

---

# The Model Law



---

# Outline of the model law

## Part I Principles

## Part II General provisions

## Part III Serious medical treatment

## Part IV Informal patients needing care and treatment

## Part V Compulsory provision of care and treatment

## Part VI Forensic provisions

## Part VII The Mental Capacity Tribunal

## Part VIII Patient safeguards

## Part I Principles

### 1. Principles of the Act

The following principles apply for the purposes of the Act:

- (1) A person must be assumed to have capacity unless lack of capacity is established.
- (2) A person is not to be treated as unable to make a decision unless all practicable steps to help the person to do so have been taken without success.
- (3) A person is not to be treated as unable to make a decision merely because the person makes an unwise decision.
- (4) An act done, or decision made, under the Act for or on behalf of a person who lacks capacity must be done, or made, in his or her best interests, except as otherwise specified.
- (5) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.
- (6) All powers shall be exercised, and all services provided without any direct or indirect discrimination on the grounds of disability, age, gender, sexual orientation, race, colour, language, religion or national, ethnic or social origin and any differences on these grounds should be respected.
- (7) Any compulsory detention or treatment of a person under the Act should be matched by a reciprocal duty to provide treatment and support that is likely to provide a health benefit to that person.
- (8) Family members, friends or partners, who provide care to patients on an informal basis, should receive respect for their role and experience and have their views and needs taken into account.

## Part II General provisions

### 2. Scope of the Act

Except as otherwise provided the Act applies to persons who because of an impairment or disturbance in the functioning of the mind lack the capacity at the material time to make a decision relating to their care or treatment.

### 3. Definition of capacity

- (1) For the purposes of the Act a person (“P”) is unable to make a decision and lacks capacity if unable:
  - (a) to understand the information relevant to the decision
  - (b) to retain that information
  - (c) to use, weigh or appreciate that information as part of the process of making the decision, or
  - (d) to communicate the decision (whether by talking, using sign language or any other means).
- (2) The fact that P is able to retain the relevant information for a short period only does not prevent P from being regarded as able to make the decision.

### 4. Definition of best interests

- (1) In determining what is in the best interests of a person (“P”), the decision-maker must consider all the relevant circumstances including whether it is likely that P will at some time have capacity in relation to the matter, and if so when that is likely to be.
  - (2) He or she must, so far as reasonably practicable, permit and encourage P to participate, or to improve P’s ability to participate, as fully as possible in any act done, and any decision made, affecting P
  - (3) The decision-maker must consider, so far as is reasonably ascertainable:
    - (a) P’s past and present wishes and feelings (and, in particular, any relevant written statement made by P with capacity)
    - (b) the beliefs and values that would be likely to influence P’s decision if he or she had capacity, and
    - (c) the other factors that P would be likely to consider if able to do so.
  - (4) The decision-maker must take into account, if it is practicable and appropriate to consult them, the views of:
    - (a) anyone named by P as someone to be consulted on the matter in question or on matters of that kind
    - (b) anyone engaged in caring for P or interested in P’s welfare
    - (c) any substitute decision maker appointed by the person or appointed for the person by the Tribunal as to what would be in P’s best interests.
  - (5) Notwithstanding (4) above, if a clause of this Act requires the agreement of any person that provision shall apply.
  - (6) The principle of best interests applies to all decisions and to those participating as carers (or advocates) in decisions made on behalf of P, unless otherwise specified.
-

(7) For the purpose of this Act a substitute decision maker is a person who has been appointed by the person (“P”) or by the Tribunal to act on behalf of P for the purposes of making decisions in relation to the care or treatment of P.

(8) If all the other factors above are met, a decision may be in P’s best interests although it is not in accordance with P’s present expression of wishes and feelings, and although P objects to the treatment.

(9) In determining best interests an advance refusal of treatment made by P in accordance with clause 53 shall be binding upon a decision maker in accordance with the provisions of clause 54.

(10) Where:

(a) under the Act, P’s treatment is authorised only when it is in his or her best interests, and

(b) during the course of such treatment P poses a serious threat of harm to another person,

P may be provided with such treatment as is immediately necessary to prevent such harm occurring and is proportionate to the likely seriousness of that harm.

### **5. Further definitions: care and treatment and primary carer**

(1) “Care or treatment” that may be provided under the Act includes actions in relation to medical treatment, nursing, psychological or care needs, habilitation and rehabilitation and specific welfare arrangements, and includes the use of restraint or seclusion in accordance with guidelines established by Regulations.

(2) “A decision in relation to care or treatment” of the person (“P”) includes a decision to admit the person to a hospital or care home for the purposes of care or treatment.

(3) The “primary carer” is the person who has the closest day to day care of P or, in the absence of such a person, a person who has an ongoing concern for the well-being of P.

(4) The primary carer shall act in the role of substitute decision maker until another person is appointed unless:

(a) P objects to the primary carer being appointed

(b) the primary carer is unable to act or is otherwise unsuitable.

(5) If subclause (4)(a) or (b) applies the appropriate authority shall appoint an advocate to act in the role until the substitute decision maker is appointed.

(6) The advocate may at any time make an application to a single member Tribunal for a substitute decision maker to be appointed.

### **6. General authority**

(1) Subject to the other provisions of the Act, a person is authorised to do an act with respect to the welfare, care or treatment of a person who lacks capacity (“P”) if that act is in the best interests of P.

(2) Nothing in this clause excludes a person’s civil or criminal liability resulting from negligence in doing the act.

(3) If that act involves the restraint of P the act must be a proportionate response to the likelihood of harm to P and the seriousness of that harm if the act is not done.

