122 – Applications to the court**

This clause provides that no leave to apply to the court is required by P; anyone with parental responsibility for a person under the age of 18; a donor of a lasting power of attorney or an enduring power of attorney; an attorney under a lasting power of attorney or an enduring power of attorney; a deputy appointed by the court; or a person named in an existing court order if the application relates to that order. Nor is leave required for an application to the court under Schedule 9 paragraph 21(2) which relates to a declaration as to whether measure taken to protect a person or his or her property in another jurisdiction is to be recognised in Northern Ireland.

Subject to court rules, any other application will require the leave of the court. In deciding whether to grant leave, the court must have regard to various factors, in particular, the applicant's connection with the person who is the subject of the application, the reasons for the application, the benefit to the person to whom the application relates, and whether that benefit can be achieved in another way.

### **Clause 123– Duty to notify Attorney General**

This clause provides that a person who makes an application to the court under Part 6 must notify the Attorney General of the application. This notification must be in accordance with Rules of Court. The Attorney General may intervene in the proceedings in such a way as the Attorney considers appropriate.

### **Clause 124 – Rules of court**

This clause lists matters in relation to which court rules may be made.

## **PART 7 – PUBLIC GUARDIAN AND COURT VISITORS**

Part 7 of the Bill provides for the creation of an officer to be known as the Public Guardian, the functions to be performed by this officer, as well as imposing duties upon relevant authorities to notify the Public Guardian of certain events. Part 7 also provides a further power for the Department of Justice to appoint Court Visitors.

### **Clause 125 – The Public Guardian**

This clause provides for the creation of a new officer, to be known as the Public Guardian, to be appointed by the Department of Justice. The clause also provides the Department of Justice with powers to pay to the Public Guardian a salary and allowances, subject to approval by the Department of Finance. The clause also provides that the Department of Justice may, after consulting the Public Guardian, provide such staff and officers as it considers necessary for the proper performance of the Public Guardian's functions.

### **Clause 126 – Functions of the Public Guardian**

This clause provides for the functions of the Public Guardian, which include: establishing and maintaining registers of lasting powers of attorney, and orders appointing deputies; supervising deputies appointed by the court; directing a Court Visitor to visit certain individuals and produce a report for the Public Guardian; receiving court-imposed securities from persons; receiving reports from persons who are attorneys under lasting powers of attorney and court-appointed deputies; reporting to the court on matters relating to proceedings under this Bill, except proceedings under Part 10, as required; dealing with complaints about the operation of lasting powers of attorney; and publishing reports about the performance of the Public Guardian as appropriate.

This clause includes a power for the Department of Justice to make provision for other functions of the Public Guardian by regulations. The scope of these regulations is outlined within the clause.

### **Clause 127 – Further powers of the Public Guardian**

This clause includes powers for the Public Guardian to require the production of relevant records from certain bodies to assist with carrying out the above mentioned functions, as well as a power to interview the person who lacks capacity in private for the same purpose.

### **Clause 128 – Duty to notify the Public Guardian**

This clause imposes a duty upon relevant authorities to notify the Public Guardian about a person with whom the authority is concerned in certain circumstances. These circumstances include that the person in question lacks capacity in relation to matter(s) concerning their care, treatment, personal welfare, or property and affairs. If the relevant authority also considers that any of the powers under clause 113 ought to be exercised in respect to that matter or matters, and that arrangements have not been made and are not being made in this regard, then it must notify the Public Guardian.

### **Clause 129 – Notifications under section 128: procedure and effect**

This clause provides for the procedure and effect of a notification to the Public Guardian under clause 128. The clause requires that the timing and form of any notification must be made as specified within court rules, and the relevant authority making the notification must inform P's nominated person, where practicable. Upon receipt of the notification, the Public Guardian must consider if it is appropriate to make inquiries into the case and seek leave from the court to do so. Where inquiries have been made, the Public Guardian may, if he or she considers it appropriate to do so, arrange for proceedings to be brought before the court under clause 113.

### **Clause 130 – Court Visitors**

This clause provides a power for the Department of Justice to appoint Court Visitors. Court Visitors may be appointed to two different panels; Special Visitors or General Visitors. The Department of Justice must be satisfied that Special Visitors are medical practitioners or have other sufficient qualifications or training, as well as special knowledge and experience of persons with impairment of or disturbance in the functioning of the mind or brain. General Visitors do not require a medical qualification.

The clause provides for the appointment, remuneration and allowances of a Court Visitor to be determined by the Department of Justice.

### **Clause 131 – Powers of Court Visitors**

The clause provides powers for Court Visitors to require the production of relevant records from certain bodies to assist with carrying out the above mentioned functions, as well as a power to interview the person who lacks capacity in private for the same purpose.

## **PART 8 – RESEARCH**

### **Clause 132 - Research**

This clause allows intrusive research to be lawfully carried out on, or in relation to, a person who is 16 or over who lacks capacity to consent to taking part in that research (“P”), if the research is part of a research project approved by an appropriate body (to be prescribed) and it is carried out in accordance with the conditions set out in clauses 134 to 137. Intrusive research is defined as research that would normally require consent if it involved a person aged 16 or over with capacity.

### **Clause 133 – Section 132: exception for clinical trials**

This clause provides that clinical trials that are currently regulated by the Medicines for Human Use (Clinical Trials) Regulations 2004 (or regulations succeeding or amending them) are not to be treated as research for the purposes of clause 132.

### **Clause 134 – Approval of research projects**

This clause sets out the matters of which the appropriate body must satisfy itself before approving a research project involving a person who is 16 or over and lacks capacity. The research must be connected with an impairing condition (one that is, or may be, attributable to, or which causes or contributes to an impairment of, or disturbance in the functioning of, the mind or brain) that affects P, or with the treatment of his or her condition. There must also be reasonable grounds for believing that the research project cannot be carried out as effectively if it only involves people who have capacity to consent to taking part in it.

The research must have the potential to benefit P without imposing a disproportionate burden; or provide knowledge of the causes or treatment of P’s condition, or of the care of people who have the same or similar condition. Where the latter applies, there must also be reasonable grounds for believing that the risk to P is negligible and the research must not interfere with P’s freedom of action or privacy in a significant way, or be unduly invasive or restrictive.

Importantly the clause also sets out that there must be a reasonable belief that no serious intervention will be carried out in respect of P as part of the research project

unless the intervention could be lawfully carried out if it were not part of the project, for example, under Part 2). This in effect means that for a serious intervention, whether part of a research project or not, all the applicable safeguards in Part 2 must be met.

### **Clause 135 – Requirement to consult nominated person, carer etc**

Before a research project can be undertaken, this clause requires the person conducting the research project (“R”) to identify a person close to P who is prepared to be consulted about P’s involvement. This could include an attorney appointed under a lasting power of attorney or enduring power of attorney, P’s deputy or nominated person but not someone acting in a professional capacity. If there is no such person, R must appoint a person independent of the research and who is prepared to be consulted, in accordance with Departmental guidance.

R must give the consultee information about the research and seek his or her advice as to whether P should take part and what, in his or her opinion P’s wishes and feelings would be about taking part if P had capacity in relation to it. If at any time the consultee advises that it is likely P would decline to take part, R must either ensure that P does not take part in the project, or if the research is already underway, that P is withdrawn from it. Where the latter applies, P may still receive treatment if it can be lawfully carried out despite no longer being part of the project.

### **Clause 136 – Section 135: exception for urgent treatment**

Treatment can still be provided urgently where it is not practical to undertake the consultation requirements in clause 135 with the agreement of a medical practitioner unconnected to the organisation or the research project; or where it is not practicable in the time available to obtain that agreement, in accordance with a procedure previously agreed by the appropriate body.

### **Clause 137 – Additional safeguards**

The purpose of this clause is to provide additional safeguards for P once the research has begun. It requires R to respect any signs of resistance from P (except where what is being done is intended to protect P from harm or to reduce or prevent pain or discomfort) and not involve P in research that would be contrary to an effective advance decision to refuse treatment, or any other form of statement made by P of which the R is aware. P’s interests must also be assumed to outweigh those of science and society.

P must be withdrawn from the research without delay if he or she indicates that he or she wishes to be withdrawn from it, or if R has reasonable grounds for believing that any of the requirements for approval of the project are no longer met. However, in

these circumstances, P may still receive treatment if it can be lawfully carried out despite no longer being part of the project.

**Clause 138 – Loss of capacity during research project: transitional cases**

This clause provides for a transitional regulation-making power to cover research started before clause 132 comes into operation and which involves people who had capacity when enrolled but who lose capacity before the end of the project. The regulations will set out how such research should continue and any additional safeguards that are required.

**PART 9 – POWER OF POLICE TO REMOVE PERSON TO PLACE OF SAFETY**

Part 9 of the Bill sets out the police’s powers to remove an individual from a public place, if that person appears to be in immediate need of care or control, and take them to a place of safety. Part 9 also includes powers for constables to detain persons at a place of safety or transfer persons between places of safety.

**Clause 139 - Power of police to remove person from public place to place of safety**

This clause provides constables with a power to remove persons from a public place to a place of safety. In order to do so, the person must appear to the constable to be in immediate need of care or control, and the constable must reasonably believe that a series of other conditions are satisfied.

The constable must reasonably believe that failing to remove the person could cause serious physical or psychological harm to that person or serious physical harm to other people. The constable must also reasonably believe that removing the individual is a proportionate measure in light of the seriousness and likelihood of that harm, and that the person is unable to decide for themselves if they should be removed to a place of safety due to an impairment in the functioning of their mind or brain. The decision to remove the person must also be in that person’s best interests.

**Clause 140 - Information to be given on removal**

This clause provides that a person removed under clause 139 to a place of safety must be informed that they have been, or are being, so removed as soon as practicable. This information must be provided either at the time of their removal, as soon as practicable after that time or, if necessary, upon arrival at the place of safety. This requirement does not have to be adhered to if the person escapes prior to the information being provided.

The clause also provides that Article 30 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (“PACE”) – which provides that the police must provide arrested persons with certain information – does not apply in relation to a person removed to a place of safety.

**Clause 141 - Search of person on exercise of power to remove**

This clause provides that when a person is informed that they are to be (or are being) removed to a place of safety, he or she is considered to be arrested for the purposes of Article 34 of PACE. Article 34 of PACE provides constables with certain search powers when arresting a person. Even if it has not been practicable to inform the person of their removal to a place of safety the person will be considered for the purposes of carrying out a search under Article 34 of PACE as being arrested at the time it was decided to remove them from the public place to the place of safety.

This clause also provides for a modification of Article 34 of PACE so that it can apply in these circumstances.

**Clause 142 - Power of police to detain in hospital a person removed from a public place**

This clause provides the police with a power to detain a person who has been removed from a public place at a hospital. The purpose of detaining the individual there is to allow them to be examined by a medical practitioner and interviewed by an approved social worker. The person can only be detained if the constable reasonably believes that the “detention conditions” set out at clause 144 are met, and if any of these conditions are no longer met at any time the person then must be discharged. Any period of detention can only last for a maximum of 24 hours beginning with the time of removal.

**Clause 143 - Power to detain in police station a person removed from a public place**

This clause provides that, when the “detention conditions” provided for by clause 144 are met, a person removed from a public place may be detained in a police station. The purpose of the detention is to enable the person to be examined by a medical practitioner and interviewed by an approved social worker, and to prevent physical or psychological harm to that person or other people, whilst any necessary arrangements are made for the persons care or treatment at another location.

The person can only be detained if the constable reasonably believes that the “detention conditions” set out at clause 144 are met, and if any of these conditions are no longer met at any time the person then must be discharged. Any period of

detention can only last for a maximum of 24 hours beginning with the time of removal.

