



PLEASE NOTE -THIS SECTION WAS LAST UPDATED ON 11 FEBRUARY 2008

Child and Adolescent Mental Health Law in Northern Ireland

Kiera Duddy

This paper gives an overview of child and adolescent mental health law in Northern Ireland. Before examining the relevant law this paper tries to set the context by giving a short synopsis of child and adolescent mental health in Northern Ireland. It then considers the Children (NI) Order 1995, which is the principal piece of children's legislation in Northern Ireland and the Mental Health (NI) Order 1986, a piece of legislation, governing the compulsory admission of people to a psychiatric hospital, their rights while detained, discharge from hospital, and aftercare. This paper also considers the rights of children and young people with mental health issues under the Human Rights Act 1998 and the United Nations Convention on the Rights of the Child 1989. There has recently been a review of mental health legislation in Northern Ireland¹ and it is anticipated that new mental health legislation will be introduced in the near future based on the four overarching principles of respect for autonomy, justice, benefit and least harm. It is hoped that this new legislation will strengthen the rights of children and young people.

1. Child and Adolescent Mental Health in Northern Ireland

Child mental health has been defined as²:

- The ability to develop psychologically, emotionally, intellectually and spiritually
- The ability to initiate, develop and sustain mutually satisfying personal relationships
- The ability to become aware of others and to empathise with them
- The ability to use psychological distress as a development process, so that it does not hinder or impair further development.

Statistically, it is estimated that even at the lowest prevalence rate of 10%, approximately 45,000 children aged between 5 and 15 living in Northern Ireland will have a moderate to severe mental health problem or disorder that requires a Child & Adolescent Mental Health Service (CAMHS) intervention.³

¹ See the report "A Comprehensive Legislative Framework' The Bamford Review of Mental Health and Learning Disability.

² Definition taken from "A Vision for a Comprehensive Child and Adolescent Mental Health Service", page 11, Review of Mental Health & Learning Disability, Consultation Document (2005)

³ Green et al, 2005; Meltzer et al., 2000

Mental Disorder is defined in the Mental Health (NI) Order 1986 as “mental illness, mental handicap and any other disorder or disability of mind.”⁴ Mental illness is defined in the Mental Health (NI) Order 1986 as “a state of mind which affects a person’s thinking, perceiving, emotion or judgement to the extent that he requires care or medical treatment in his own interests or the interests of other persons.” Mental handicap is defined in the Mental Health (NI) Order 1986 as “a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning.”

CAMHS deal with a wide range of mental health issues such as children and young people at risk of suicide or self harm, children with attention deficit hyperactivity disorder, with feeding and eating disorders or with mental health difficulties associated with alcohol and drugs misuse problems. The provision of CAMHS in Northern Ireland has been described as “a situation characterised by overwhelming need and chronic underinvestment”⁵. There are huge service gaps in CAMHS and as a result children are facing a range of problems. They are experiencing long waiting lists to access mental health services with tragic consequences. In recent years, there have been a number of reports in the media of teenagers who committed suicide whilst on the waiting list for CAMHS. Children in Northern Ireland are being treated in adult psychiatric wards as a result of the shortage of child and adolescent inpatient beds. Children are also being referred to specialist inpatient clinics outside of Northern Ireland, which can be detrimental to a child or adolescent as family support networks can be difficult to maintain.

In 2002, the Department of Health & Social Care commissioned the first comprehensive review of mental health in Northern Ireland in 40 years known as The Bamford Review of Mental Health and Learning Disability. The review was completed in August 2007. The report on children and adolescents entitled “A Vision of a Comprehensive Child and Adolescent Mental Health Service” made 54 recommendations for reform of CAMHS. It referred to the findings of the Chief Medical Officer who estimated that more than 20% of young people in Northern Ireland are suffering significant mental health problems by their 18th birthday⁶. The Review made numerous recommendations for reform of services and the law. The Comprehensive Legislative Framework produced as part of the Bamford Review stated that “while some elements of the current legislation are considered to work well, it has become clear that aspects of the Mental Health (NI) Order 1986 may not be human rights compliant.”⁷ This report detailed the reforms envisaged.

2. The Children (NI) Order 1995

The Children (NI) Order 1995 is the principal piece of children’s legislation in Northern Ireland and it contains a number of provisions for children and adolescents with mental health difficulties.

⁴ Article 3.(1) Mental Health (NI) Order 1986

⁵ Introduction, A Vision of a Comprehensive Child & Adolescent Mental Health Service, The Bamford Review of Mental Health & Learning Disability (NI) July 2006

⁶ Chief Medical Officer (1999), Health of the Public in NI: Report of the Chief Medical Officer 1999: Taking Care of the Next Generation. Belfast: DHSSPS

⁷ Page 25, A Comprehensive Legislative Framework, The Bamford Review of Mental Health & Learning Disability (NI)

2.1 *Duty to provide mental health services under Articles 17 and 18*

Articles 17 and 18 of the Order place specific obligations on Health & Social Services Boards to provide for children who are assessed as children in need.