- 
- (4) A person restrains P if he or she:
- (a) uses or threatens to use force to secure the doing of an act which P resists, or
  - (b) restricts P's liberty of movement, whether or not P resists, or authorises another person to do any of those things.
- (5) This clause does not authorise the use of force on P to administer medication unless it is immediately necessary to prevent serious harm to P.
- (6) This clause does not authorise the provision of serious medical treatment, unless the requirements of Part III are met.
- (7) Except as provided by (3) above, this clause does not authorise the deprivation of P's liberty.
- (8) This clause does not authorise a person to do an act that is contrary to:
- (a) a decision made by P in a valid advance directive, as provided by clauses 53 and 54
  - (b) the decision of a substitute decision maker acting within the scope of his or her authority.

## 7. Application of the Parts of the Act<sup>1</sup>

The following Parts of the Act apply to certain decisions or acts:

- (1) Part III applies if the decision or act involves serious medical treatment.
- (2) Part IV applies if P does not object to the care or treatment but:
  - (a) is likely to require care or treatment in a hospital or care home for at least 28 days, or
  - (b) needs to be deprived of liberty in his or her best interests in a hospital or care home.
- (3) Part V applies if a person ("P") objects to a decision or act that involves the provision of care or treatment to P, unless that decision or act is authorised by clause 6.

## Part III Serious medical treatment

### 8. Application of this Part

Except as otherwise provided, this Part applies to every person receiving care or treatment under this Act or receiving treatment authorised by a substitute decision maker or the Tribunal under clause 49 or 50.

### 9. Requirements before serious medical treatment can be provided

- (1) If a health or social care provider is proposing to provide, or secure the provision of, serious medical treatment for a person ("P") who lacks capacity to consent to the treatment, the following provisions apply:
- (a) The clinician in charge of P's care or treatment (the responsible clinician) shall consult:
    - (i) P, unless inappropriate or impracticable
    - (ii) the substitute decision maker for P
    - (iii) P's primary carer.

---

<sup>1</sup> A possible amendment to Clause 7 following review of the commentaries (see our Response to Commentaries) is presented in the Addendum at the end of the Model Law.

- (b) Where no substitute decision maker has been appointed the responsible clinician shall apply to the Tribunal for the appointment of a suitable person to act.
- (c) If the appointment of such a person is impracticable the primary carer of P shall be appointed to act in that role in accordance with clause 5(4).
- (2) Before serious medical treatment is provided to P the approved clinician must prepare a written care plan.
- (3) “Serious medical treatment” means treatment that is defined in Regulations.

#### **10. Approved doctor to provide second opinion on serious medical treatment where there is a disagreement as to P’s best interests**

- (1) In the event of a disagreement between the responsible clinician and the substitute decision maker, or person acting in that role under clause 5(4), that the treatment is in the best interests of a person (“P”), an approved doctor must examine P and give a second opinion.
- (2) In any case where it is proposed to provide serious medical treatment to P a request for an approved doctor to examine P and give a second opinion may also be made by:
  - (a) the substitute decision maker
  - (b) an advocate
  - (c) P’s primary carer.
- (3) If agreement on whether the proposed treatment is in P’s best interests still cannot be reached following the second opinion, the case will be referred to the Tribunal for a determination.

#### **11. Treatment urgently required**

- (1) If serious medical treatment needs to be provided to a person who lacks capacity as a matter of urgency in order to save life or serious and imminent deterioration in health, it may be provided on the basis of the opinion of one medical practitioner despite the absence of a second opinion or a care plan.
- (2) This clause does not authorise a person to provide treatment that is contrary to:
  - (a) a decision made by P in a valid advance directive, as provided by clauses 53 and 54
  - (b) the decision of a substitute decision maker acting within the scope of his or her authority.

#### **12. Serious medical treatment requiring approval by a second medical opinion or the Tribunal**

- (1) If a healthcare provider is proposing to provide, or secure the provision of:
  - (a) electroconvulsive therapy
  - (b) medication for mental disorder beyond the period of 3 months from the date of the first treatment provided under this Act
  - (c) other treatments prescribed in Regulations

for a person (“P”), who lacks capacity to consent to the treatment, the agreement of an approved doctor qualified to give a second opinion on the treatment shall be obtained before the treatment proceeds.

(2) The agreement to the proposed treatment of the approved doctor who gives the second opinion shall be recorded on an approved form.

(3) Regulations shall provide for the period of time for which the approved form is in force.

(4) In respect of treatment provided under clause (1)(b) above, the maximum period for which the approved form shall be in force is 6 months.

(5) If a healthcare provider is proposing:

(a) to withhold or withdraw artificial nutrition or hydration from a person in a permanent vegetative state or a minimally conscious state

(b) organ or bone marrow donation by a person who lacks capacity to consent

(c) non-therapeutic sterilisation of a person who lacks capacity to consent

(d) other treatment prescribed by Regulations

an application shall be made to the Tribunal for a determination on the matter.

## Part IV Informal Patients lacking capacity and needing care and treatment<sup>2</sup>

### 13. Application of this Part

(1) This Part applies to a person (“P”) who because of an impairment or disturbance in the functioning of the mind is reasonably believed to lack the capacity to make a decision relating to his or her care or treatment (including accommodation for care and treatment) and:

(a) P is likely to require care and treatment in hospital or a care home for at least 28 days, or

(b) it is reasonably believed that P needs to be deprived of liberty in his or her best interests in a hospital or care home.