**Clause 144 - Sections 142 and 143: the detention conditions**

This clause sets out the conditions which must be met for a person to be detained at a place of safety. The detention conditions include that failure to detain the person could create a risk of serious physical or psychological harm to that person or serious physical harm to other people. The detention must also be a proportionate measure in light of the likelihood and seriousness of that harm, and the person must be unable to decide for themselves if they should be detained at a place of safety due to impairment in the functioning of their mind or brain. The detention must also be in that person's best interests.

**Clause 145 - Transfer from one place of safety to another**

This clause provides that a person may be transferred from one place of safety to another if certain conditions are met. There must be appropriate care or treatment available at the new place of safety that is not available at the current place of detention. Discharging rather than transferring the person would also have to cause a risk of serious physical or psychological harm to that person or serious physical harm to other people. The transfer must also be a proportionate measure in light of the likelihood and seriousness of that harm, and the person must be unable to decide for themselves if they should be transferred to another place of safety due to an impairment of or disturbance in the functioning of their mind or brain. The transfer must also be in that person's best interests.

**Clause 146 - Maximum period of detention under Part 9**

This clause provides that a person removed to a place of safety cannot be detained after the end of a period of 24 hours, beginning at the time of the person's removal from a public place. The Department of Justice can amend the maximum period of detention by regulations.

**Clause 147 - Duty to inform certain persons where power of removal or transfer used**

This clause provides that where the power to take or transfer a person to a place of safety is used, the constable must ensure that certain information (contained in clause 148) is provided as soon as practicable after the person ("R") arrives at a place of safety. This information must be given to the HSC trust in whose area that place of safety is located; an appropriate person; and, if the appropriate person does not live with R and it is practicable to give the information to a person who lives with R who is aged 16 or over, and is named by R as someone to whom the information should be

given or who is engaged in caring for R or who is interested in his or her welfare, that person.

However, if it is not practicable to give the information to the appropriate person but it is practicable to give the information to a person who is aged 16 or over and is named by R as someone to whom the information should be given or is engaged in caring for R or interested in his or her welfare, the constable must instead ensure that that person is given the information as soon as practicable after R arrives at the place of safety.

The clause defines “appropriate person” as any person who is R’s nominated person if R is aged 16 or over, or if R is aged under 16, a person who has parental responsibility for R.

**Clause 148 - Section 147: meaning of “the required information”**

This clause makes provision for the information that is to be given when a person is taken to a place of safety under clause 139 or clause 145. This information includes the fact that the person has been taken to a place of safety, the person’s name and address, the address of the place of safety to which he or she has been taken, the date and time of the taking or transfer to a place of safety, and the circumstances which gave rise to the removal or transfer.

In situations where this clause applies, Article 10 of the Criminal Justice (Children) (Northern Ireland) Order 1998 and Article 57 of PACE do not apply.

**Clause 149 - Record of detention to be kept**

This clause requires the “appropriate officer” (as defined in clause 160) to make a written record of a person’s detention. The record must be made as soon as practicable after the decision to detain the person has been taken, and must be made in the presence of the detained person. If the person is incapable of understanding what is being said, is acting in a violent manner or is in urgent need of medical attention, then they do not have to be present when the written record is made.

**Clause 150 - Responsibilities of the appropriate officer**

This clause sets out the responsibilities of the appropriate officer. These include ensuring that the person detained at a place of safety is treated in accordance with the provisions of the Part or of PACE which relate to the treatment of detained persons, or any code of practice relating to either piece of legislation. The appropriate officer must also ensure that any written record required by this Part or PACE is completed.

### **Clause 151 - Review of detention**

This clause provides that the detention of any person at a place of safety must be periodically reviewed to determine whether or not the detention conditions are met. The first review must be no later than six hours after the person arrives at the place of safety, and subsequent reviews should be at six hourly intervals. A review may be postponed if it is not practicable to complete one or if the appropriate officer is not available, but a review must be completed as soon as practicable after any delay. If there is any delay in conducting a review, that delay does not alter the requirement for a review at six hour intervals, beginning at the time of arrival.

Decisions to retain a person following review, or to postpone a review, must be recorded in writing. This should be done as soon as practicable after any such decision in the presence of the person. If the person is incapable of understanding what is being said, asleep, acting in a violent manner or is in urgent need of medical attention, then they do not have to be present when the written record is made.

References to periods of time in this clause are to be treated as approximate only.

### **Clause 152 - Access to legal advice**

This clause provides that any person detained under the Part is entitled to consult a solicitor privately at any time. If such a request is made then it should be facilitated as soon as is practicable. The request and the time it was made should be recorded in writing. Article 59 of PACE, which deals with access to legal advice when in police custody, does not apply in relation to persons detained at a place of safety under this Part.

### **Clause 153 - Searches of person following removal to place of safety**

This clause provides that if any person is detained or transferred to a police station under this Part, the person is to be treated as having been arrested elsewhere and brought to the station for the purposes of Article 55 of PACE, which provides constables with powers to search arrested persons at police stations. A constable can avail of these powers in respect a person detained at a hospital as a place of safety under this Part. This clause also provides for a modification of Article 55 of PACE so that it can apply in these circumstances.

### **Clause 154 - Searches and examination to ascertain identity**

This clause provides that a constable can avail of the powers of search and examination to ascertain identity under Article 55A of PACE in respect of a person detained at a place of safety under this Part. This clause also provides for a modification of Article 55A of PACE so that it can apply in these circumstances.

### **Clause 155 - Intimate searches**

This clause provides that a constable can avail of the power to perform intimate searches under Article 56 of PACE in respect of a person detained at a place of safety under this Part. This clause also provides for a modification of Article 56 of PACE so that it can apply in these circumstances.

### **Clause 156 - Annual records**

This clause provides that annual records must be kept by the police of the number of persons detained in hospital and the number of persons detained in police stations under this Part. The clause further specifies that the police must keep specific records regarding children detained at hospitals and police stations under Part 9, as well as the final disposals in respect of those children. “Children” is defined for these purposes as any persons under the age of 18, and the definition of “final disposals” may be prescribed by the Department of Justice in regulations.

This clause also specifies that this information must be included within the annual reports published by the police under section 58(1) of the Police (Northern Ireland) Act 2000.

### **Clause 157 - Principles applying for purposes of Part 9**

This clause sets out the principles that should be complied with when making certain determinations under this Part.

When a determination is to be made about whether or not a person is unable to make a decision for themselves, that determination cannot be made solely on the basis of whether or not the person can do the things mentioned in clause 4(1)(a) to (d) of the Bill. Certain other principles apply, including ensuring that all practicable help and support has been provided to help the person make the decision, as well as not determining that the person is unable to make a decision because that person makes an unwise decision. The clause requires that a determination about someone’s decision-making capability or best interests should not be made on the basis of their age or appearance, or any other condition that the person has which may lead to unjustified assumptions about their ability to make a decision for themselves.

This clause also provides that when making a determination about a person’s best interests, the decision maker must take account of all relevant circumstances and take a series of steps. These steps include encouraging the person to participate in the determination of their best interests, and taking account of the person’s past and present wishes if possible. Where it is practicable the decision maker should also consult a “key person”, as defined within the clause.

This clause provides that where any removal, transfer or detention is being considered, the relevant officer must have regard to whether the purpose for which that action would be carried out can be as effectively achieved in a way that is less restrictive of R's rights and freedom of action.

The principles within this clause are specific to Part 9. Clauses 1 to 3 and 5 to 8 of the Bill do not apply for the purposes of this Part.

#### **Clause 158 - Reasonable belief etc**

This clause provides an explanation of the factors which must be considered when determining if certain decisions made under this Part have been made on the basis of a "reasonable belief". The factors to be considered include the place and circumstances in which the decision was made, and the availability or lack thereof of advice from a medical practitioner or approved social worker.

#### **Clause 159 - Power of constable to use reasonable force**

This clause provides that any constable exercising a power conferred by this Part may exercise reasonable force, if necessary.

#### **Clause 160 - Definition for purposes of Part 9**

This clause defines several key terms within Part 9 of the Bill. The clause also provides the Department of Justice with a power to amend the definition of a place of safety by regulations. The clause provides that the Department of Justice may also amend other clauses within Part 9 as necessary if the definition of a place of safety is changed.

The clause also provides, for the purposes of clauses 147 and 157, that where the age of the person is not known, it is to be taken to be the age that the person appears to be.

#### **Clause 161 - Relationship of Part 9 to other provisions**

This clause makes provision for the relationship between the powers available to a constable under this Part, and other powers available to a constable under other legislation, including within other parts of this Bill. The clause also provides that if a person is detained in or being taken to a place of safety and they are arrested for an offence, then the relevant provisions of PACE will apply and the provisions of this Part will cease to apply to that person.

## **PART 10 – CRIMINAL JUSTICE**

This part sets out the powers of the courts to impose particular healthcare disposals on offenders at remand, sentencing or following a finding of unfitness to plead.

### **CHAPTER 1- REMAND TO HOSPITAL**

#### **Clause 162 – Remand to hospital**

This clause provides that, where the Crown Court or court of summary jurisdiction has the power to remand an accused person in custody and is of the view that they would remand the person in custody, the court may instead remand the accused to hospital for either a medical report or treatment or both. The criteria for remanding the person in hospital are contained within clause 164(1) (the “medical report condition”) and clause 165(1) (the “treatment condition”).

Before a court remands an accused person to hospital, it must be satisfied on the written or oral evidence from the managing authority of the hospital in question that arrangements have been made for the accused person’s detention there.

This clause also provides that an accused person may be further remanded if remanding him or her on bail is not appropriate and the conditions set out in clause 164(1) and clause 165(1) are still met. An accused person can be remanded or further remanded under this clause for a maximum of 28 days at a time and for no more than 12 weeks in total.

#### **Clause 163 - Section 162: meaning of “accused person”**

This clause defines “accused person” for the purposes of clause 162.

An “accused person”, in relation to the Crown Court, is defined as a person who is awaiting trial before the court for an offence punishable with imprisonment, or a person who has been arraigned before the court for an offence punishable by imprisonment but has not yet been sentenced or otherwise dealt with for that offence.

An “accused person”, in relation to a court of summary jurisdiction, is defined as a person who has been convicted by the court of an offence punishable on summary conviction by imprisonment, or a person charged with such an offence if the court is satisfied that the person did the act or made the omission charged.

#### **Clause 164 - Section 162: the medical report condition**

This clause makes provision for the test that must be met before the “medical report condition” in clause 162 is satisfied.

The court must be satisfied on the basis of medical evidence that the accused has a disorder or is suspected of having a disorder; that a report on his or her mental or physical condition ought to be made; that a proper assessment of his or her condition would be impracticable if he or she was remanded in custody; and that such an assessment will be practicable if the accused is remanded there. In determining if the assessment will be practicable, the court must have regard to how likely it is that consent will be obtained or that examination will be capable of being carried out under Part 2 of the Bill, or if the accused is under 16, that the examination can be carried out under the Mental Health Order.

**Clause 165 - Section 162: the treatment condition**

This clause makes provision for the test that must be met before the “treatment condition” in clause 162 is satisfied.

The court must be satisfied on the basis of medical evidence that the accused person has a disorder requiring treatment, and that failure to provide treatment as an in-patient in a hospital would more likely than not result in serious physical or psychological harm to the accused person or serious physical harm to other people. The court must also be satisfied on the basis of the medical evidence that remanding the accused person to hospital is likely to have significantly better clinical outcomes for the person than would be the case if they were remanded in custody. In forming this view, the court must have regard to any other ways in which the accused person might be admitted to hospital if they were remanded in custody. In addition, the court must have regard to whether treatment for the disorder is available in the hospital that the accused person would be remanded to, and how likely it is that consent will be obtained or that treatment will be capable of being carried out under Part 2 of the Bill, or, if the accused is under 16, that the examination can be carried out under the Mental Health Order.

**Clause 166 - Effect of remand to hospital**

This clause provides for the effect of remanding an accused person to hospital. Where the accused person has been remanded, a constable or persons directed by the court must take the accused person to hospital. The clause also provides that the managing authority of a hospital must admit and detain the accused person for the duration of the remand period.