Articles 17 of the Children (NI) Order 1995 provides that a child is in need if;

- (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health (*including mental health*⁸) or development without the provision for him of services by an authority under this Part;
- (b) his health (*including mental health*⁹) or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or
- (c) he is disabled.

Article 2(2) of the Children (NI) Order 1995 states that ‘disabled’ means blind, deaf or dumb or suffering from mental disorder of any kind or substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed)

Article 18 of the Children (NI) Order 1995 places a general duty on the Board to provide services for children in need and their families to safeguard and promote the welfare of children within its area who are in need and so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of personal social services appropriate to those children's needs. This means that if a child is assessed as having mental ill health which requires the assistance of a particular mental health service to enable the child to obtain a reasonable standard of mental health, the Board are obliged to try and provide the service. This provision was said to represent “a major shift regarding the onus on the State to support families to promote the positive mental health and development of children.”¹⁰

If a child or young person is not given access to the mental health service appropriate to his/her mental health needs a complaint can be made to the Health Trust/ Health Board. If the service is still not provided to the child, legal action could be considered. This would involve an application to the High Court in Northern Ireland seeking a court order compelling the Health Trust/ Health Board to perform its duty under Article 17 and Article 18 of the Children (NI) Order 1995. This process, which is called Judicial Review will only be appropriate in certain cases.

⁸ Article 2 (2) The Children (NI) Order 1995.

⁹ Article 2 (2) The Children (NI) Order 1995

¹⁰ P231, Mc Ternan & Godfrey, Children's Services Planning in Northern Ireland: Developing a Planning Model to Address Rights and Needs, Child Care in Practice, vol. 12, no. 3, July 2006

2.2 *Supervision Orders under Article 50*

Supervision Orders under Article 50 of the Children (NI) Order 1995 can be sought by a local authority to protect a child with a mental health difficulty. There are used in situations where the parents of the child are unwilling to co-operate with voluntary arrangements intended to prevent significant harm to the child's mental health and are an alternative to compulsory detention under the Mental Health (NI) Order 1986.

A Supervision Order places a child under the age of 17 in the care of a designated authority. The supervisor appointed is tasked with advising, assisting and befriending the supervised child and taking all such steps as are reasonable to give effect to the order.

The court is only permitted to make a supervision order if,

“ it is satisfied that the child concerned is suffering or is likely to suffer significant harm and the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or the child is beyond parental control.”

The court may consider that a child will suffer significant harm to his/her health or development if it fell below what could reasonably be expected of a similar child.

An application for a supervision order falls within the meaning of “specified proceedings” under Article 60 of the Children (NI) Order 1995. This requires the court to appoint a guardian ad litem for the child unless it is satisfied that it is not necessary to do so in the interests of the child. The guardian ad litem will then instruct a solicitor to represent the child.

The effect of a supervision order is that the local authority is required to become directly involved in the child's life. The supervision order may contain any of the following requirements:

- require the child to comply with the supervisors directions;
- require the child to submit to medical or psychiatric examination;
- in certain circumstances require the child to submit to treatment concerning his mental health;
- require the person the child lives with (if they have parental responsibility) to take certain steps including taking the child to a psychiatric examination or treatment. That person must consent to the requirement.

The supervisor must be allowed to have reasonable contact with the child whilst the supervision order is in force. This can be enforced with the assistance of the police if necessary by obtaining a warrant.

If the child has sufficient understanding to make an informed decision, the court can only order the child to be examined by a psychiatrist if that child consents. The order must specify who will carry out the examination and where it will take place. The court can order the child to attend a psychiatric hospital as a resident patient if it considers that it is necessary in order to properly examine the child. It must be

satisfied, however, that the child may be suffering from a medical condition that requires and is susceptible to treatment. The court can also require the child to submit to psychiatric treatment if it is satisfied on the evidence of a psychiatrist approved under the Mental Health (NI) Order 1986 that the child requires and may be susceptible to treatment but that detention under the Mental Health (NI) Order 1986 is not warranted.

The treatment the child receives must be under the direction of the psychiatrist recorded on the order and be either as a non-resident patient at a specified place or a resident patient in a hospital or mental nursing home.

The psychiatrist stipulated on the order is obliged to provide a written report if there is any change in the child's condition and the supervisor must refer it back to court. This will include if the psychiatrist does not want to continue treating the child or if the treatment is no longer working or required. A report will also be required to extend the treatment.

Unless otherwise stipulated, a supervision order lasts for one year from the date it was made. It can be extended up to a maximum period of three years from the date it was first made. It will cease to have effect if the child turns 18. The child, the supervisor or any person with parental responsibility for the child can appeal the decision of the court to make or refuse to make an order. They can also apply to the court to vary or discharge the order.