### 14. Protections for informal patients in residential care

(1) If a person (“P”) to whom this Part applies is receiving care or treatment in a hospital or care home, or it is necessary for him or her to enter hospital or a care home for care or treatment, and:

(a) treatment can lawfully be provided without P being subject to the provisions of Part V

(d) it is likely that P will continue to lack capacity and to require care or treatment in hospital or a care home for at least 28 days

an approved clinician shall examine P

(2) If the approved clinician is satisfied that:

(a) P lacks capacity in relation to care or treatment in the hospital or care home

(b) care or treatment in the hospital or care home for at least 28 days is in P’s best interests

P may be admitted to that hospital or care home and the hospital or care home shall register P with the appropriate authority.

---

<sup>2</sup> We propose a number of simplifying amendments to Part IV in the light of the commentaries (see our Response to Commentaries) – A simplified Part IV, now dealing only with ‘Deprivation of Liberty’ can be found in the Addendum at the end of the Model Law.



(3) The appropriate authority shall appoint a person as the responsible clinician in charge of the care or treatment of P.

### **15. Requirements for informal patients lacking capacity and requiring residential care for a significant period**

- (1) The responsible clinician shall prepare a written care plan.
- (2) Before preparing the care plan the responsible clinician shall consult the substitute decision maker for P or, in the absence of such a person, the primary carer.
- (3) A copy of the care plan should be provided to P, the substitute decision maker, the carer and an advocate of P.

### **16. Review of care plan**

The care plan shall be reviewed by the approved clinician at regular intervals, as specified by Regulations.

### **17. Requirements for informal patients lacking capacity and needing to be deprived of liberty in their best interests**

- (1) In the following situation, clause 18 applies:
  - (a) a person (“P”) to whom this Part applies:
    - (i) is receiving care or treatment in a hospital or care home, or
    - (ii) it is necessary for P to enter a hospital or care home for care or treatment
  - (b) treatment can be lawfully be provided without P being subject to the provisions of Part V
  - (c) it is reasonably believed that P needs to be deprived of liberty in his or her best interests.

### **18. Conditions for deprivation of liberty**

- (1) When the conditions specified in clause 17 apply, a registered medical practitioner and an approved health or social care professional must each examine P and decide whether the following conditions are met:
  - (a) P lacks capacity in relation to whether he or she should be accommodated in the relevant hospital or care home for care or treatment
  - (b) P has an impairment or dysfunction of the mind
  - (c) it is in P’s best interests to be a detained resident
  - (d) deprivation of liberty is a proportionate response to the likelihood of P suffering harm, and the likely seriousness of that harm.
- (2) P is to be considered to be deprived of liberty within this Part if:
  - (a) he or she would not be permitted to leave the hospital or care home upon expressing a wish to do so or attempting to do so, or
  - (b) effective control is exercised over P’s care and his or her freedom of movement is so confined as to amount to a deprivation of liberty.

(3) Before a person may be deprived of liberty under this clause the period of deprivation of liberty shall be agreed by the registered medical practitioner and the health or social care professional.

(4) This period shall not exceed 12 months.

(5) If it is an emergency P may be deprived of liberty on the basis of one assessment provided that the second assessment occurs within 72 hours.

(6) Where the examiners are agreed that conditions of this clause are met, P may be deprived of liberty in the manner authorised.

### **19. Formal procedures for deprivation of liberty**

(1) If the registered medical practitioner and the approved health or social care professional agree that the conditions in clause 18(1) are met, the hospital or care home shall register P with the appropriate authority.

(2) The appropriate authority shall appoint a person as the responsible clinician in charge of the care or treatment of P.

(3) The responsible clinician shall prepare a written care plan.

(4) Before preparing the care plan the responsible clinician shall consult the substitute decision maker for P or, in the absence of such a person, the primary carer.

(5) A copy of the care plan shall be provided to P, the substitute decision maker, the carer and an advocate of P.

(6) If there is no substitute decision maker the responsible clinician shall apply to the Tribunal to appoint one.

### **20. Applications to the Mental Capacity Tribunal**

P, P's primary carer, or P's substitute decision maker may apply to the Tribunal for a review of a decision to admit P to a hospital or care home or to deprive P of liberty under this Part.

## **Part V Compulsory Provision of Care and Treatment<sup>3</sup>**

### **21. Application of this Part**

(a) This Part applies to a person ("P") if the following conditions are met:

(1) P has an impairment or dysfunction of the mind.

(2) P lacks capacity to make a decision about his or her care or treatment.

(3) P needs care or treatment in his or her best interests.

(4) P objects to the decision or act that is proposed in relation to his or her care or treatment and that decision or act is not authorised by clause 6.

(5) The proposed objective cannot be achieved in an alternative less restrictive fashion.

(6) Treatment is available that is likely to alleviate or prevent a deterioration in P's condition.

---

<sup>3</sup> We propose a number of amendments to Part V that simplify the compulsory treatment process as a result of the commentaries (see our Response to the Commentaries). The amendments include a change to Clause 27 (3) and revised Clauses 28–33. They are presented in the Addendum at the end of the Model Law.

- (7) The exercise of compulsory powers is a necessary and proportionate response to the risk of harm posed to P or any other person, and to the seriousness of that harm, if the care or treatment is not provided.
- (b) If any of these conditions are no longer met P shall be discharged from compulsory powers.