The court has the power to terminate the remand at any time if it thinks it appropriate to do so.

This clause also provides that an accused person may obtain an independent medical report for the purposes of applying to the court for a termination of the remand.

Provision is also made for the arrest without warrant and return to court of an accused person who absconds from hospital or absconds whilst they are being taken to or from hospital. When the accused person is brought before the court, the remand can be terminated and the court can deal with the person in any way in which it would have dealt with the person had they not been remanded to hospital.

The clause also provides that the court can further remand an accused person, without the person being brought before the court, if they are represented by counsel or a solicitor who is given an opportunity of being heard by the court.

## **CHAPTER 2 – POWERS OF COURT ON CONVICTION**

### **Clause 167 - Public protection orders with and without restrictions**

This clause provides the Crown Court with the power to make a public protection order with or without restriction in cases where a person is convicted of an offence punishable by imprisonment (with the exception of those offences where the sentence is fixed by law). A court of summary jurisdiction also has the power to make a public protection order with or without restriction where a person has been convicted of an offence punishable on summary conviction with imprisonment.

If the detention conditions provided by clause 168 are met, the court may make a public protection order without restrictions. If those detention conditions are met as well as the restriction conditions provided by clause 169, then the court may make a public protection order with restrictions.

The clause provides that a public protection order without restrictions means an order which requires that the offender is admitted and detained in an appropriate establishment which is specified in the order. A public protection order with restrictions is defined as an order which requires that the offender is admitted to and detained in an appropriate establishment specified in the order and either provides that the order is to be treated as a public protection order with restrictions with no time limitation; or provides that for a specified period the order is to be treated as a public protection order with restrictions for a specific period of time.

An “appropriate establishment” is defined as either a hospital, or a care home in which care is provided for persons who have an impairment of, or a disturbance in the functioning of, the mind or brain, and which is designated by the Department of Justice for the purposes of this clause.

### **Clause 168 - Section 167: the detention conditions**

This clause provides the detention conditions that must be met in order for the court to make a public protection order with or without restrictions. The court must be

satisfied, on the required medical evidence, that: the offender has an impairment of, or a disturbance in the functioning of, the mind or brain: appropriate care or treatment is

available for the offender in the establishment specified in the public protection order: dealing with the offender in any other way not involving his or her detention would create a risk, linked to the impairment or disturbance, of serious physical or psychological harm to other people; and detaining the offender is a proportionate response to both the likelihood of the harm concerned and the seriousness of that harm.

The court must also be satisfied that making an order that: detaining the individual is the most suitable way of dealing with the case, having regard to any other ways of dealing with the offender; the nature of the offence; the past history of the offender; and the risk of serious physical or psychological harm to other persons if the individual was not detained. In considering whether it would be appropriate to deal with the offender in a way not involving detention, or what risk doing so would create, the court must consider whether it could also make a sexual offences prevention order made under section 104 of the Sexual Offences Act 2003 or a violent offences prevention order and the effect of such an order. A violent offences protection order has the same meaning as in Part 8 of the Justice Act (Northern Ireland) 2015.

#### **Clause 169 - Section 167: the restriction condition**

This clause provides the additional condition that must be met in order for the court to be able to make a public protection order *with* restrictions. In order to meet this condition, the court must be satisfied that the risk of serious physical or psychological harm to other people is sufficient to warrant making a public protection order with restrictions rather than making a public protection order without restrictions. The nature of the offence, the past history of the offender, and the risk of serious physical or psychological harm to other persons if the person was set at large must be considered by the court.

#### **Clause 170 - Further provision about making of public protection orders**

This clause provides that a court may still make a public protection order in instances where an offender would otherwise be liable to be sentenced under Article 70(2) of the Firearms (NI) Order 2004, paragraph 2(4) or (5) of Schedule 2 to the Violent Crime Reduction Act 2006, or Article 13 or 14 of the Criminal Justice (Northern Ireland) Order 2008, or section 7 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 – all of which would otherwise provide for minimum sentences on conviction.

Provision is also made that in cases where a public protection order is made, no custodial sentence, fine, or probation order may be made in respect of the offence, but the court may make any other order that it has power to make.

**Clause 171 - Effect of public protection orders**

This clause makes provision for the effect of a public protection order with or without restrictions. It places a duty on a constable, or persons directed by the court, to convey the accused person to hospital or a care home. It also provides that the managing authority of a hospital or care home must admit and detain the offender there in accordance with Chapter 3 (in respect of public protection orders without restriction) or Chapter 4 (in respect of public protection orders with restrictions).

This clause also provides that any question of whether treatment should be given to a person detained under a public protection order is to be determined in the same way as it would be for a person who is not so detained.

**Clause 172 - Power to direct the ending of restrictions under a public protection order**

This clause provides the Department of Justice with the power to end restrictions if it is of the view that such a public protection order with restrictions is no longer needed to protect the public from serious physical or psychological harm. On the ending of restrictions, the public protection order has effect as a public protection order without restrictions.

**Clause 173 - Effect of ending restrictions under a public protection order**

This clause applies where the Department of Justice ends the restriction element of a public protection order, or where a public protection order remains in force but the restriction period of the order has expired. In these circumstances, the public protection order continues as if it were a public protection order without restrictions, thus requiring the person to be detained in the establishment concerned.

**Clause 174 - Hospital direction when passing custodial sentence**

This clause provides the Crown Court with the power to make a hospital direction where a person is convicted of an offence punishable with imprisonment, other than an offence for which the sentence is fixed by law. A court of summary jurisdiction also has the power to make a hospital direction where a person is convicted of an offence punishable on summary conviction with imprisonment. Therefore, if the court, having considered the other available ways of dealing with the offender, decides to impose a custodial sentence and the conditions set out in clause 175 are

met, it may direct that the person, instead of being removed to and detained in prison, is instead removed to and detained in a specified hospital.

The clause also provides that a hospital direction has effect not only in respect of the custodial sentence in respect of which the direction was made, but also any other custodial sentence imposed on the same or previous occasion.

### **Clause 175 - Conditions for giving hospital direction**

This clause provides the conditions that the court must be satisfied are met before it can issue a hospital direction.

The court must be satisfied, on the required medical evidence, that the offender has a disorder requiring treatment, that failure to provide treatment to the offender as in-patient in a hospital would be more likely than not to result in serious physical or psychological harm to the offender or serious physical harm to other people, and that treatment appropriate to the offender's case is available in the hospital concerned.

The court must consider that giving a hospital direction is appropriate having regard to all the circumstances. In particular the court must have regard for: the power to transfer the person to prison when discharged from hospital; the ways in which the offender could become an in-patient in a hospital if the court imposed a custodial sentence without giving a hospital direction; and how likely it will be that consent will be obtained for treatment, or will be capable of being given under Part 2 of the Bill or under the Mental Health Order if the person is under 16 years old.

### **Clause 176 - Effect of hospital directions**

Where a court makes a hospital direction, this clause places a duty on a constable, or persons directed by the court, to take the offender to the appropriate hospital. It also provides that the managing authority of a hospital must admit and detain the offender in accordance with Chapter 5 of this Part.

This clause also provides that any question of whether treatment should be given to a person detained under a hospital direction is to be determined in the same way as it would be for a person who is not so detained.

### **Clause 177 - Interim detention orders**

Before making a public protection order, hospital direction or dealing with the offender in some other way, this clause provides that the Crown Court may make an interim detention order where a person is convicted of an offence punishable with imprisonment, other than an offence for which the sentence is fixed by law. A court of summary jurisdiction is also given power to make an interim detention order where a

person is convicted of an offence punishable on summary conviction with imprisonment.

Before an interim detention order can be made, the court must be satisfied on the required medical evidence that: the offender has an impairment of, or disturbance in the functioning of, the mind or brain; that appropriate care or treatment is available for the offender in the hospital specified in the order; and there is reason to suppose that the most suitable way of dealing with the case may be to make a public protection order or to pass a custodial sentence and give a hospital direction.

The clause provides that a court may not make an interim detention order unless satisfied on the written or oral evidence of a person representing the managing authority of the hospital specified in the order that arrangements have been made for the offender's detention in that hospital.

#### **Clause 178 - Effect of interim detention orders**

Where the court makes an interim detention order, this clause places a duty on a constable or persons directed by the court to take the person subject to hospital. It also provides that the managing authority of a hospital must admit and detain the person.

This clause also provides that any question of whether treatment should be given to a person detained under an interim detention order is to be determined in the same way as it would be for a person who is not so detained. It also provides that a court can make an interim detention order for an initial period of up to 12 weeks and that the court may also renew the order for a maximum of 28 days at a time if this is justified on the basis of medical advice. The clause also sets a maximum total period for detention under the interim detention order of 6 months.

The clause also provides that a court must terminate an interim detention order if it makes a public protection order, or a custodial sentence with or without a hospital direction, or another disposal in respect of the person. It further provides for the arresting without warrant and bringing before the court of an offender who absconds from hospital while subject to an interim detention order.

### **CHAPTER 3 – DETENTION UNDER A PUBLIC PROTECTION ORDER WITHOUT RESTRICTIONS**

#### **Clause 179 - Detention under a public protection order without restrictions**

This clause provides that a person detained in an establishment under a public protection order without restrictions can be detained for a period not exceeding 6 months. This is subject to discharge under clause 180, extension under clauses 181 to 186, and the powers of the Tribunal under clause 231.

**Clause 180 - Discharge from detention by responsible medical practitioner**

This clause provides for the discharge from detention of an individual who is subject to a public protection order without restrictions by a responsible medical practitioner.

The responsible medical practitioner must make an order discharging the person from detention if they are satisfied that doing so would not create a substantial risk to others. The clause provides that releasing the person would create a substantial risk to others if doing so would create a risk, linked to an impairment of or disturbance in the functioning of the person's mind or brain, of serious physical or psychological harm to other persons, and the likelihood and seriousness of the harm concerned are such that detaining the person is a proportionate response.

The clause also provides that being discharged from a public protection order without restrictions does not prevent a person being detained under Part 2 of the Bill (or Part 2 of the Mental Health Order if the person is aged under 16) providing that the relevant detention criteria are met.

**Clause 181 - First extension of period of order**

This clause provides that a public protection order without restriction can be extended for 6 months where the person concerned is still liable to be held under the order and the "initial period" of the order has not ended. The "initial period" is six months beginning with the date of the order.

**Clause 182 - Subsequent extensions**

This clause provides that a public protection order without restrictions may be extended for a period of one year where the order has previously been extended under clause 181, this clause, or under paragraph 8 of Schedule 6, and the person is still liable to be detained under the order.

**Clause 183 - Sections 181 and 182: extension reports**

This clause provides for the format of extension reports. For an order to be extended, a report must be made by an appropriate medical practitioner within the reporting period, and the medical practitioner must have examined the person within that timeframe. The report must state that, in the medical practitioner's opinion, the conditions for continued detention are met and also include a statement from a responsible social worker to that effect and such other information as may be prescribed in regulations.

**Clause 184 - Extension of period where responsible person not of the requisite opinion**

This clause provides that Schedule 6 sets out the procedure for cases where it is proposed to extend a public protection order without restrictions but the responsible social worker considers that criteria for continuation are not met.

**Clause 185 - The criteria for continuation**

This clause sets out the criteria that must be met in order to extend a public protection order by 6 months in the case of a first extension or one year in the case of a further extension. The criteria are that: the person subject to the order has an impairment of, or disturbance in the functioning of, the mind or brain; appropriate care or treatment is available for him/her in the establishment concerned; failure to detain him/her in circumstances amounting to a deprivation of liberty in an appropriate establishment in which such care or treatment is available for him or her would create a risk, linked to the impairment or disturbance, of serious physical or psychological harm to other persons; and that detaining him or her in the establishment concerned, in circumstances amounting to a deprivation of liberty, would be a proportionate response to the likelihood of the harm concerned and the seriousness of that harm.