2.3. *Secure Accommodation Orders under Article 44*

Secure accommodation orders can be sought by a Trust under Article 44 of the Children (NI) Order 1995 as a last resort in the case of a child who does not meet the criteria for detention under the Mental Health (NI) Order 1986 but who fulfils the criteria set out in Article 44 (2)-

Article 44 (2) states that subject to paragraph 3 and 10 of that Article a child who is being looked after by an authority may not be placed, and, if placed, may not be kept, in secure accommodation unless it appears—

(a) that—

(i) he has a history of absconding and is likely to abscond from any other description of accommodation; and

(ii) if he absconds, he is likely to suffer significant harm; or

(b) that if he is kept in any other description of accommodation he is likely to injure himself or other persons.

The Trust can determine whether the criteria for detention are met if secure accommodation is used for the child for less than 72 hours. If secure accommodation is required for more than 72 hours, the court must apply to the court. If the court makes a secure accommodation order it must state the maximum period of time on the order and in any event it should only be for as long as is necessary and unavoidable. An application to keep a child in secure accommodation falls within the meaning of “specified proceedings” under Article 60 of the Children (NI) Order 1995 and the

rules of court¹¹. This requires the court to appoint a guardian ad litem for the child unless it is satisfied that it is not necessary to do so in the interests of the child. The guardian ad litem will then instruct a solicitor to represent the child

The following rules apply to Secure Accommodation Orders:

- (i) the maximum period a child can be kept in secure accommodation without a court order is 72 hours¹² in any 28 day period;
- (ii) The maximum period a court can initially authorise a secure accommodation order for is 3 months but further 6 month periods can be authorised thereafter;
- (iii) The authority looking after the child in secure accommodation must appoint 3 people to review the child's placement in secure accommodation within 1 month of him being placed there and thereafter at intervals of less than 3 months;
- (iv) The person conducting the review must consider the following;
 - whether the criteria for keeping the child in secure accommodation still apply;
 - whether placement in that accommodation is still necessary;
 - whether any other type of accommodation would be appropriate taking into account the welfare of the child;
- (v) Unless it would be unreasonable to do so the person conducting the review is required to seek the views of the child, his parents, anybody with parental responsibility for the child, the child's independent visitor if appointed and the authority managing the secure accommodation. Anybody whose view is sought should be notified of the result of the review, the proposed action and reasons for this.
- (vi) No young person under the age of thirteen may be kept in secure accommodation beyond 72 hours without the approval of the Secretary of State for Health.

Both the child and the Trust may appeal to the County Court against a decision by the Family Proceedings Court to make, or a refusal to make an order under Article 44 of the Children (NI) Order 1995. The appeal process is set out at Article 166 of the Children (NI) Order 1995.

3. The Mental Health (NI) Order 1986

The Mental Health (NI) Order 1986 provides the statutory framework for the admission of patients with a mental disorder and for their subsequent treatment and aftercare. Unlike the Children (NI) Order 1995, this piece of legislation does not apply specifically to children. The main provisions of the Mental Health (NI) Order 1986 are discussed below in the following order:

¹¹ Article 2 (2)(b) Magistrates' Courts (Children (Northern Ireland) Order 1995) Rules (Northern Ireland) 1996

¹² It should be noted that in the context of applications for Emergency Protection Orders in the case of *In the Matter of an Application by ES for Judicial Review (2007) NIQB 58* it was determined that Article 64 (8) of the Children (NI) Order 1995 was incompatible with Articles 6 and 8 of the European Convention on Human Rights. Article 64 (8) provides that an application for discharge of an Emergency Protection Order may not be heard until 72 hours after the making of the order. Article 64(8) has now been repealed.

- 3.1 Admission for assessment
- 3.2 Detention for treatment
- 3.3 Consent to treatment
- 3.4 Rights whilst detained under the Mental Health (NI) Order 1986
- 3.5 Guardianship

3.1 Admission for assessment

(i) *Grounds for detention that must be established*

A child or young person can be involuntarily detained in hospital for an assessment of their mental health condition under Article 4 of the Mental Health (NI) Order 1986 provided a doctor who has seen the child or young person within the past 2 days, is of the opinion that :

- *the child is suffering from a degree of mental disorder which warrants detention*
and
- *that there would be a substantial likelihood of serious physical harm to the child or to other people if the child was not detained.*

There are 4 categories of mental disorder under Article 3 of the Mental Health (NI) Order 1986. These are mental illness, mental handicap, severe mental handicap and severe mental impairment.

mental illness –a state of mind which affects a person’s thinking, perceiving, emotion or judgment to the extent that he requires care or medical treatment in his own interests or the interests of other persons.

mental handicap- a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning.

severe mental handicap- a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning.

severe mental impairment- a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned.