## **22. Preliminary examination**

- (1) If the appropriate authority receives a reasonable request for a health assessment of a person (“P”) from any person with a legitimate interest in P’s welfare, and if the conditions in clause 21 appear to be met in P’s case, it must, as soon as practicable after receiving the request, arrange for P to be examined by a registered medical practitioner.
- (2) After examining P, if the registered medical practitioner considers it likely that all the conditions in clause 21 are met in P’s case and that compulsory assessment is necessary, the registered medical practitioner may apply to the authority for the compulsory assessment and registration of P.
- (3) The appropriate authority shall:
- (a) appoint a responsible clinician to be in charge of the assessment, care or treatment of P
  - (b) ensure P is advised, as far as practicable, of the availability of advocates
  - (c) register P as a compulsory patient
  - (d) provide P with a copy of the certificate of registration and appropriate information.
- (4) P may be detained in hospital for assessment and treatment under this clause for up to 24 hours from the time of admission to hospital, or the responsible clinician may direct that P be assessed in the community if that would be safe and viable, provided no treatment is provided to P that is contrary to clause 28 below.
- (5) The substitute decision maker for P or the primary carer shall be consulted concerning P’s assessment if practicable.

## **23. Powers of entry and inspection**

An approved health or social care professional as provided in Regulations may at all reasonable times enter and inspect any premises (not being a hospital) in which a person who lacks mental capacity is living, if he or she has reasonable cause to believe that the person is not under proper care.

## **24. Power to take a person to a place of safety**

- (1) If it appears to a justice of the peace on information on oath by an approved health or social care professional that there is reasonable cause to suspect that a person (“P”) appears to lack capacity to make decisions about his or her care or treatment and:
- (a) has been, or is being, ill treated or neglected in any place, or kept otherwise than under proper control, or
  - (b) being unable to care for himself or herself is living alone and is in need of care and attention
- the justice may issue a warrant authorising a police officer to enter the premises, by force if necessary, and if thought fit to remove P to a place of safety with a view to making proper arrangements for P’s care.

(2) If a police officer finds in a place to which the public have access a person (“P”) who appears to be unable to make decisions about care or treatment, and who appears to be in immediate need of care or control, the constable may, if he or she thinks necessary to do so in the best interests of that person or for the protection of others, remove that person to a place of safety.

(3) P may be detained under this clause for a period not exceeding 24 hours for the purpose of being examined by a registered medical practitioner under clause 22.

## **25. Conveyance to hospital**

(1) A person:

- (a) for whom an application for compulsory assessment has been made by a registered medical practitioner
- (b) who has been registered as a compulsory patient under clause 22(3)
- (c) who is lawfully recalled to hospital by the responsible clinician

may be taken by an authorised person and conveyed to a hospital, or to another designated place of assessment, at any time within the following 72 hours.

(2) The range of persons who may be authorised to exercise this power shall be designated by Regulations.

## **26. Application in respect of patient already in hospital**

If, in the case of a person (“P”) who is receiving treatment in a hospital, it appears to a nurse of the prescribed class:

- (a) that P is suffering from an impairment or dysfunction of the mind of such a degree that it is necessary for P’s health or safety or for the protection of others for P to be immediately restrained from leaving the hospital; and
- (b) that it is not practicable to secure the immediate attendance of a practitioner for the purpose of furnishing a report under clause 22

the nurse may record that fact in writing, and in that event P may be detained in the hospital until a medical practitioner has arrived and examined P, provided that the maximum period for which P may be detained under this clause is 6 hours.

## **27. Initial assessment**

(1) At the end of 24 hours after the person (“P”) is registered as a compulsory patient, he or she must be discharged from compulsory care, unless a health or social care professional as provided in Regulations has examined P and made a report to the appropriate authority that the conditions in clause 21 are likely to be met in P’s case and that it is appropriate for P to be subject to initial assessment under this Part.

(2) The report under the above clause shall not be provided by the registered medical practitioner who provided the initial report under clause 22.

(3) If both examiners agree that the conditions appear to be met, P may be detained and given care or treatment for a further 7 days, or the responsible clinician may direct that P be assessed in the community as provided below, but no treatment may given to P contrary to clause 28 below.

- (4) Each examiner must give an opinion as to whether it is appropriate for P:
  - (a) to be detained in a hospital while the assessment is carried out, or
  - (b) to be assessed in the community.
- (5) In considering whether it is appropriate for the assessment to take place in the community they shall each consider:
  - (a) P's views on being assessed in the community
  - (b) whether P can be safely and effectively assessed in the community
  - (c) whether care or treatment for P can be provided safely and effectively in the community.
- (6) If, during the period of assessment, the responsible clinician considers:
  - (a) a person under community assessment requires care or treatment in hospital
  - (b) a person in hospital could be adequately assessed in the communitythe responsible clinician may direct such a change in the place of assessment.
- (7) If at any time during the period of initial assessment the responsible clinician considers there are no longer reasonable grounds to believe that P meets the conditions in clause 21, the responsible clinician shall immediately discharge P from compulsory assessment.

## **28. Treatment within the period of preliminary examination and initial assessment**

- (1) During the period of preliminary examination and initial assessment the person ("P") may not be provided with medical treatment to which he or she objects unless:
  - (a) it is covered by the general authority established by clause 6
  - (b) it is necessary to save life or prevent serious and immediate deterioration in P's health or to protect another person from harm
  - (c) where serious medical treatment is to be provided that is covered by clause 12, the requirements of that clause are satisfied.
- (2) Any treatment provided under (1)(a) or (b) shall not be given in the community but P shall be conveyed to hospital for the purposes of treatment.