**Clause 186 - Extension reports: further provision**

This clause makes further provision in respect of a report made under clause 183. It provides that a report for the purposes of each of those clauses is made upon its signing by the medical practitioner making it. The report must be given to the relevant HSC trust in whose area the establishment in which the individual is detained is situated as soon as practicable. The clause also provides that where a report is given to the HSC trust, that HSC trust must as soon as practicable give information to the person to whom the public protection order relates as well as such other persons as may be prescribed in regulations. The HSC trust must also forward a copy of the report to RQIA.

**Clause 187 - Permission for absence**

This clause provides that a responsible medical practitioner may give permission to a person detained under a protection order without restrictions to be absent from the establishment where he or she is detained. Any conditions considered necessary by the practitioner for the health and safety of the offender or the protection of others can be imposed.

Permission to be absent can be given for a specified occasion or for a specified period. Where the permission is in respect of a specified period, the period can be extended by a further permission, given in the person's absence.

The responsible medical practitioner may also direct that the person is to remain in custody during his or her absence. Such a direction can only be given if the practitioner thinks that this is necessary for the health and safety of the offender or for the protection of other persons. In these cases, the offender may be kept in the custody of a person on the staff of the establishment concerned, or in the custody of any other person authorised in writing by the managing authority of the establishment.

The clause also provides that where a person is given permission to be absent for more than 28 days under this clause, or a period of permitted absence is extended for more than 28 days, the managing authority of the establishment must notify RQIA of the address where the offender is staying within 14 days of the permission being given or on the day when the period is extended. The managing authority must also notify RQIA of the person's return to the establishment within 14 days of his or her arrival back in the establishment.

Where a person is absent under this clause and it appears to the responsible medical practitioner that it is necessary to do so for the health and safety of the offender, the protection of other persons, or because the offender is not receiving proper care, the practitioner may revoke the permission and recall the offender to the establishment concerned.

Notice of revocation of the permission must be in writing. An offender may not be recalled after ceasing to be liable to be detained under the public protection order.

#### **Clause 188 - Transfer between hospitals etc**

This clause provides that the managing authority of the establishment where a person subject to a public protection order without restrictions is detained has the power to transfer that person to another suitable establishment. Where the person is transferred under this clause, the managing authority of the new establishment must admit him or her and detain him or her in accordance with the relevant provisions defined in Chapter 3 of Part 10 of the Bill.

Before a person is transferred under this clause, the managing authority has must inform certain people, depending on the age of the person being transferred. Where a person transferred under this clause is 16 years of age or over, the managing authority must, where practicable, inform his or her nominated person. If the person is under 16, then the managing authority must inform someone with parental responsibility for him or her. Where a person is transferred under this clause, the managing authority must immediately notify RQIA of the transfer.

### **Clause 189 - Effect of custodial sentence**

This clause applies where a person who is liable to be detained under a public protection order without restrictions is detained in custody in pursuance of any sentence or order passed or made by a court in the UK. This includes an order committing or remanding the person in custody.

If such a person is detained in custody for a period of more than 6 months, or successive periods of time which exceed 6 months in total, then this clause provides that at the end of 6 months beginning with the date of the person's detention in custody he or she or she ceases to be liable to be detained under the public protection order.

If the person is detained in custody for a period of time not exceeding 6 months, or a period of time not exceeding 6 months in total, and has not ceased to be liable to be detained under the public protection order, then clause 244 of the Bill applies as if, on the day of discharge from custody, the person had absented him or herself without permission from the establishment he or she is liable to be detained under the public protection order.

## **CHAPTER 4 – DETENTION UNDER A PUBLIC PROTECTION ORDER WITH RESTRICTIONS**

### **Clause 190 - Detention under a public protection order with restrictions**

This clause provides that a person liable to be detained under a public protection order with restrictions is to continue to be so liable until absolutely discharged by the Department of Justice under clause 191 or by the Tribunal under Chapter 8.

### **Clause 191 - Discharge from detention by Department of Justice**

This clause provides the Department of Justice with the power, at any time where a public protection order is in force in relation to a person, to discharge the person by warrant, either absolutely or subject to conditions. The power to discharge absolutely can also be exercised in respect of a person who has been conditionally discharged by the Department of Justice under this clause or by the Review Tribunal under clause 232.

If a public protection order with restrictions provides that such restrictions are for a specified period of time and that period of time ends when a person has been conditionally discharged and not recalled, this clause provides that at the end of the restricted period, the person is to be treated as absolutely discharged and no longer liable to be detained under the public protection order.

Discharge of a person under this clause does not prevent him/her being detained under Part 2 of the Bill or Part 2 of the Mental Health Order if he or she is under 16, if the relevant criteria for detention are met.

**Clause 192 - Power to recall person who has been conditionally discharged**

This clause provides the Department of Justice with the power to recall a person who has been conditionally discharged under clause 191 at any time where the public protection order with restrictions remains in force. In order to recall the person, it must appear to the Department of Justice that failure to recall the person would create a risk, linked to an impairment of or disturbance in the functioning of the person's mind or brain, of serious physical or psychological harm to others, and that the likelihood and seriousness of the harm concerned are such that recalling the person is a proportionate response.

**Clause 193- Reports by responsible medical practitioner**

This clause provides that where a public protection order with restrictions is in force in respect of a person, the responsible medical practitioner must examine that person and make a report to the Department of Justice at such intervals as the Department of Justice directs. Such intervals must not exceed one year.

**Clause 194 - Direction for person to attend for purposes of justice etc**

This clause provides that where a person is liable to be detained under a public protection order with restrictions and the Department of Justice is satisfied that his or her attendance at any place in Northern Ireland is desirable in the interests of justice or for the purposes of any public inquiry, the Department of Justice may direct that the person is taken to that place. In these circumstances, unless the Department of Justice directs otherwise, the person is to be kept in custody while being taken to that place, while being kept there, and while being taken back to the establishment where he or she is liable to be detained under the public protection order.

**Clause 195 - Permission for absence**

This clause provides that where a person is liable to be detained under a public protection order with restrictions, a responsible medical practitioner may, with the consent of the Department of Justice, give permission for that person to be absent from the establishment where he or she is detained. The practitioner may attach to the permission any conditions considered necessary by the practitioner for the health and safety of the offender or the protection of others. Permission to be absent can be given for a specified occasion or for a specified period. Where the permission is in respect of a specified period, the period can be extended by further permission given in the offender's absence.

The responsible medical practitioner may also direct that the person is to remain in custody during his or her absence but such a direction can only be given if the practitioner thinks that this is necessary for the health and safety of the person or for the protection of other persons. In these cases, the person may be kept in the custody of a person on the staff of the establishment concerned, or in the custody of any other person authorised in writing by the managing authority of the establishment.

The clause also provides that where a person is given permission to be absent for more than 28 days under this clause, or a period of permitted absence is extended for more than 28 days, the managing authority of the establishment must notify RQIA of the address where the person is staying within 14 days of the permission being given or of the day when the period is extended. The managing authority must also notify RQIA of the offender's return within 14 days.

Where a person is absent under this clause and it appears to the responsible medical practitioner or the Department of Justice that it is necessary to do so for the health and safety of the offender, the protection of other persons, or because the offender is not receiving proper care, the practitioner or Department of Justice may revoke the permission and recall the person to the establishment concerned. However, a person may not be recalled when he or she has ceased to be liable to be detained under the public protection order.

#### **Clause 196 - Transfers between hospitals etc**

While a person is subject to a public protection order with restrictions, this clause provides the managing authority of the establishment where the person is detained, to have a power to transfer the person to another suitable establishment with the consent of the Department of Justice.

Before a person is transferred under this clause, the managing authority must inform certain people of the transfer, depending on the age of the person. Where a person transferred under this clause is 16 years of age or over, the managing authority must, where practicable, inform his or her nominated person. If the person is under 16, then the managing authority must inform someone with parental responsibility for him or her. Where a person is transferred under this clause, the managing authority must immediately also notify RQIA of the transfer.

### **CHAPTER 5 – DETENTION UNDER A HOSPITAL DIRECTION**

#### **Clause 197 - Detention under a hospital direction**

This clause provides that a person liable to be detained under a hospital direction will continue to be detained under the direction until it ceases to have effect under clause 198, when the Department of Justice transfers the person back to prison, or under

clause 240, when the Review Tribunal notifies the Department of Justice that the criteria for detaining the person in hospital are no longer met.

### **Clause 198 - Termination of hospital directions**

This clause provides that the Department of Justice must, on receipt of a relevant notification before a person's release date, by warrant direct that a person serving a prison sentence and detained in hospital under a hospital direction is removed to any prison in which he or she might have been detained if the hospital direction had not been given. On the person's arrival in prison, the hospital direction ceases to have effect.

However, this does not apply if (having received a relevant notification) the Department of Justice 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 a relevant provision and that the hospital direction is to cease to have effect. "Relevant provision" is defined as meaning 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.

The clause defines "relevant notification" as a notification by a suitable medical practitioner (defined as the responsible medical practitioner or any medical practitioner who is approved by RQIA for the purposes of this clause as having special experience in the diagnosis or treatment of disorder of the kind in question) that, in the opinion of the practitioner, the person does not have, or no longer has the disorder in respect of which the hospital direction was given, no effective treatment for the disorder can be given to him or her in the hospital, or it is more likely than not that if he or she were transferred to a prison, that no serious physical or psychological harm to him or herself or serious physical harm to other persons would result from his or her ceasing to be provided with medical treatment as an in-patient in a hospital.

The clause also provides that where a person is serving a custodial sentence which is not a sentence of imprisonment, references to prison mean a place where persons serving a sentence of that kind may be detained.

### **Clause 199 - Section 198: meaning of "release date"**

This clause defines "release date" for the purposes of clause 198. An individual's release date will be determined in accordance with the duties and powers to release them from detention under clause 200.

### **Clause 200 - Duties and powers to release from detention**

This clause imposes duties and grants powers to release an individual from detention under a hospital direction. The individual is to be treated as if they were detained in

custody for the purposes of these duties and powers. If the individual is required to be released on license, unconditionally, under the terms of the legislation which authorised their custodial sentence, referred to the Parole Commissioners, or subject to the duty of that body, or can apply to the Sentence Review Commissioners, or subject to any power or duty of that body or the Secretary of State under the Northern Ireland (Sentences) Act 1998, then these requirements or duties apply as if the person were not subject to a hospital direction.

If the individual is subject to Articles 39 or 44A the Criminal Justice (Children) (Northern Ireland) Order 1998, their release date is the day on which the period of supervision under that order begins.

An individual absent without leave from a hospital direction and liable to be taken into custody under this Part, shall be treated as unlawfully at large and absent from prison.

#### **Clause 201 - Reports by responsible medical practitioner**

This clause provides that where a hospital direction is in force, the responsible medical officer must examine the person to whom it applies, and report to the Department of Justice at such intervals as the Department of Justice directs. Such intervals must not exceed one year.

#### **Clause 202 - Permission for absence etc**

This clause provides that clause 194 (direction for person to attend for purposes of justice etc.) and clause 195 (permission for absence) apply in relation to a person liable to be detained under a hospital direction.

#### **Clause 203 - Transfers between hospitals**

While a person is subject to a hospital direction, this clause provides the managing authority of the establishment where the person is detained to have a power to transfer the person to another suitable establishment with the consent of the Department of Justice.

Before a person is transferred under this clause, the managing authority must inform certain people of the transfer, depending on the age of the person. Where a person transferred under this clause is 16 years of age or over, the managing authority must, where practicable, inform his or her nominated person. If the person is under 16, then the managing authority must inform someone with parental responsibility for him or her. Where a person is transferred under this clause, the managing authority must immediately also notify RQIA of the transfer.