(ii) *Who can bring the application to detain the child or young person*

- The application for admission can be made by either the child or young person’s nearest relative or by an approved social worker.
- The child or young person’s nearest relative is the person caring for the child prior to admission and is the first person from the following list of people;
(a) spouse,

- (b) parent,
- (c) brother or sister,
- (d) grandparent,
- (e) uncle or aunt,
- (f) nephew or niece.

- If the child is looked after by the local Health & Social Care Trust, it will be the nearest relative.
- The application must be accompanied by a medical recommendation from the child or young person's medical practitioner e.g. GP or psychiatrist who must have seen the child or young person within the past 2 days and, unless it is an urgent necessity, should not be on the staff of the hospital to which the admission is sought.
- Once the application is completed this is authority to convey the child or young person to the hospital for immediate examination.

(iii) ***Duty to inform the Mental Health Commission for Northern Ireland***

- Once the child is admitted to hospital the Mental Health Commission for Northern Ireland must be sent a copy of the application to admit the child or young person by the Health Board.

The Mental Health Commission for Northern Ireland, is tasked under Article 86 of the Mental Health (NI) Order 1986 with keeping under review the care and treatment of patients, including the exercise of powers and the discharge of the duties conferred or imposed by the Mental Health (NI) Order 1986.

The Commission has important statutory duties. It has a duty to inquire into any case where there appears to be ill-treatment of a patient, deficiency in care or treatment, improper detention or where the patient's property has been exposed to loss or damage. The Commission has a duty to visit and interview detained patients as often as appropriate. The Commission also has a duty to bring certain facts to the attention of the Secretary of State, the Department, a Board or person in charge of the voluntary home where the patient is staying.

In order to carry out its duties, the Commission may;

- (a) refer any case to the Review Tribunal,
- (b) visit interview and medically examine the patient at any reasonable time,
- (c) require the production of patients records and then inspect them.

A complaint can be lodged directly with the Mental Health Commission for Northern Ireland at Elizabeth House, 118 Holywood Road, Belfast, BT4 1NY.

(iv) ***Maximum period of detention for assessment***

- The maximum length of time the hospital can assess the child or young person's mental health is 14 days from the date of admission.

- If the child or young person was detained by a responsible medical officer or medical practitioner appointed by the Commission the initial maximum period of detention is 7 days.
- The responsible medical officer can then recommend a further 7 day period.
- If the child or young person was initially detained by any other medical practitioner the maximum period is 48 hours.
- A responsible medical officer must then examine the child or young person before the end of the 48 hour period and can detain for up to 7 days from initial date of admission.
- The responsible medical officer can then detain for a further 7 days thereafter.

3.2 **Detention for treatment**

The following applies to a child or young person involuntarily detained in a psychiatric facility in Northern Ireland for treatment of their mental condition:

(i) ***Grounds for detention that must be established***

- The child or young person can be detained in hospital for treatment following the assessment period under Article 12 of the Mental Health (NI) Order 1986 if a medical practitioner (psychiatrist) appointed by the Mental Health Commission (who is different from the medical practitioner who recommended detention for assessment) is of the opinion that:

the child is suffering from a mental illness or severe mental impairment of a nature or degree warranting his detention in hospital for medical treatment

and

failure to detain the child would create a substantial likelihood of serious physical harm to the child or other people.

(ii) ***Maximum period of detention***

- When a child or young person is first detained for treatment, the longest he/she can be detained is 6 months.
- After 6 months, the detention can be renewed for a further 6 months if the doctor treating the child or young person states that the original grounds for detention for treatment still apply.
- After one year has passed since the child or young person was first detained for treatment, the grounds for detention must be considered again by 2 doctors. If both doctors agree that the original grounds for detention still apply they can detain the child or young person for a further year. One of the doctors must not have been previously involved in giving a recommendation or report in relation to the patient or be on the hospital staff where the patient is detained.
- The child or young person can be detained for further one year periods thereafter, provided 1 doctor states that the original grounds for detention apply.

3.3 Discharge of a detained child or young person

By the responsible medical officer

- There is a duty on the responsible medical officer to discharge the child or young person if he is satisfied –
 - (a) *that the child or young person is no longer suffering from mental illness or severe mental impairment which warrants detention in hospital for treatment*
 - or*
 - (b) *having regard to the care which would be available for the child or young person if he were discharged, the discharge would not create a substantial likelihood of serious physical harm to himself or other people.*

By the nearest relative

- If the child or young person's nearest relative disagree with the detention, he/she can discharge the child. The Health Board must be given 72 hours written notice of this intention to discharge.
- The nearest relative can arrange for an independent doctor to examine the child or young person and view their hospital notes to help them decide whether the child or young person should be discharged.
- The responsible medical officer treating the child or young person can stop the child or young person from being discharged if he/she sends a report to the Health Board stating that the child or young person should not be discharged because:
 - (a) *the child or young person is suffering from mental illness or severe mental impairment of a nature or degree which warrants detention for medical treatment and discharge could create a substantial likelihood of serious physical harm to themselves or others.*
 - or*
 - (b) *the child or young person would not receive proper care if discharged*
- The decision of the Health Board to prevent the discharge can be appealed within 28 days to a Mental Health Review Tribunal. The Mental Health Review Tribunal must order the discharge of the child if he/she is satisfied that he/she would receive proper care if discharged.