## **29. The end of the initial assessment period**

- (1) Before the end of the 7 day period of initial assessment the responsible clinician may apply to the Tribunal for:
  - (a) an Assessment Order for up to 28 days
  - (b) a Compulsory Treatment Order.
- (2) If no application is made to the Tribunal the authority for the compulsory assessment of P shall lapse at the end of 7 days.
- (3) An Assessment Order may be made, following an initial hearing, by a single member Tribunal.
- (4) A Compulsory Treatment Order may be made, following a full hearing, by a three member Tribunal.

(5) An application may not be made for a Compulsory Treatment Order under (1)(b), without an initial Assessment Order having first been made, unless:

- (a) a substitute decision maker has been appointed for P and he or she does not object
- (b) P has on a previous occasion been admitted to hospital lacking capacity and needing treatment in his or her best interests and was, immediately prior to registration under this Part, being treated as a voluntary patient in the same health service.

### **30. Preliminary care plan**

(1) Prior to the hearing before the Tribunal concerning the Assessment Order, the responsible clinician shall prepare a preliminary care plan, setting out the medical treatment which the person ("P") is to receive under compulsory powers.

(2) This plan shall be included in P's records.

(3) A copy of the plan shall be provided to P and to his or her SDM.

(4) If it is appropriate for the person ("P") to be subject to assessment under the Assessment Order in the community, the plan must specify the conditions to be imposed on P:

- (a) to ensure that the assessment may be properly carried out
- (b) to protect the health or safety of P or any other person.

(5) The conditions may include a condition that P:

- (a) attends at a specified place at specified times
- (b) makes himself or herself available for assessment during specified periods.

(6) Before making a determination that it is appropriate for P to be assessed in the community or specifying any conditions under (2) the examiner must consult:

- (a) P, unless inappropriate or impracticable
- (b) the substitute decision maker
- (c) any person who will have the care of P in the community.

### **31. General consultation requirements under the preliminary care plan**

(1) Before finalising the preliminary care plan the responsible clinician shall consult the substitute decision maker, or, if no substitute decision maker has been appointed, the person who provides care for P (the primary carer).

(2) If the substitute decision maker does not agree with any element of the plan this shall be recorded in the plan and the matter shall be decided by the Tribunal.

### **32. Initial hearing before the Mental Capacity Tribunal**

(1) An application for an Assessment Order shall be heard before a Tribunal consisting of a single legal member.

(2) The Tribunal shall discharge the patient if the conditions in Clause 21 are not met.

(3) If the Tribunal decides that the conditions in Clause 21 are met and it is appropriate to do so it shall make an Assessment Order.

(4) At any time prior to the making of the Assessment Order, on application by the primary carer, an advocate acting on behalf of P, or the responsible clinician, the Tribunal shall have the power to appoint a substitute decision maker.

(5) When making an order under (3) the Tribunal may set a date within 28 days for a full hearing concerning a Compulsory Treatment Order.

### **33. Assessment Orders**

(1) The Assessment Order shall:

(a) specify the length of the assessment period, which shall not exceed 28 days

(b) authorise the provision of compulsory treatment under a preliminary care plan, provided no treatment is authorised contrary to Part III of the Act

(c) appoint a substitute decision maker if none has been appointed.

(2) If the Assessment Order expires before a Compulsory Treatment Order is made P shall be immediately discharged from compulsory assessment.

### **34. Compulsory Treatment Orders**

(1) The responsible clinician may apply to the Full Tribunal during the compulsory assessment period for a Compulsory Treatment Order.

(2) The full Tribunal shall consist of a legal member, a medical member and a lay member

(3) The legal member of the Tribunal shall be the presiding officer.

(4) The application shall be based on:

(a) the written recommendation of a registered medical practitioner and another health or social care professional that the conditions in clause 21 are met

(b) a draft care plan.

(5) if the Tribunal finds that the conditions in clause 21 are met it may make an order considered appropriate in the circumstances.

(6) The Tribunal may specify the kinds of conditions that can be imposed by the responsible clinician on the person ("P") within the community. These conditions may include:

(a) where P may reside

(b) where and when P shall attend for treatment

(c) restrictions or limits that can be imposed on P's conduct or freedom of movement, provided that any such restrictions must be proportionate to the harm that is likely to occur if they are not imposed.

(7) The Tribunal shall authorise the care plan, subject to any amendments it requires, although amendments to the treatment provisions may only be made with the agreement of the Responsible Clinician and the medical member of the Tribunal.

(8) Once it has been authorised by the Tribunal, the care plan provides sufficient authority for authorised persons to provide the care or treatment described in the plan, including the authority to detain P in hospital, and to return P to hospital if he or she is absent without permission, when hospital treatment is included in the plan.

- (9) The duration of the order shall be specified by the Tribunal but shall not exceed 6 months.
- (10) P or P's substitute decision maker may make one application to the tribunal for review of the terms of, or discharge from, the Compulsory Treatment Order, at any time while the order is in force.
- (11) Notwithstanding (10), P or P's substitute decision maker may apply to the Tribunal for review of, or discharge from, the Compulsory Treatment Order if P is returned from community treatment to detention in hospital for treatment for more than 72 hours.

### **35. The care plan**

- (1) The care plan to be approved by the Tribunal must include:
- (a) a description of the medical treatment to be provided to the person ("P") while the plan is in force, provided no treatment may be authorised contrary to Part III
  - (b) such other information relating to the care of P as may be prescribed in Regulations.
- (2) In preparing a plan for P, the responsible clinician must consult the following persons about the treatment proposed:
- (a) P, unless inappropriate or impracticable
  - (b) P's substitute decision maker
  - (c) the primary carer of P
- (3) The responsible clinician must send a copy of the plan to:
- (a) P
  - (b) P's substitute decision maker
  - (c) the primary carer of P

as soon as practicable after the plan is in force.