## **CHAPTER 6 – UNFITNESS TO BE TRIED ETC**

### **Clause 204 - Procedure where question of unfitness to be tried arises**

Where a person has been charged on indictment with an offence and the question arises whether he or she is fit to be tried, this clause provides for procedures to be followed by the court.

The question of unfitness to be tried must be determined as soon as it arises. However, the court may postpone consideration of the question until any time up to the opening of the case for the defence if, having regard to the nature of the supposed condition of the accused, the court considers that the postponement is appropriate and in the interests of the accused. In addition, the clause provides that if, before the question falls to be determined, the jury returns a verdict of acquittal on the count or each of the counts on which the accused is being tried, that question must not be determined.

The clause also provides that the question of fitness to be tried is to be determined by the court without a jury. The court must not determine that the accused person is unfit to be tried unless it is satisfied on the medical evidence that this is the case.

### **Clause 205 - Finding that the accused did the act or made the omission charged**

Where the court determines that a person is unfit to be tried this clause provides that the trial must not proceed any further. It must be determined by a jury on the evidence (if any) already given in the trial, and on such evidence as may be put forward by the prosecution, or by a person appointed by the court under this clause to put the case for the defence, whether it is satisfied that the accused did the act or made the omission with which he or she was charged. If the jury is satisfied, it must make a finding that the accused did the act or made the omission charged against the accused. If the jury is not so satisfied, it must return a verdict of acquittal as if on the count in question the trial had proceeded to a conclusion.

The clause also provides that where the question of fitness to be tried was determined after arraignment of the accused, the jury is to determine whether the accused did the act or made the omission with which he or she was charged.

### **Clause 206 - Procedure in relation to finding of insanity**

Where, on the trial on indictment of any person charged with the commissioning of an offence, medical evidence is given that the person charged was an insane person at the time the offence was committed, and the jury finds that although the person charged did the act or made the omission, he or she was an insane person at that time, the

clause provides that, in these circumstances, the court must direct a finding that the person is not guilty on the grounds of insanity.

**Clause 207 - Powers to deal with person unfit to be tried or not guilty by reason of insanity**

This clause makes provision for the powers of a court to dispose of a person who is found unfit to be tried, or was found not guilty by reason of insanity. In these circumstances, the court must make a public protection order without restrictions; make a public protection order with restrictions; make a supervision and assessment order; or make an order for the absolute discharge of the accused. Schedule 7 makes provision for supervision and assessment orders.

The power to make a public protection order without restrictions is only exercisable if the detention conditions provided by clause 168 are met. The power to make a public protection order with restrictions is only exercisable if the detention conditions provided by clause 168 and the restriction condition provided by clause 169 are met.

The clause also provides that, where the findings relate to an offence for which the sentence is fixed by law, the provisions in respect of disposals detailed above do not apply, and instead the court must make a public protection order with restrictions. That order must not include provision that the restriction is for a specified period only.

**Clause 208 - Remission for trial where person no longer unfit to be tried**

This clause applies where findings have been recorded against a person that he or she is unfit to be tried and that he or she did the act or made the omission charged, he or she is liable to be detained under a public protection order or subject to a supervision and assessment order made under clause 207, and the Department of Justice has been notified by a responsible medical practitioner that the person is no longer unfit to be tried.

Where a public protection order has been made, the Department of Justice may remit the person for trial to the Crown Court.

Where a supervision and assessment order has been made, the Department of Justice may remit the person's case for trial to the Crown Court.

This clause also provides that where a person is remitted for trial under this clause, the public protection order ceases to have effect once the person has arrived at the Crown Court and the court has made any order relating to the trial. A supervision and assessment order will cease to have effect when the case has been remitted for trial, and the Crown Court has made any order relating to the trial.

**Clause 209 - Power to make order where the accused did the act or made the omission charged**

Where a person is charged before a court of summary jurisdiction with any act or omission as an offence and the court would have the power on conviction to make a public protection order, if the court is satisfied that the person did the act or made the omission charged, the court may make a public protection order with or without restrictions if it considers it appropriate to do so.

**New clause 210 – Power to make restraining order following finding of unfitness to plead etc**

This clause amends Article 7 of the Protection from Harassment (Northern Ireland) Order 1997 by providing that a restraining order can be made in respect of a person who has been found to be unfit to plead and to have done the act or omission charged against him or her and in respect of a person in relation to whom a public protection order has been made by virtue of clause 209. The clause also provides a right of appeal against a restraining order.

**CHAPTER 7 – TRANSFER FROM PRISON ETC TO HOSPITAL**

**Clause 211 - Power to transfer person serving custodial sentence etc to hospital**

This clause provides that the Department of Justice may direct that a person who is serving a sentence is removed to hospital if certain conditions are met. The clause applies to a person who is serving a custodial sentence as defined in clause 253; a person who is detained because of a failure to comply with an order to enter into a recognizance to keep the peace or to be of good behaviour (or both); or a person who is detained because of a failure to pay a fine.

**Clause 212 - Conditions for transfer under section 211**

This clause makes provision for the conditions that must be met for transferring a person to hospital under clause 211. The Department of Justice must be satisfied, based on medical evidence, that the person has a disorder which requires treatment and that failure to provide that treatment on the basis of in-patient care would be more likely than not to result in serious physical or psychological harm to the person, or serious physical harm to other people. The Department of Justice also has to be satisfied on the medical evidence that treatment that is appropriate for the person has to be available in the hospital that he or she will be transferred to. Additionally, the Department of Justice also has to consider that giving a direction to transfer a person to hospital is appropriate, having regard to the public interest; all the circumstances of the case; the ways in which the person could otherwise become an in-patient if a direction was not given; and how likely it is that consent will be obtained for

treatment, treatment can be given to the person under Part 2 of the Bill or if the person is under 16 years of age, the Mental Health Order.

**Clause 213 - Effect of transfer under section 211**

This clause provides for the effect of a transferring a person to hospital. If a direction is given to transfer the person, the managing authority of the hospital must admit the person and detain him or her in the hospital in accordance with chapter 5 of Part 10 of the Bill.

**Clause 214 - Transfer of civil prisoner or immigration detainee to hospital**

This clause provides that the Department of Justice may direct that a person who is a civil prisoner or immigration detainee can be transferred to hospital if certain conditions are met.

The clause also provides that if such a direction is given, then the managing authority of the hospital must admit the person and detain him or her there in accordance with clause 215.

**Clause 215 - Detention in hospital on removal under section 214**

This clause provides that where a hospital transfer direction is given in relation to a civil prisoner or an immigration detainee, the person will be liable to be detained in hospital until the hospital transfer direction ceases to have effect. It ceases to have effect if the conditions under clause 216 are met, or if the Review Tribunal so directs under clause 240. Clauses 201 to 203, which relate to detention under hospital directions, apply to civil prisoner and immigration detainees detained in hospital under this section.

**Clause 216 - Duration of direction under section 214**

The clause provides that hospital transfer direction under clause 214 ceases to have effect in certain circumstances. The direction ceases to have effect, if it has not done so already, at the end of the period of liability to detention. The Department of Justice may also direct by warrant that the individual be returned to custody, with the hospital direction ceasing to have effect upon their return. This warrant must be based on a relevant notification by a suitable medical practitioner. The medical practitioner must be of the opinion that the individual's hospital direction should cease on the basis that they are no longer suffering from the disorder which precipitated the direction, or it is more likely than not that if the person was transferred from hospital, no serious physical or psychological harm to him or her or serious physical harm to other persons would result from the cessation of treatment as an in-patient, or on the basis that effective treatment for the individual's disorder can no longer be provided.

The clause also provides that the duty does not apply if (having received a relevant notification) the Department of Justice directs that with effect from a specified date that the person is to be treated as if he or she had been removed to the hospital under a relevant provision and that the hospital direction is to cease to have effect. “Relevant provision” is defined in the case of a civil prisoner as section 16(2) of the Prison Act (Northern Ireland) 1953; in the case of an immigration detainee as either section 16(2) of the Prison Act (Northern Ireland) 1953 or Part 8 of the Immigration and Asylum Act 1999.

#### **Clause 217 - Transfer to hospital of person remanded by magistrates’ court**

This clause provides that the Department of Justice may direct that a person who is remanded in custody by a magistrates’ court can be transferred to hospital if certain conditions are met.

If the Department of Justice does so direct, the clause also provides that the managing authority of the hospital must admit the person and detain him or her there in accordance with clause 218.

#### **Clause 218 - Detention in hospital on removal under section 217**

This clause provides that when an individual is detained in hospital following removal under a direction given in accordance with clause 217, he or she shall be liable to be detained until the direction ceases to have effect in accordance with clauses 219, 222 or 240.

Provision is also made for applying clauses 201 to 203 in these circumstances. Clause 201 requires the responsible medical practitioner to examine the person and report to the Department of Justice at intervals not exceeding a year. Clause 202 makes provision for permission being granted to give the person leave of absence from hospital, whilst clause 203 makes provision for transferring the individual between hospitals.

#### **Clause 219 - Duration of direction under section 217**

The clause provides that hospital transfer direction, made in respect of an individual remanded by a magistrates’ court, ceases to have effect in certain circumstances. The direction ceases to have effect at the end of the remand period, unless it has already ceased to have effect, the individual is committed in custody to the Crown Court for trial, or otherwise dealt with.

If the magistrates’ court is satisfied that the person is no longer suffering from the disorder which precipitated the direction, or that it is more likely than not that no serious physical or psychological harm to the person or serious physical harm to

others would result from the person ceasing to be provided with treatment as an in-patient, or on the basis that effective treatment for the individual's disorder can no longer be provided, it may direct that the direction will cease to have effect. The court can make this decision even if the period of remand has not expired or if the individual has been committed to the Crown Court.

The magistrates' court may also further remand the individual in their absence, unless the individual has not appeared before the court within the previous three months. The Court may also conduct a preliminary enquiry and commit the individual to trial in his or her absence, on the basis of oral or written medical evidence that the individual is unable to take part in proceedings, and the individual is represented by counsel or a solicitor who is given the opportunity of being heard.

### **Clause 220 - Transfer of certain other detainees to hospital**

This clause provides that the Department of Justice may direct by warrant that a "relevant detainee" – being someone who is not serving a sentence within the meaning of clause 211, a civil prisoner or immigration detainee within the meaning of clause 214, or a person remanded in custody by a magistrates court – be removed from a relevant place to a hospital if the conditions for giving such a direction set out in clause 223 are met. The managing authority of the hospital specified in the direction must admit the person and detain them.

### **Clause 221 - Detention in hospital on removal under section 220**

This clause provides that a person subject to a hospital direction given under clause 217 shall be liable to be detained under the direction ceases to have effect under clause 222 or 238. The clause also provides that clauses 201 to 203 apply to hospital directions granted under clause 220.

### **Clause 222 - Termination of direction under section 220**

The clause provides that hospital transfer direction, made in respect of other detainees under clause 220, ceases to have effect in certain circumstances. The direction ceases to have effect when the detainee's case is dealt with by the court.

The Department of Justice must also direct by warrant that the detainee be removed to custody and the direction will cease to have effect upon the detainee's return to custody. The Department of Justice may issue this warrant following written notification from a suitable medical practitioner that, in his or her opinion, the detainee is no longer suffering from the disorder which precipitated the direction, or on the basis of risk, or on the basis that effective treatment for the detainee's disorder can no longer be provided.

However, this does not apply if (having received a relevant notification) the Department of Justice 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 a relevant provision and that the hospital transfer direction is to cease to have effect. “Relevant provision” is defined as meaning 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.

In the absence of warrant from the Department of Justice, the court may direct that an individual be returned to custody from hospital or released on bail. This direction must be based on the written or oral evidence the responsible medical practitioner, on the basis that, in his or her opinion, the detainee is no longer suffering from the disorder which precipitated the direction, or on the basis of risk, or on the basis that effective treatment for the detainee’s disorder can no longer be provided.