- If the Health Board prevent the discharge of the child, the nearest relative cannot try to discharge the child again for a further 6 months.

3.4 Consent to Treatment

Part IV of the Mental Health (NI) Order 1986 sets out the rights of involuntarily detained patients to consent to medical treatment. Treatment means “nursing and care and training under medical supervision.¹³” Although there are exceptions to this rule, patients detained under the Mental Health (NI) Order 1986 can be treated **without** their consent. The Code of Practice of the Mental Health (NI) Order 1986 stresses that even though treatment can be administered without the consent of the involuntary patient their consent to treatment should still be sought. The Code of Practice is considered further on in this paper. The exceptions to the rule that a medical practitioner can treat an involuntarily detained patient without their consent are detailed below and consent must be obtained in all these situations;

- a. The patient is an in-patient detained for up to 48 hours on a doctor’s report or for up to 6 hours under the nurses holding power;
- b. The patient is an accused patient remanded to hospital for a report on their mental condition;
- c. The patient is an offender admitted to hospital as a place of safety under a direction made by the court for up to 28 days following the making of a hospital order;
- d. The patient is suffering from or believed to be suffering from mental disorder and removed to a place of safety by a warrant made under Article 129 or found in a public place and removed to a place of safety under Article 130 for up to 48 hours;
- e. The patient is a restricted patient who has been conditionally discharged under Article 48(2), 78 or 79 and has not been recalled to hospital;

If the type of treatment proposed is specifically referred to in either Article 63 or Article 64 of the Mental Health (NI) Order 1986 there are special rules regarding consent.

Article 63 Treatments:

- Surgical operation for destroying brain tissue and destroying the functioning of brain tissue
- Surgical implantation for the purposes of reducing male sex drive

Rules regarding Article 63 Treatments

- (i) A doctor must obtain both the consent of the patient *and* a second opinion for any of the above treatments.

¹³ Article 2 (2) of the Mental Health (NI) Order 1986

(ii) A medical practitioner appointed by the Mental Health Commission for Northern Ireland who is not the responsible medical officer and two other persons appointed by the Commission must certify in the prescribed form that the patient is capable of understanding the nature, purpose and likely effects of the treatment in question and has consented to it.

(iii) Any of these people can interview or visit the patient privately.

(iv) The medical practitioner can medically examine the patient and examine his medical records.

(v) The medical practitioner must also have certified in a prescribed form that having regard to the likelihood of the treatment alleviating or preventing a deterioration of the patient's condition, the treatment should be given. Before doing this the medical practitioner should have consulted with the person or persons principally concerned with the patient's medical treatment.

(vi) The patient can withdraw his consent to treatment or a treatment plan at any time before the treatment is completed and the remainder of the treatment will be treated as if it were a separate form of treatment.

(vii) If the patient is given this form of treatment, the responsible medical officer must send a report to the Commission on the treatment and condition of the patient when he is next submitting a report to the Health Board requesting the renewal of the patient's detention under Article 13.

Article 64 Treatments:

- Treatment administered after a period of three months have elapsed since the first occasion in that period when the medicine was administered for the mental disorder.
- ECT or electro-convulsive therapy

Rules regarding Article 64 Treatments

(i) A doctor must obtain either the consent of the patient *or* a second opinion for any of the above treatments.

(ii) If the patient does not consent or is deemed incapable of consenting to treatment (as he does not understand the nature, purpose and likely effects of the treatment) and the doctor feels that the treatment should go ahead, the Mental Health Commission should be immediately informed. The Mental Health Commission will then send a medical practitioner to examine the patient and give a second opinion.

(iii) The medical practitioner appointed by the Mental Health Commission must agree with the doctor treating the patient that the treatment should be administered despite the fact that the patient has not or cannot consent having regard to the likelihood of it alleviating or preventing a deterioration of the condition. The medical practitioner should consult such person or persons appearing principally concerned with the patient's medical treatment.

(iv) If the patient consented to the above treatment, he could withdraw his consent at any time before the treatment is completed and the remainder of the treatment would be assessed as if it were a separate form of treatment. For example, ECT is usually planned as a series of treatments.

(v) If the patient is given this form of treatment, the Mental Health Commission should be sent a report.