- (4) The responsible clinician may amend the care plan with the agreement of the substitute decision maker at any time while it is in force.
- (5) If there is disagreement between the responsible clinician and the substitute decision maker as to:
- (a) a change to the treatment
  - (b) a condition of a community treatment order
  - (c) a change in the location of treatment from community to hospital or from hospital to community
- and it cannot be resolved between them, an opinion shall be sought from a approved doctor qualified to give a second opinion and the change shall not be instituted without his or her agreement.

### **36. Renewal and termination of Compulsory Treatment Orders**

- (1) If at any time during the life of a Compulsory Treatment Order the responsible clinician considers the conditions in clause 21 are no longer met, the responsible clinician shall discharge P from the Order.
- (2) The responsible clinician may, before the Compulsory Treatment Order has expired, apply to the Tribunal for a new order under Clause 34.
- (3) If no new order has been made, the order shall lapse at its conclusion and P shall be immediately released from compulsory treatment.



### **37. Community treatment**

(1) Before deciding whether the person (“P”) may reside in the community under a Compulsory Treatment Order the responsible clinician shall be satisfied that:

- (a) compulsory care in the community is compatible with safe and effective care
- (b) appropriate services are available in the community
- (c) P has been consulted as far as practicable, and P’s views carefully considered, as to whether community treatment should proceed
- (d) any carers have been consulted and their views considered
- (e) the SDM has been consulted and his or her view considered.

(2) If the conditions in (1)(a) or 1(b) cease to apply P shall be recalled by the responsible clinician to hospital or discharged from compulsory care.

### **38. Power to recall to hospital**

(1) The responsible clinician may recall to hospital a person (“P”) under compulsory treatment in the community, if the responsible clinician considers:

- (a) P requires medical treatment in hospital; and
- (b) there would be a risk of harm to the health or safety of P or to other persons if P were not recalled to hospital for that purpose.

(2) The responsible clinician may also recall P to hospital if P fails to comply with a condition specified under clause 34(6) above.

(3) The lawful recall of P to hospital shall be sufficient authority for an authorised person to take and convey P to hospital and for P to be detained there in accordance with the provisions of the Act.

### **39. Treatment without consent under Assessment Order or Compulsory Treatment Order**

The consent of a person (“P”), who is the subject of an Assessment Order or a Compulsory Treatment Order, shall not be required for the provision to P of any treatment, given by or under the direction of P’s responsible clinician:

- (a) that is covered by the general authority established by clause 6
- (b) that is included in the care plan approved by the Tribunal, or in a lawfully amended care plan
- (c) that needs to be provided as a matter of urgency in order to save P’s life or serious and imminent deterioration in P’s health.

## **Part VI Forensic provisions**

### **40. Remand on bail or to hospital for a report on mental condition**

(1) An accused person (P) charged with a criminal offence may be remanded by the court on bail or, if it would be impractical for P to be assessed on bail, to hospital for up to 28 days for a report to be prepared on his or her mental condition, where:

(a) the court is satisfied on the evidence of a medical practitioner that there is reason to suspect that P has an impairment or dysfunction of mind, and

(b) P consents to the exercise by the court of this power, or

(c) if P lacks capacity to consent, the court is satisfied on the evidence of a medical practitioner that an assessment is in P's best interests.

(2) P and P's substitute decision maker may request a second medical opinion as to whether the conditions in (1) are met.

(3) P may appeal to the Tribunal against the order, and if the Tribunal is satisfied that any of the conditions in (1) are not met, it shall discharge P from assessment.

#### **41. Remand to hospital for treatment**

(1) An accused person (P) charged with a criminal offence may be remanded by the court on bail or, if it would be impractical for P to be treated on bail, to detention in hospital for treatment for his or her mental condition, provided that:

(a) the court is satisfied on the evidence of a medical practitioner and an approved health or social care professional that P has an impairment or dysfunction of the mind

(b) P needs care or treatment for his or her health or safety or the safety of another person

(c) where P has capacity he or she consents to the exercise by the court of this power, or where P lacks capacity the court is satisfied on the evidence of a medical practitioner that treatment is in P's best interests

(d) treatment is available which is likely to alleviate or prevent a deterioration in P's condition.

(2) P and P's substitute decision maker may request a second medical opinion as to whether the conditions in (1) are met.

(3) The duration of the order shall not exceed 6 months.

#### **42. Due process and treatment during remand under clause 40 or 41**

(1) The accused person ("P") must be represented by a lawyer when a court makes a remand order under clause 40 or 41.

(2) P may apply to the Tribunal for discharge from a remand order, and if the Tribunal is satisfied that any of the conditions in clause 40(1) or 41(1) are not met, as required, P shall be discharged from the order and returned to the court.

(3) P and P's substitute decision maker may request a second medical opinion, to be placed before the court or Tribunal, as to whether the conditions in clause 40(1) or 41(1) are met.

(4) During a remand for assessment or treatment under clause 40 or 41, P may not be provided with medical treatment to which he or she objects, unless:

(a) it is covered by the general authority established by clause 6, or

(b) there are reasonable grounds to believe P lacks the capacity to consent to treatment, and

(i) the treatment is necessary to save life or prevent serious and immediate deterioration in P's health, or to protect another person from harm

(ii) where serious medical treatment covered by clause 12 is to be provided, the requirements of that clause are satisfied.