### **Clause 223 - Conditions for transfer to hospital under section 214, 217 or 220**

This clause makes provision for the conditions that are to be satisfied before the Department of Justice can make a hospital transfer direction in respect of civil prisoners, immigration detainees, persons who have been remanded in custody by a magistrates’ court and “other detainees”.

The Department of Justice has to be satisfied, on the basis of medical evidence, that the person urgently needs treatment for a disorder; that failure to provide treatment to the person as an in-patient would be more likely than not to result in serious physical or psychological harm to him or her or serious physical harm to other people; and that treatment that is appropriate for the person is available in the hospital concerned.

In addition, the clause provides that the Department of Justice also has to consider that giving the hospital transfer direction is appropriate, having regard to all the circumstances. In particular, the Department of Justice has to consider other ways in which the person may become an in-patient and also the likelihood that consent will be obtained for treatment, the treatment can be given to the person under Part 2 of the Bill or if the person is under 16 years of age, the Mental Health Order.

### **Clause 224 - General provisions about hospital transfer directions**

This clause contains general provisions about hospital transfer directions. It provides for the meaning of “hospital transfer direction” for the purposes of the Part. It also provides that a hospital transfer direction will cease to have effect at the end of the period of 14 days beginning with the date of the direction, if the person has not been admitted to hospital during that time.

The clause also provides that the question of whether a person who is detained in hospital under a hospital transfer direction should receive treatment is to be determined as if the person was not detained under the direction.

The clause also provides that the responsible medical practitioner must, as soon as practicable, give the Attorney General any prescribed information and notice that a hospital transfer direction has been given and that the practitioner is of the opinion that the person who has been given the direction lacks or probably lacks capacity in relation to whether an application to the Tribunal under clause 225 should be made.

## **CHAPTER 8 – RIGHTS OF REVIEW OF DETENTION UNDER PART 10**

### **Clause 225 - Right to apply to Tribunal**

This clause provides that a “qualifying person” (as defined in clause 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 clause 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 clause 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.

### **Clause 226 - Meaning of “a qualifying person”**

This clause 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” is someone who has parental responsibility for the person.

The clause 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.

**Clause 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 clause provides that a medical practitioner who has been authorised by or on behalf of the person, or 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.

**Clause 228 - Power of certain persons to refer case to Tribunal**

This clause 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.

**Clause 229 - Duty of HSC trust to refer case to Tribunal**

This clause provides that the HSC trust in whose area the person is detained has a duty to refer the person's case to the Tribunal. 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, the relevant Trust must as soon as practicable refer the person's case to the Tribunal. "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 clause 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 requiring 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.

#### **Clause 230 - Duty to notify the Attorney General**

This clause provides that the responsible medical practitioner must, as soon as practicable, give the Attorney General any prescribed information and notice of various matters. These matters are that 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 clause 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.

#### **Clause 231 - Powers of Tribunal as to public protection order without restrictions**

This clause 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 clause 233 is met.

#### **Clause 232 - Powers of Tribunal as to public protection order with restrictions**

This clause 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 clause provides that a person must be discharged absolutely if the Tribunal 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 clause 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 clause 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.

### **Clause 233 - Sections 231 and 232: the prevention of serious harm condition**

This clause 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.

### **Clause 234 – Sections 231 and 232: additional powers of Tribunal etc**

This clause provides that where the Tribunal decides under clause 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, clause 231 or as the case may be, 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.

### **Clause 235 - Effect of conditional discharge**

This clause 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 power to recall the person to hospital. The clause 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 clause 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.

**Clause 236 - Application and references to Tribunal where person recalled**

This clause 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 clause 225 may be made in respect of the order.

**Clause 237 - Applications to Tribunal where person has not been recalled**

This clause 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.

**Clause 238 - Powers of Tribunal as to hospital directions and hospital transfer directions**

This clause 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 clause, 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, no 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 clause, “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.

#### **Clause 239 – Section 238: additional powers of Tribunal**

Where under clause 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, clause 239 applies.

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

This clause 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 clause, “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 clause 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.

### **CHAPTER 9 – SUPPLEMENTARY**

#### **Clause 241 - Provision of information**

This clause contains a power to make regulations that may provide that information is to be given to certain prescribed persons at prescribed times when a public protection

order, hospital direction or hospital transfer direction is made, or in such other circumstances where a person is or has been detained by virtue of this Part as may be prescribed in regulations.

Any regulations must include provision for the purpose of ensuring that where a person has been detained as a result of Part 10, as soon as possible, that the person is made aware of the provision under which he or she has been detained, the effect of that provision and the rights of review by the Tribunal that are available.

**Clause 242 - Ways in which information must be provided**

This clause provides for power to make regulations which provide for the ways in which information that is required to be given under Part 10 or any regulations made under Part 10 must be given to prescribed persons. Regulations may in particular require information to be given orally as well as in written form.

**Clause 243 - Section 22 may apply to person detained under Part 10**

This clause provides that if a question arises regarding whether any person detained under Part 10 requires treatment, that question is to be determined as if the person was not detained under that Part. If treatment requires authorisation under clause 22, then that authorisation is to be obtained.

**Clause 244 - Absence without permission**

This clause applies when a person who is liable to be detained under a public protection order, hospital direction or hospital transfer direction is absent without permission, fails to return to the establishment in which or she is liable to be detained after a period of leave of absence or is absent without permission from any place where he or she is required to be as a result of conditions that have been imposed on the grant of the period of leave. If a person is absent or fails to return to an establishment, he or she may be taken into custody and returned to there by any person who is on the staff of the establishment, any constable, any approved social worker or any person who has been authorised to do so by the managing authority of the establishment.

**Clause 245 - Effect of court order or direction on previous authority for hospital detention**

This clause provides that where an individual is admitted to a hospital or other establishment as a result of the making of a public protection order or hospital direction, any previous public protection order or authority for detention under Part 2 of the Bill will cease to have effect.

**Clause 246 - Appeals: general**

This clause applies where the court makes a public protection order, a hospital direction or a supervision and assessment order. Where a person appeals to any court against the order or direction, that court has the same powers as if the appeal was also against any further order made by the court. Where the person is a child, any appeal may be brought by the child, on behalf of the child by anyone who has parental responsibility for that child, or any guardian.

**Clause 247 - Appeals against orders made on finding of unfitness to be tried etc**

This clause applies where, by virtue of Chapter 6, a court makes a public protection order or supervision and assessment order in respect of a person who is unfit to plead or who is not guilty by reason of insanity.

The clause provides that the person has the same rights of appeal as if the order had been made upon his or her conviction. Accordingly, for the purposes of section 8 of the Criminal Appeal (Northern Ireland) Act 1980 and Article 140 of the Magistrates' Courts (Northern Ireland) Order 1981, the order is treated as if it were an order made on conviction, and for the purposes of Article 146 of the 1981 Order, the order is a determination of the proceedings in which the order was made.

On any appeal against the order, the Court of Appeal or county court has the same powers as if the appeal had been against both the finding and the sentence.

**Clause 248 – Hospital directions: cases stated by magistrates' courts**

This clause makes provision for an appeal against a hospital direction made by a Magistrates' Court.

**Clause 249 - Requirements as to written evidence**

This clause provides that where, under Part 10, a court may act on the written evidence of a medical practitioner, a report in writing that is purported to be signed by the medical practitioner may be received in evidence without further proof of signature or that the practitioner has the required qualifications or is of the required description. However, the court may require the practitioner to give oral evidence.

Where a report is tendered in evidence other than by or on behalf of the person who is the subject of that report, then a copy of the report must be given to his or her legal representative. If the person is not legally represented, the substance of the report must be disclosed to him or her or if the person is a child, then the substance of the report must be disclosed to the parent or guardian, if they are present in court. The

person may require the medical practitioner to be called to give oral evidence and evidence to rebut the report may be called.

**Clause 250 - Interpretation of Part 10: children**

This clause contains provision to aid with interpretation of Part 10 as it relates to children.

**Clause 251 - Interpretation of Part 10: impairment of or disturbance in the functioning of the mind or brain**

This clause contains provision to aid with the interpretation of any reference to an impairment of or a disturbance in the function of a person's mind or brain within Part 10.

**Clause 252 - Interpretation of Part 10: references to disorder**

This clause contains provision to aid with the interpretation of any reference to a disorder within Part 10.

**Clause 253 - Interpretation of Part 10: general**

This clause contains provision to aid with interpretation of Part 10. It also provides that a remand, order, direction of the court is not to be regarded as an act done or decision made for or on behalf of a person for the purposes of clause 2 or any other purpose of the Act.

**PART 11 – TRANSFER BETWEEN JURISDICTIONS**

**Clauses 254 and 255 – Removal of persons detained under Part 2 from Northern Ireland to England or Wales or Scotland**

Clause 254 establishes a framework for the transfer of patients detained in a hospital under Part 2 of the Bill from Northern Ireland to England or Wales.

If P is detained in a hospital under a Schedule 1 authorisation, the Department may authorise his or her removal to England or Wales (and may give any necessary directions for P's conveyance there) provided the following conditions are met: (1) P lacks capacity in relation to the question of his or her removal to England or Wales; (2) it would be in P's best interests to remove P there; and (3) appropriate arrangements have been made for admitting P to a hospital in England or Wales in which appropriate care or treatment is available.

The effect of the clause is that an authorisation granted in respect of P under Schedule 1 of the Bill will cease to have effect once P is admitted to a hospital in England or Wales. At that point, the relevant law in England and Wales will apply (the Mental Health Act 1983). Corresponding amendments to that Act will also have to be made for the purposes of this clause and clause 250.

Clause 255 establishes the same framework for the transfer of patients detained in a hospital under Part 2 from Northern Ireland to Scotland. The effect of the clause is that the authorisation granted in respect of P under Schedule 1 will cease to have effect once P is admitted to a hospital in Scotland or P's detention is authorised (in another way) under the 2003 Act. At that point, the relevant law in Scotland will apply (the Mental Health (Care and Treatment) Act 2003). Corresponding amendments to that Act will also have to be made for the purposes of this clause and clause 251.

#### **Clause 256 – Removal of certain persons detained under Part 10 to England or Wales**

Clause 256 establishes a framework for the transfer of patients from Northern Ireland to England or Wales who are detained under a public protection order or a hospital direction made under clause 211, 214 or 220. The Department of Justice may authorise the removal of a person to England or Wales if certain conditions are met. These conditions are that failure to remove the person would be more likely than not to result in serious physical or psychological harm to the person or serious physical harm to others; and that arrangements have been made for admitting the person to hospital in the other jurisdiction in which care or treatment that is appropriate in the person's case is available.

#### **Clause 257 - Removal of certain persons detained under Part 10 to Scotland**

Clause 257 establishes the same framework for the transfer of patients from Northern Ireland to Scotland who are detained under a public protection order or a hospital direction made under clause 211, 214 or 220.

#### **Clauses 258 and 259 – Persons to be detained under Part 2 after removal from England or Wales or Scotland to Northern Ireland**

Clause 258 makes provision for the transfer of a person who is aged 16 or over and who is liable to be detained for treatment under Part 2 of the 1983 Act from England or Wales to Northern Ireland. It places certain obligations upon the relevant HSC Trust to: (1) notify RQIA of the person's admission to hospital; (2) arrange for a report to be made (the form of which is to be prescribed) within 28 days of admission; and (3) forward a copy of that report to RQIA as soon as practicable.

The effect of the clause is that an authorisation under Schedule 1 is deemed to have been granted for the purposes of P's detention in hospital in Northern Ireland for the purposes of providing care or treatment to P.

Clause 259 makes provision for the transfer of a person who is aged 16 or over and who is subject to a compulsory treatment order under section 64 of the 2003 Act from Scotland to Northern Ireland. It places the same obligations on the relevant Trust as clause 250 in respect of such transfers. The effect of the clause is also the same as of clause 250.