Urgent Treatment

The rules regarding consent set out at Article 63 and Article 64 do not apply to any treatment¹⁴ -

- (a) which is immediately necessary to save the patient's life; or
- (b) which (not being irreversible) is immediately necessary to prevent a serious deterioration of his condition; or
- (c) which (not being irreversible or hazardous) is immediately necessary to alleviate serious suffering by the patient; or
- (d) which (not irreversible or hazardous) is immediately necessary and represents the minimum interference necessary to prevent the patient from behaving violently or being a danger to himself or others.

The responsible medical officer must notify the Commission immediately of the nature of the urgent treatment given and the circumstances which made it necessary to give urgent treatment.

Code of Practice guidance on consent of involuntarily detained patients

Consent is defined in the Code of Practice as “the voluntary and continuing permission for a particular form of treatment to be given, based on an adequate knowledge of its nature, purpose, and likely effects.¹⁵” The Code of Practice offers some guidance on how the issue of consent to medical treatment should be dealt with. It states that even when consent is not legally required, every attempt should be made to explain what is proposed and to obtain the patient's agreement. It further states,

“being mentally disordered does not preclude the ability to give consent. The treatment proposed should be explained to the patient as fully as possible, in terms appropriate to his ability to understand. An explanation should be given of the desired effect and outcome of the treatment as well as the risk of developing significant and, in particular, disabling side-effects. The explanation may also include an account of the likely progress of the illness if the treatment is not given. It should be explained to the patient that he has the right to withdraw consent at any time.”¹⁶

In relation to children and young people the Code of Practice states that “*unless statute specifically overrides, young people should be regarded as having the right to make their own decisions (and in particular treatment decisions) when they have sufficient understanding and intelligence.*¹⁷”

Patients should have a treatment plan which according to the Code of Practice,

“should include a description of the immediate and long-term goals for the patient with a clear indication of the treatments proposed and the methods of treatment. The patient's progress and possible changes to the plan should be reviewed at regular intervals. Wherever possible the plan should be discussed with the patient who should

¹⁴ Article 68 of the Mental Health (NI) Order 1986

¹⁵ Page 51, DH&SS Mental Health (NI) Order 1986 Code of Practice, Belfast: HMSO

¹⁶ Page 52, DH&SS Mental Health (NI) Order 1986 Code of Practice, Belfast: HMSO

¹⁷ Page 15, DH&SS Mental Health (NI) Order 1986 Code of Practice, Belfast: HMSO

be encouraged to say whether or not he agrees with the plan and to make his own contribution.”

3.5 Rights whilst detained under the Mental Health (NI) Order 1986

All children and adolescents detained under the Mental Health (NI) Order have certain rights which should be upheld by the Health Board responsible for their care. The most significant of these are detailed below:

(a) *The right to information*

As soon as practicable after the child or adolescent is detained, the Health Board should take steps in accordance with Article 27 of the Mental Health (NI) Order 1986 to ensure that information is provided both orally and in writing to the child or adolescent and their nearest relative to ensure that he/she understands-

- the provision under which they are being detained and the effect of the provision
- their rights to apply to the Review Tribunal
- the fact that he/she can make representations to the Commission
- certain important provisions of the order if they are relevant (Articles 14, 24, 71(4), 16, 17, 111 and Part IV)

The patient's nearest relative should also be given a written statement of the patient's rights and powers under the Mental Health (NI) Order 1986 and should be informed if the patient ceases to be liable to be detained. Unless the patient otherwise requests, the nearest relative should be given a copy of any information given to the patient in writing.

The child or adolescent also has a right to view their psychiatric notes and records under the Data Protection Act 1998. If the child does not have a general understanding of what it means to exercise the right to obtain these notes, a person with parental responsibility could apply on the child's behalf. If the notes are requested, the hospital should provide them within 40 days of receiving the appropriate fee unless they wish to argue that they are exempt from disclosure under the Data Protection Act 1998 on the grounds that they would be likely to cause serious harm to the physical or mental health of the child or young person or of any other person. This decision can be appealed to the Information Commissioner's Office.

(b) *The right to receive/send correspondence*

The Mental Health (NI) Order 1986 only places restrictions on the mail of patients in special accommodation on account of dangerous, violent or criminal propensities. The Order does not restrict the incoming mail of patients detained in ordinary psychiatric units in hospital. Outgoing mail can only be restricted if the person whom it is

addressed to has requested (in writing to the Board or RMO) that he receives no correspondence from that patient.

(c) ***The right to complain***

If there is a problem with any aspect of the treatment or care the child or young person is receiving whilst detained in hospital, a complaint can be lodged with the hospital trust. Each hospital trust will have their own complaints procedure but this usually states that the complaint will be acknowledged within 2 working days and investigated within 20 working days. Quite often there are time limits for lodging a complaint so it should be lodged as soon as possible. If the response to the complaint is unsatisfactory then a request can be made for an independent review by the local Health and Social Services Board. In this instance an independent convenor and lay chair would be appointed (both specially trained members of the public) to consider whether there was anything that could be done about the complaint.