(5) That a person has been remanded for assessment or treatment does not prevent an application being made for that person's compulsory assessment or treatment under Part V.

#### **43. A hospital order with a concurrent sentence**

(1) If a person is convicted of a criminal offence punishable by imprisonment the court may, after determining the sentence for the offence, make an order that the person ("P") be detained in hospital, if the court is satisfied on the evidence of a medical practitioner and a social or health professional that the following conditions are met:

- (a) P has an impairment or dysfunction of the mind
- (b) P needs care or treatment in his or her best interests or to protect the safety of another person
- (c) treatment is available that is likely to alleviate or prevent deterioration in P's condition
- (d) if P has capacity he or she is willing to accept treatment for the disorder, or if P lacks capacity treatment is in his or her best interests.

(2) P may be treated under this order despite his or her objection so long as P lacks capacity to consent to treatment, provided that where serious medical treatment covered by clause 12 is to be provided, the requirements of that clause must be satisfied.

(3) While P is under treatment in a hospital under this provision P's sentence will continue to run.

(4) If any of the conditions in (1) are no longer met P shall be admitted to prison to complete the sentence or, if the sentence is in the community, to the terms of the sentence.

(5) P may apply to the Tribunal for discharge from a treatment order made under this clause, and if any of the conditions in (1) are no longer met the Tribunal shall discharge P from the order, and P shall then be admitted to prison to complete his or her sentence or, if the sentence is in the community, the terms of the sentence.

(6) Where at the end of P's sentence the conditions in (1) continue to apply:

- (a) if P lacks capacity to consent to treatment P shall be deemed to be subject to a compulsory treatment order made under clause 34
- (b) if P has capacity and is willing to consent to treatment he or she shall be treated as a voluntary patient.

#### **44. Treatment order without a concurrent sentence**

(1) Where a person ("P") is convicted of an offence punishable by imprisonment the court may make a treatment order without sentencing P if:

- (a) P has an impairment or dysfunction of the mind
- (b) P lacks capacity to make a decision about his or her care or treatment
- (c) P needs care or treatment in his or her best interests
- (d) treatment is available that is likely to alleviate or prevent deterioration in P's condition
- (e) the care or treatment cannot safely be provided in a less restrictive manner

(f) the court is of the opinion, having regard to all the circumstances of the case, including the nature of the offence and the character and antecedents of the offender and other methods of dealing with P, that an order under this clause is the most suitable method of disposing of the case.

(2) A treatment order made under this clause deems P to be subject to a compulsory treatment order made under clause 34 and the associated provisions of the Act shall apply.

#### **45. Treatment order for a person found not guilty by reason of insanity or unfit to plead**

(1) If a person ("P") accused of an offence punishable by imprisonment is found not guilty by reason of insanity or unfit to plead for the offence, the court may:

- (a) if it considers it necessary in the interests of P or to protect the safety of another person, order P's detention in hospital for treatment under this clause
- (b) make a Compulsory Treatment Order for P under clause 34, if the conditions for such an order are met
- (c) make no order, if P is subject to a sentence imposed on another charge
- (d) if it would be safe to do so, direct P's immediate release.

(2) Where the court orders P's detention in a hospital under clause (1)(a) the consent of P shall not be required for the provision of treatment to P by or under the direction of his or her responsible clinician, for the duration of the order, where the following conditions are met:

- (a) where serious medical treatment covered by clause 12 is to be provided, the requirements of that clause are satisfied
- (b) where P lacks the capacity to consent, the treatment is in P's best interests or necessary to protect the safety of others
- (c) where P has the capacity to consent, the responsible clinician is satisfied that:
  - (i) P needs treatment in his or her own interests or for the protection of another person from harm
  - (ii) P is suffering from an impairment or dysfunction of the mind that contributed significantly to the acts or omissions that constituted the offence
  - (iii) treatment is available that is likely to alleviate or prevent a deterioration in P's condition and is likely to reduce the risk of the recurrence of those acts or omissions.

(3) P may apply to the Tribunal for discharge from an order under clause (1)(a) at intervals specified by Regulations.

(4) Where, on such an application, the Tribunal is satisfied that the order is no longer necessary in the interests of P or for the protection of others, or that continuation of the order would be disproportionate to the seriousness of the offence with which P was charged, the Tribunal shall:

- (a) exercise the power under clause 34 to make a Compulsory Treatment Order for P, if the conditions for such an order are met;
- (b) direct P's discharge from the order.

#### **46. Transfer from prison to hospital**

(1) A person (“P”) serving a custodial sentence may be transferred from prison to hospital if one medical practitioner and one health or social care professional certify that the following conditions are met:

- (a) P has an impairment or dysfunction of the mind
- (b) P needs care or treatment in hospital
- (c) treatment is available which is likely to alleviate or prevent a deterioration in P’s condition
- (d) if P retains capacity he or she is willing to accept treatment
- (e) if P lacks capacity, treatment is in his or her best interests.

(2) If any of the conditions in (1) are no longer met P shall be admitted to prison to complete the sentence.

(3) P may apply to the Tribunal for discharge from treatment in hospital under this clause, and if any of the conditions in (1) are no longer met the Tribunal shall discharge P and direct that P be admitted to prison to complete his or her sentence.

#### **47. Care plans for patients detained under Part VI**

(1) A preliminary care plan shall be prepared for a person remanded to hospital for assessment under clause 40 as if that person was subject to an Assessment Order under clause 33.