**Clause 260 – Persons to be detained under Part 10 after removal from England or Wales**

This clause applies where a person is transferred from England or Wales to Northern Ireland and immediately before being removed was subject to a hospital order, hospital direction or a transfer direction in England or Wales. Certain obligations are placed on the HSC Trust to (1) notify RQIA of the person's admission to an appropriate establishment; (2) arrange for a report to be made (the form of which is to be prescribed) within 28 days of admission; and (3) forward a copy of that report to RQIA as soon as practicable. Provision is also made to treat a person as if a particular order or direction under Part 10 had been made or given in respect of that person. Additionally, provision is made so that the order or direction that is treated as having been made or given in respect of the person is so treated for particular purposes from a specified date.

**Clause 261 – Persons to be detained under Part 10 after removal from Scotland**

This clause establishes the same approach for persons who are transferred from Scotland as is taken in clause 260 for those transferred from England or Wales.

**Clause 262– Removal or transfer from Northern Ireland: power to make further provision**

Clause 262 provides for regulations to make provision in connection with the removal of a person by virtue of Part 11 or Part 2 to a place outside Northern Ireland (whether or not a place which is in the United Kingdom). The clause also provides for regulations to make provision for, and in connection with, enabling the Department and the Department of Justice to authorise and give directions in connection with the removal or transfer to a place outside Northern Ireland of prescribed descriptions of persons in particular circumstances. The regulations may prescribe steps to be taken before a person is removed or transferred or may prescribe other conditions to be met before removal or transfer; may provide that where a person is removed or transferred, any prescribed measure to which the person is subject ceases to have effect; and may apply, or make provision similar to, any provision of Part 2 or Part 10

(with or without modifications). The power to make regulations must be exercised so as to ensure that notice is given to prescribed persons and the person who is to be removed or transferred at least a prescribed period before the date of the proposed removal or transfer; and there is a right to apply to the Tribunal in respect of the removal or transfer.

**Clause 263 – Persons removed or transferred to Northern Ireland: power to make further provision**

Clause 263 provides that regulations may be made to make provision, in respect of persons of a prescribed description who are removed to Northern Ireland, requiring prescribed steps to be taken when the person arrives in Northern Ireland and providing for the person to be treated as if he or she was a person of a prescribed description subject to measures under the Bill. The clause also provides that regulations may make provision about the application of the Bill to persons who are removed to Northern Ireland and who are treated as being subject to particular measures under the Bill.

Clauses 262 and 263 enable provision to be made in the future should it prove possible to devise arrangements for the transfer between the UK jurisdictions of persons subject to other measures such as community residence requirements and their equivalent in England, Wales or Scotland. Once the Bill comes into force, there is insufficient correspondence between such measures and their equivalents in the rest of the UK to enable the Bill to make such provisions at this point.

**Clause 264 – Interpretation of Part 11**

Clause 264 provides definitions of particular terms for the purposes of Part 11.

**PART 12 - CHILDREN**

**Clause 265 – In-patients under 18: duties of hospital managers**

This clause places a new duty on hospital managers to ensure that any person aged 16 or 17 who is an in-patient in a hospital for the assessment or treatment of mental disorder under the Bill is accommodated in an environment that is suitable for their age, subject to their needs. This is an additional safeguard for 16 and 17 years olds which recognises that they are still children under the law

**Clause 266 and Schedule 8 – Amendments of Mental Health Order: children etc**

As the Bill will replace Part 2 of the Mental Health Order as it currently applies to persons aged 16 and over, clause 266 and Schedule 8 restricts its future application to children (defined in clause 266 as children under 16) and repeals Articles 18 to 26

(guardianship) and all references to guardianship throughout the Order. Provisions in the Order relating to patients concerned in criminal proceedings are also repealed as the new provisions in the Bill apply to persons of all ages. Articles 97 to 109 (management of property and affairs of patients) are also repealed.

In addition, Schedule 8 makes provision for additional safeguards for children in the Mental Health Order. These include a new overarching principle requiring persons making certain decisions under the Order to have a child's best interests as their primary consideration. Provision based on clause 7 of the Bill but adapted so that it is appropriate for children is made explaining the steps to be taken when making a determination of what care or treatment would be in a child's best interests.

Provision is also made in Schedule 8 for independent advocates to be available to represent and support children admitted to hospital for assessment or treatment of mental disorder or where it is proposed to give a child certain kinds of serious treatment. The detail of this new safeguard will be provided for in regulations made under the Order. A duty to provide age-appropriate accommodation is also included in Schedule 8.

The application of Part 4 of the Mental Health Order has also been restricted so that it only applies to persons under 16 in the future. However, some significant amendments have been made to this Part to align the safeguards in it as closely as possible to those that would apply to similar treatment if given under the provisions of the Bill in respect of a person aged 16 and over.

## **PART 13 – OFFENCES**

### **Clause 267 – Ill-treatment or neglect**

This clause makes it an offence for a person, X, to ill-treat or wilfully neglect another person, P, where: (1) P is in the care of X and X knows or believes that P lacks capacity in relation to matters concerning P's care; (2) P is detained under Part 9 or 10 and is in the custody or case of X; (3) X is an attorney appointed by P under a lasting power of attorney or enduring power of attorney; or (4) X is a court-appointed deputy for P. This offence applies in respect of persons of all ages. Conviction can result in a fine, prison term or both.

### **Clause 268 – Forgery, false statements etc**

This clause makes it an offence for anyone to make a false entry or statement in the documents listed in this clause. Conviction can result in a fine, prison term or both.

**Clause 269 – Unlawful detention of persons lacking capacity etc**

This clause makes it an offence for a person (“R”) to knowingly detain a person (“P”) who is over 16 and lacks capacity, in circumstances amounting to a deprivation of liberty and there is no authority to do so under the Bill or any other statutory provision. R also commits an offence if R intentionally detains P in circumstances amounting to a deprivation of liberty; R does so in purported reliance on Part 9 or 10; and P is not liable to be detained by virtue of that Part. It also makes it an offence to continue to detain someone who has been detained in any place under the Bill after their liability to be so detained by virtue of the Bill or any other statutory provision ceases. Conviction can result in a fine, prison term or both. However, no offence under this clause is committed where the person who is detained is under 18 and the detention gives effect to a decision made by a parent or guardian of the person. Nor does this new offence replace or in any way interfere with the common law offence of false imprisonment.

**Clause 270 – Assisting persons to absent themselves without permission**

This clause creates several new offences relating to assisting someone to absent themselves without permission from a place in which they are liable to be detained in circumstances amounting to a deprivation of liberty under the Bill. A person can only be guilty of an offence under this clause if they know that the person they are assisting is liable to be detained under the Bill. Conviction can result in a fine, prison term or both.

**Clause 271 – Assisting persons to breach community residence requirement**

This sets out that the offence detailed in clause 270 is similarly applicable to the provisions of a community residence requirement under the Bill.

**Clause 272 - Obstruction**

In certain circumstances someone may be authorised by the Bill to visit, interview or examine a person affected by the provisions of the Bill. This clause makes it an offence to refuse or obstruct that access, or to refuse to produce related records when requested by the authorised person. The clause also makes it an offence for any third person to insist on being present after having been requested to withdraw by the authorised person. Conviction can result in a fine, prison term or both.

**Clause 273 – Offences by bodies corporate**

Where an offence has been committed under the Bill by a body corporate, e.g. bank, building society, private healthcare company, HSC trust, this clause sets out that any director, manager, secretary, or other similar officer of that body is also guilty of the

offence if (1) it was done with their consent; (2) if they connived in the offence; or (3) if the offence can be attributed to neglect on their part. Under the clause such persons can have proceedings issued against them in addition to those which may be issued against the body corporate.

Section 20(2) of the Interpretation Act (Northern Ireland) 1954 (offences committed by a body corporate) has been disapplied to offences committed by bodies corporate under the Bill. Specific provision on this topic is made by subsections (1) and (2) of this clause.

## **PART 14 – MISCELLANEOUS**

### **Clause 274 - Renaming of Mental Health Review Tribunal**

Clause 274 provides for the renaming of the Mental Health Review Tribunal for Northern Ireland (as constituted under Article 70 of the Mental Health Order). It will be known as the ‘Review Tribunal’ when the Bill comes into operation.

### **Clause 275 - Visiting etc powers of medical practitioners in connection with the Tribunal**

Clause 275 is to be read alongside a number of provision in the Bill that give medical practitioners certain powers to visit and to obtain/examine health and other records relating to P for certain purposes. If P has capacity regarding the granting of access to such records, this clause provides that the medical practitioner must obtain P’s consent prior to exercising that power.

### **Clause 276 – Power to make regulations about dealing with money and valuables**

Clause 276 gives the Department a power to make regulations about dealing with P’s money and valuables where P is aged 16 or over and lacks capacity in relation to the management of his or her property or affairs and is an inpatient in hospital, or a resident of a care home, or any other establishment specified by the Department.

The regulations may permit the HSC trust or the management authority of the care home in which P is resident to hold money and valuables on behalf of P and to spend or dispose of them for P’s benefit. This only applies to money or valuables not exceeding £20,000. For valuables or money in excess of this sum, the consent of RQIA will be required. The Department is given the power under the clause to amend this sum by regulations. The regulations cannot give the HSC trust any authority to act in any way that is inconsistent with a decision made by a lasting power of attorney, or court deputy that falls within the scope of their powers and is made in accordance with this Bill or a decision made by an enduring power of attorney in accordance with the Enduring Powers of Attorney (Northern Ireland) Order 1987.

**Clause 277 – Contravention of regulations under section 276(2)**

This clause allows the Department to make it an offence for any person to fail to comply with regulations made under the previous clause 265.

**Clauses 278 and 279 – Expenditure and payment for necessary goods and services**

Clause 278 ensures that, provided the applicable safeguards are met under Part, D can use cash in the possession of a person who lacks capacity or promise payment on his or her behalf to cover the expenditure involved. They can also be reimbursed should they choose instead to pay for the goods or services themselves.

Clause 279 ensures that where a contract for necessary goods or services has been made on behalf of a person who lacks capacity, they must pay a reasonable price for them. “Necessary” is defined for this purpose as suitable to the person’s condition in life and to that person’s actual requirements at the time when the goods or services are supplied.

These rules do not however extend to accessing a person’s bank account or selling their property. A finance intervention of this kind can only be done under the legal authority conveyed to an attorney under a lasting power of attorney (or an EPA) or by application to the court or if the power to make decisions of this kind has been given to a deputy by the court.

**Clause 280 – Appointment of approved social workers**

Clause 280 requires each HSC trust to ensure that it appoints a sufficient number of approved social workers to carry out the functions assigned to them under the Bill. The clause also provides that no one can be appointed an approved social worker unless the HSC trust has approved him/her as having appropriate competence in dealing with people who lack capacity. In appointing approved social workers the HSC trust must also have regard to directions issued by the Department.

**Clause 281– Miscellaneous functions of HSC trusts**

Clause 281 enables a HSC trust in certain circumstances to provide occasional personal expenses, financial assistance, suitable training or occupation to a person who lacks capacity. The extent of any such schemes will be set by the Department.

**Clause 282 – Direct payments in place of provision of care services**

This clause amends Section 8 of the Carers and Direct Payments Act (Northern Ireland) 2002 to enable regulations to be made allowing a suitable person to receive a

direct payment on behalf of another person who lacks capacity to consent. Provisions describe the consent required, namely that of the suitable person and an attorney/deputy of the service user, and enable regulations to be made to specify matters that the HSC trust must have regard to, how individuals with fluctuating capacity are to be treated, and to set out conditions that must/may be imposed in relation to the direct payment.

#### **Clause 283 – International protection of adults**

This clause provides that Schedule 9 gives effect in Northern Ireland to the Convention on the International Protection of Adults 2000.