The Northern Ireland Ombudsman also investigates complaints against health care professionals in the Health and Personal Social Services. He reports annually to the Northern Ireland Assembly but is independent of any government department or body. Examples of the types of complaints the NI Ombudsman can investigate are avoidable delay, refusing to answer reasonable questions, unfairness. It is likely that the Northern Ireland Ombudsman will only investigate a complaint if it has already been considered by the Trust or the Board and the response was unsatisfactory. If the Northern Ireland Ombudsman concludes that the complaint was justified he can recommend that the hospital provide a remedy e.g. apology.

A complaint can also be made to the Northern Ireland Commissioner for Young People and Children (NICCY) whose office was set up following the introduction of the Commissioner for Children and Young People (Northern Ireland) Order 2003. This Order gave the Commissioner power to deal with individual complaints from children and young people or their parents/guardians about services (including mental health services) affecting people under 18 years of age. The Commissioner is obliged to take account of any existing complaints mechanism first. Where appropriate the Commissioner can start or take over legal proceedings on behalf of a child or young person if a general principle is at stake.

(d) ***The right to have the grounds for detention reviewed by a Mental Health Review Tribunal***

The child or young person has the right to apply to a Mental Health Review Tribunal to have the grounds of detention reviewed and the procedure involved is detailed later in this paper. Under the Mental Health (NI) Order 1986 the child will automatically be referred to the MHRT by the local health board after a period of time. The automatic referral time varies depending on whether the child is aged under 16 years or aged 16-18. Any child under 16 years of age will automatically be referred to the Mental Health Review Tribunal one year after being admitted to hospital and every year thereafter. A child aged 16-18 will, however, only be automatically referred to a Mental Health Review Tribunal if their case has not been considered by the tribunal for 2 years.

(e) ***The right to request a leave of absence from the hospital***

Under Article 15 (1) of the Mental Health (NI) Order 1986 the child or young person can request a leave of absence from hospital. This could be to attend a special occasion, home visit or for a longer period of time to allow the child or young person to live at home on a trial basis. This is granted at the discretion of the responsible medical officer and the child or young person remains under his care and liable to be returned to hospital.

3.6 Guardianship

Guardianship under Article 18 of the Mental Health (NI) Order 1986 is the process whereby a person or Health Board is appointed and given special powers to look out for and protect a person suffering from mental illness or “severe mental handicap.” That person must be over 16 years of age.

Grounds to be established

Under Article 18 (2) a guardianship application may be made in respect of a patient on the grounds that –

(a) he is suffering from mental illness or severe mental handicap of a nature or degree which warrants his reception into guardianship under this Article;

and

(b) it is necessary in the interests of the welfare of the patient that he should be received.”

Powers of the guardian

- the power to require the person to live at a specified place,
- the power to require the person to attend specified places for medical treatment, occupation, education or training and
- the power to require that at any place where the person is residing access will be given to a doctor, approved social worker or other specified person.

The guardian does not have power to detain a person or restrict the person’s movements.

Who can bring the application

- nearest relative of patient; or
- approved social worker (must be different from approved social worker who recommends guardianship)

The applicant must have seen the patient not more than 14 days before the date on which the application is made.

The application

- The application to appoint a guardian, which is considered by the local Health Board must be founded on and accompanied by two medical recommendations and a recommendation by an approved social worker.
- Both medical practitioners must have personally examined the person not more than 2 days before signing the recommendation and both must describe the patient as suffering from the same form of mental disorder. If the medical practitioners examined the person separately there must not be more than 7 days between the examinations.
- One medical practitioner must be appointed by the Commission and if practicable the other should be the patient's medical practitioner.
- If the proposed guardian is not the Health Board, the application for guardianship must include a written statement from the person wishing to act as guardian confirming that they wish to do so.

Duration of Guardianship

If the Health Board accept the application for guardianship, the guardian will be appointed for up to 6 months initially and this can then be renewed for a further 6 months and annually after that.

Discharge from Guardianship

- A young person can be discharged from guardianship by the responsible medical officer (RMO) or the approved social worker (ASW).
- The nearest relative can also discharge the young person provided they have given 72 hours notice to the Health Board and the RMO or ASW have not provided the Health Board with a report stating that the grounds for detention still apply. The nearest relative cannot make another order discharging the patient for another 6 months if unsuccessful in discharging the child.
- A young person can also be discharged from guardianship by a Mental Health Review Tribunal.