(2) A care plan shall be prepared for a person ordered to undergo treatment in hospital under clauses 41, 43, 44, 45 and 46, as if that person was subject to a Compulsory Treatment Order under Part V.

### **Part VII The Mental Capacity Tribunal**

#### **48. The Mental Capacity Tribunal**

(1) There shall be a Mental Capacity Tribunal that shall consist of two divisions:

- (a) the Primary Division
- (b) the Appeal Division.

(2) The Primary Division shall hear all cases in the original jurisdiction except matters reserved to the Appeal Division.

(3) Hearings before the Primary Division may, as provided in the Act, be conducted by a single legal member of the Tribunal.

(4) In all other cases the Primary Division shall comprise three members, a legal member, a medical member and a lay member.

(5) The legal member of the Tribunal shall preside.

(6) The Appeal Division shall have the powers of a court and shall be presided over by a judge.

(7) The Appeal Division shall have jurisdiction over:

- (a) appeals from the Primary Division
- (b) any other specified matters.

## **Part VIII Patient safeguards**

### **49. Appointment of person to act as substitute decision maker**

- (1) P may appoint a substitute decision maker to have authority to make decisions about P's care or treatment in the event that P has lost the capacity to make the decisions.
- (2) P must have reached 18 and have capacity to make the gift of power.
- (3) The gift of power must be in writing and be witnessed.
- (4) Subject to (5) the authority includes the power to consent to or to refuse treatment by a person providing care (subject to an advance refusal by P).
- (5) The power conferred on a substitute decision maker shall not authorise:
  - (a) giving or refusing consent to life sustaining treatment unless the power expressly so provides
  - (b) the provision of treatment contrary to Parts III, IV or V of the Act
  - (c) the provision of treatment to which the patient objects unless that treatment is authorised by clause 6.

### **50. Powers of the Tribunal to make decisions and appoint substitute decision makers**

- (1) If a person ("P") lacks capacity in relation to any matter concerning his or her care or treatment the Tribunal may:
  - (a) by making an order, make the necessary decision or decisions on P's behalf, or
  - (b) appoint a person (the "substitute decision maker") to make decisions on P's behalf in relation to a specified matter or matters.
- (2) The Tribunal shall not authorise the provision of treatment contrary to Parts III, IV or V of the Act.

### **51. The appointment of advocates**

- (1) The appropriate authority must make reasonable arrangements to enable persons ("independent mental capacity advocates") to be available to represent and support persons for whom acts or decisions are proposed under the Act.
- (2) For the purpose of carrying out his or her functions, an independent mental capacity advocate:
  - (a) may interview in private the person whom he or she has been instructed to represent
  - (b) may, at all reasonable times, examine and take copies of any health record or a record in connection with a social services function, which in his or her opinion may be relevant to the independent mental capacity advocate's investigation.
- (3) The appropriate authority must inform P of the availability of advocates whenever P becomes subject to any Part of this Act.

### **52. Functions of advocates**

- (1) The functions of independent mental capacity advocates include:
  - (a) providing support to the person whom the advocate has been instructed to represent ("P") so that P may participate as fully as possible in any relevant decision

- (b) obtaining and evaluating relevant information
- (c) ascertaining P's likely wishes and feelings, and the beliefs and values that would be likely to influence P, if he or she had capacity
- (d) ascertaining what alternative courses of action are available in relation to P
- (e) obtaining a further medical opinion where treatment is proposed and the advocate thinks that one should be obtained
- (f) challenging, or providing assistance for the purpose of challenging, any relevant decision.

### **53. Advance decisions to refuse treatment**

- (1) "Advance decision" means a decision made with capacity by a person ("P") aged 18 years or over:
  - (a) that if at a later time and in such circumstances as P may specify a particular treatment is proposed to be carried out or continued by a person providing health care for P, and
  - (b) at that time P lacks capacity to consent to the carrying out or continuation of that treatmentthe specified treatment is not to be carried out or continued.
- (2) P may withdraw or alter an advance decision at any time when P has capacity.
- (3) A withdrawal (including a partial withdrawal) need not be in writing.
- (4) An advance decision is not valid if P has, after the advance decision was made, conferred authority on a substitute decision maker to give or refuse consent to the treatment to which the advance decision relates, or has done anything else clearly inconsistent with the advance decision remaining P's fixed decision.
- (5) An advance decision is not applicable to the treatment in question if any circumstances specified in the advance decision are absent, or there are reasonable grounds for believing that circumstances exist which P did not anticipate at the time of the advance decision and which would have affected P's decision.
- (6) An advance decision is not applicable to life-sustaining treatment unless the decision is verified by a statement by P to the effect that it is to apply to that treatment even if life is at risk.
- (7) To be effective:
  - (a) an advance decision must be in writing and signed by P or by another person in P's presence and by P's direction
  - (b) P's signature on the advance directive must be made or acknowledged by P in the presence of a witness who also signs the document in P's presence.

### **54. Effect of advance decisions**

- (1) If P has made an advance decision which is valid, and applicable to a treatment, the decision has effect as if he or she had made it, and had had capacity to make it, at the time when the question arises whether the treatment should be carried out or continued.
- (2) Nothing in an apparent advance decision stops a person:
  - (a) providing life-sustaining treatment, or

(b) doing any act he reasonably believes to be necessary to prevent a serious deterioration in P's condition,

while a decision on any relevant issue is sought from the Tribunal.

(3) Where a substitute decision maker is appointed for P that person shall not have authority over those treatments that are covered by a valid advance decision made by P unless P has subsequently conferred express authority on the substitute decision maker to make decisions of that kind.