#### **Clause 284 – Review of law relating to advance decisions**

This clause puts an obligation on the Department to review the law in relation to advance decisions and to lay a report of that review before the Assembly, within 3 years of this clause coming into operation which, under clause 307, will be the day after Royal Assent

#### **Clauses 285 and 286 – Matters excluded from the Act**

Clause 285 sets out a number of decisions which can never be made under the Act on behalf of someone who lacks capacity. Many of these decisions are of such a personal nature, such as consenting to marriage, that it would be inappropriate for a person other than the person directly involved to make it. Clause 286 also clarifies that the Bill does not give anybody the right to place an electoral vote on someone else's behalf.

Unlike equivalent legislation elsewhere, there is no exclusion in relation to matters governed by mental health legislation. The Bill will replace the Mental Health Order as it applied to persons aged 16 and over.

#### **Clause 287 – Relationship of Act with law relating to murder etc**

Clause 287 clarifies that the Bill does not affect the existing laws on murder, manslaughter, or assisted suicide.

### **PART 15 – SUPPLEMENTARY**

#### **Clause 288 – Codes of practice**

This clause places an obligation on the Department to provide one or more codes of practice. It stipulates that the Department must consult with relevant bodies before preparing or revising the code and must in particular consult the Department of

Justice if the code contains specific provision about persons detained under Part 9 or 10; and that the Department may delegate the preparation or revision of the code as it sees fit. The code, or any alterations of the code, must be laid before the Assembly for the statutory period required; and provided the Assembly does not resolve to withdraw the draft, the code must then be published.

#### **Clause 289 – Effect of code**

This clause places a duty on relevant people to have regard to the code(s) of practice when acting in any of the ways mentioned in subsection (2), in relation to a person aged 16 or over who lacks capacity. The provision of the code(s) or failure to comply with them may be taken into account in any relevant court or tribunal proceedings.

#### **New clause 290 – Provision of information by HSC trusts and the Department**

This clause places a duty on the HSC trusts and the Department to provide a relevant authority with returns, reports and other information as the authority may require for the performance of its functions under the Bill. “A relevant authority” means the High Court, the Public Guardian, the Review Tribunal and the Attorney General for Northern Ireland.

#### **New clause 291 – Provision of facilities by HSC trusts and the Department**

This clause places a duty on an HSC trust to provide to a relevant authority such facilities as are necessary to enable the relevant authority to perform its functions under the Bill. The clause also places a duty on the Department to provide to the Review Tribunal such facilities as are necessary for it to perform its functions under the Bill. “Relevant authority” has the same meaning as is given by clause 290.

#### **Clause 292 - Warrants**

An application for a warrant may be made by an officer of a HSC trust or a constable where any person liable to be detained in a place in circumstances amounting to a deprivation of liberty is found on any premises to which admission has been refused or refusal of such admission is apprehended. The warrant authorises any constable accompanied by a medical practitioner, and an approved social worker (if appropriate), to enter the premises using force if necessary and to remove the person.

#### **Clause 293 - Warrants: persons liable to be detained under 1983 Act or 2005 Order**

An application for a warrant may be made by representatives of the health services in Scotland or England and Wales, where a person is found on any premises in NI to which admission has been refused or refusal of such admission is apprehended, and

there is reasonable cause to believe that the person may be subject to relevant mental health law in Scotland, or England and Wales, which permits him to be taken into custody there. The warrant authorises a constable, accompanied by a medical practitioner, to enter the premises using force if necessary and remove the person.

**Clause 294 – Provisions as to custody, detention etc**

This clause provides that an individual removed from, taken to or detained in any place by the police under Part 9, or taken to or detained in any place under Part 10, is to be treated as being in legal custody. The clause also provides that the constable or any other person taking or detaining the individual under Part 9 or 10 has all the powers, authorities, protections and privileges which a constable has within the area for which he or she acts as constable.

**Clause 295 – Retaking of persons escaping from legal custody**

This clause makes provision for the retaking of persons (“P”) escaped from legal custody. Provided that P remains liable to be detained by virtue of Part 9 or 10, then P can be retaken into custody by: whomever had custody of him/her prior to the escape; any constable or social worker; or, if P was detained in an appropriate establishment, any person of the staff or authorised in writing by the managing authority of that establishment.

**Clause 296 – Special accommodation**

Although Northern Ireland does not at present have any high security hospitals, this clause makes provision for the Department and the Department of Justice to, in the future, provide such special accommodation for people detained under the Bill who require care and treatment in accommodation under conditions of special security, to protect other persons.

**Clause 297 – Panels constituted to decide applications: general provision**

This clause requires a panel constituted to grant an authorisation under the Bill (under schedules 1, 3 or 7) to have 3 members, all of whom must be present during any panel proceedings. Further membership requirements may be provided by regulations, including requirements around how the panel should operate. The clause also allows for regulations to amend the time limit in which panels must make decisions on authorisations (currently 7 working days on receipt of application); and also the length of interim authorisations granted (currently 28 days).

**Clause 298 – Protection for acts done in pursuance of Part 9 or 10**

This clause provides that no civil proceedings may be brought in relation to any act purporting to be done in pursuance of Part 9 or 10, without the leave of the High Court, and any criminal proceedings in relation to such an act may only be brought by or with the consent of the Director of Public Prosecutions. This clause does not apply in respect of proceedings brought against the Department, the Regional Board, or a HSC trust.

**Clause 299 – Risk of serious physical harm to others**

This clause clarifies the evidence that should be taken into account where a determination is required on the risk of serious physical harm to others. Only evidence that the person has behaved violently towards other people, or that the person has behaved in such a way as to place other people in reasonable fear of serious physical harm to themselves, may be taken into account.

**Clause 300 – Medical practitioners who may make certain medical reports**

Regulations may specify which type of medical practitioners may make medical reports under the Bill. It may include, for example, that the medical practitioner must be approved by RQIA.

**Clause 301 – Documents appearing to be duly made**

Regulations may make provision to enable certain documents (prescribed) to be treated as factual and accurate, to the extent that they can be acted upon without further proof in certain circumstances.

**Clause 302 – Regulations**

This clause clarifies under what Assembly process regulations of the Bill shall be approved.

**Clause 303 – Consequential amendments and repeals**

This clause states that the Bill's consequential amendments can be found in Schedule 10 of the Bill; and that provisions to be repealed are to be found in Schedule 11. It also provides that the Departments may by regulations, including those passed in the same Assembly session as the Bill, make such other amendments of statutory provisions as is considered appropriate in consequence of the Bill.

**Clause 304 – Persons “unconnected with” a person**

This clause sets out what the Bill means when it refers to someone being “unconnected with” another person.

**Clause 305 – Meaning of “mental disorder”**

This clause defines “mental disorder” as meaning any disorder or disability of the mind. Drug or alcohol dependence alone does not fall within this definition, unless the drug or alcohol use is linked to the mental disorder.

**Clause 306 – Definitions for purposes of Act**

This clause sets out the definitions of words and phrases as they apply in the Bill.

**Clause 307 – Commencement etc**

This clause sets out that provisions of the Bill will commence on a day, or days, set by the Department; but that certain clauses regarding regulation making powers and definitions come into operation the day after Royal Assent is achieved. It also provides that the Departments may make transitional, transitory, or saving provisions through regulations, as appropriate, in relation to the commencement of any provision of the Bill.

**Clause 308 – Short title**

This clause sets out how the Bill may be referred to (the Mental Capacity Act (NI) 2016).

**FINANCIAL EFFECTS OF THE BILL**

40. The total estimated financial implications to DHSSPS and DOJ for the Bill when introduced were in the range of £75.8m to £129.2m for year one implementation costs; and £68m to £102.7m for recurrent costs.
41. Phase two of the exercise to provide reliable costs estimates has resulted in a significant reduction of the estimated costs.
42. The estimated costs range is now £76.4m to £84.7m for year one implementation costs; and £68.6m to £76.9m for recurrent costs (across DHSSPS and DOJ).
43. For DHSSPS specifically, the year one figure from phase two of the costings exercise is estimated at £71.8m, with recurrent costs estimated at £64m. This reduction has

been mainly achieved by reducing the assumptions made by HSC Trusts in calculating the amount of staff time that will be required under the new legislation.

44. DOJ costs have been revised upwards from £4m - £11m to an estimated £4.4m - £13m. This revision in costs is mainly due to an increase in the estimated number of individuals subject to the interventions and authorisations within the Bill. As a consequence of this increase, there will be a corresponding increase in numbers eligible to apply to the Review Tribunal and for legal aid. Review Tribunal costs have also been revised to now include an estimate for travel and subsistence for panel and staff members, which have been calculated on current average costs. The costs to the Review Tribunal of defending judicial reviews are also now included in the revised estimates.
45. The introduction of the legislation will be a very significant change to practice and culture across the health and social care (HSC) and justice sectors. The estimated costs therefore take account of the costs of training the entire HSC workforce; additional staffing costs associated with the various interventions envisaged by the Bill; Legal Aid for cases brought under the legislation; and costs associated with establishing and operating the Review Tribunal and the Office of the Public Guardian.
46. The recommendations of the House of Lords Select Committee report on the Mental Capacity Act 2005 in England and Wales have featured heavily in the considerations on the costs of implementing the Bill in Northern Ireland, and it is thought prudent to ensure that costings are realistic and reflect the very significant change to practice and culture in the HSC and justice systems that will be required if the Bill is to achieve its aims.
47. DHSSPS and DoJ will continue to further refine the estimated costs through, for example, changing existing practices, getting better value from resources already deployed, reallocating current priorities, and analysing similar costs in other jurisdictions. Crucially, commencement of the Bill can be delayed or phased, pending the resolution of the financial issues.

## **HUMAN RIGHTS ISSUES**

48. The provisions of the Bill are compatible with the provisions of the Human Rights Act 1998, and European Convention on Human Rights.

## **EQUALITY IMPACT ASSESSMENT**

49. In accordance with their duty under section 75 of the Northern Ireland Act 1998, both Departments conducted Equality Impact Assessments on their respective policy proposals.
50. Copies of the Department of Health, Social Services and Public Safety Assessment can be accessed via the link below and copies of documents relating to the Department of Justice Assessments are available on request.

Department of Health, Social Services & Public Safety Updated Equality Impact Assessment:

<https://www.dhsspsni.gov.uk/sites/default/files/consultations/dhssps/mental-capacity-updated-equality-impact.pdf>

## **SUMMARY OF THE REGULATORY IMPACT ASSESSMENT**

51. A Regulatory Impact Assessment is published alongside the Mental Capacity Bill. Copies are available from the Department for Health, Social Services and Public Safety, Mental Capacity Legislation Unit, Room D2.10, Castle Buildings, Stormont Estate, Belfast, BT4 3SQ.
52. It is considered that appreciable regulatory costs may arise due to the enactment of the Bill in the independent healthcare sector and within certain voluntary sector organisations.
53. The main cost envisaged by the Bill for the independent healthcare sector is in relation to training on the provisions, assumed as £5.42m, incorporating backfill, delivery costs and travel expenses.
54. The main costs for the voluntary and community sector will involve training and awareness raising costs for those organisations which represent or lobby for interested persons, assumed in the region of £80,000.
55. It should be noted that the Regulations and Codes of Practice to be produced under the Bill add other costs to business, but these will be subject to detailed regulatory impact assessment and consultation as these are developed. There will be considerable costs for those organisations which will perform an independent advocacy role under the new legislation. These will be further examined in a regulatory impact assessment to be produced alongside the independent advocacy draft Regulations.

## **LEGISLATIVE COMPETENCE**

56. The Minister of Health, Social Services and Public Safety had made the following statement under section 9 of the Northern Ireland Act 1998:

*“In my view the Mental Capacity Bill would be within the legislative competence of the Northern Ireland Assembly.”*

## **SECRETARY OF STATE CONSENT**

57. The Secretary of State has consented under section 8 of the Northern Ireland Act 1998 to the Assembly considering the Bill.