4. The Mental Health Review Tribunal

The Mental Health Review Tribunal (MHRT) is an independent body, set up under the Mental Health (NI) Order 1986 to review the Health Boards decision to detain in hospital or control under guardianship. The rules governing the MHRT are set out in the Mental Health Review Tribunal (NI) Rules 1986.

Membership

A Mental Health Review Tribunal consists of three members who are all from different backgrounds. The chair of the tribunal must be from a legal background (solicitor or barrister), one member must be an independent psychiatrist and the third

member must be a lay person with a relevant background. All three members are fully trained.

The application form

An application to a Mental Health Review Tribunal must be in writing. If the application is for a child or young person it can be completed by “any person authorised by him to do so on his behalf.” If the child or young person does not have the maturity to authorise a person, his nearest relative should complete the application or authorise somebody on behalf of the child or young person.

The application form does not have to be in a set format but should contain the following information:

- (a) the name of the child/young person
- (b) the child/young person’s address, which shall include:- (i) the address of the hospital where the child/young person is detained; or (ii) the name and address of the young person’s private guardian; or (iii) in the case of a conditionally discharged patient or a patient to whom leave of absence from hospital has been granted, the address of the hospital where the patient was last detained or is liable to be detained, together with the patient’s current address;
- (c) where the application is made by the child/young person’s nearest relative, the name and address of the applicant and relationship to the child/young person.
- (d) The provision of the Mental Health (NI) Order 1986 under which the child/young person is detained, is liable to be detained or is subject to guardianship;
- (e) The name and address of any person the child/young person or their nearest relative has authorised to represent the child/ young person or if none is authorised whether the young person/ nearest relative of the child/ young person intends to conduct the case.

The Tribunal process

- (1) Once the MHRT receives the application form it must notify the responsible authority, the patient if they are not the applicant and the Secretary of State if the patient is a restricted patient or conditionally discharged patient.
- (2) Within 3 weeks, the responsible authority must send a statement to the MHRT containing full patient details and relevant reports.
- (3) Once the MHRT receives the statement from the local authority it needs to notify any other relevant people including the young persons guardian if applicable, the nearest relative if different from the applicant.
- (4) The MHRT appoints a panel to hear the application and fixes a date for the hearing. It must ensure that the parties receive 14 days notice of the first hearing.
- (5) The MHRT must send the child or young person’s representative copies of all notices and documents. Unless the representative is a barrister, solicitor, registered medical practitioner or a person suitable by experience/ professional qualification in the opinion of the tribunal, the MHRT do not have to send copies of any documents which would adversely affect the health or welfare of the patient or others.

- (6) Once the child/ young person's representative receives the papers, he/she can submit written comments to the MHRT about the case. The child/ young person may qualify for free legal advice and representation under the green form scheme of legal aid from a solicitor. If eligible for green form advice and assistance an independent psychiatric report can be obtained under the general authority and the solicitor can arrange this. The green form system will also cover the cost of the solicitor attending the hearing.
- (7) Prior to the hearing, the medical member of the Tribunal will examine the applicant and view the medical records to enable him to form an opinion on the applicant's medical condition. He is not required to disclose his findings until the commencement of the hearing. At any time, the young person can ask the Tribunal to meet with him or alternatively the Tribunal can decide they wish to interview the young person.
- (8) At the start of the hearing, the president should explain how he/she proposes to conduct the hearing. The hearing will be in private unless the patient wants a public hearing and the tribunal do not think this would be contrary to his interests.
- (9) During the hearing, the Tribunal will hear evidence from the applicant or the patient if he is not the applicant and the responsible authority. The Tribunal will allow the applicant and responsible authority to hear each others evidence, put questions to each other, call witnesses and put questions to any witness or other person appearing before the tribunal. The Tribunal will also allow the applicant to address the tribunal after the evidence has been given. The Tribunal has power to exclude anyone from the hearing except the representative of the applicant/patient who has received disclosure of all relevant documents. The Tribunal has wide powers for obtaining evidence. It can receive documents that would not be admissible in a court of law, it can require witnesses to attend and produce documents or give evidence and before or during the hearing it can request further information from people or request further reports. It can adjourn a hearing to enable this to be done but must give everybody 14 days notice of the resumed hearing date.
- (10) After the hearing, the Tribunal will make a decision by majority vote and can announce this immediately or can communicate this to the parties in writing within 14 days. This must include reasons for the decision. If, however, the Tribunal are of the view that disclosing all the reasons to the patient would adversely affect the health, management or welfare of the patient or others, it can communicate the decision in whatever way it considers appropriate. If, the patient had an appropriate representative, that person must get disclosure of the full reasons. Restrictions can be placed on the appropriate representative regarding disclosure to the patient.

Decisions of the Mental Health Review Tribunal

The MHRT must direct that the child be discharged if, at the time it considers the application, it decides that the child does not have a mental disorder of a nature or degree which warrants detention in hospital for assessment or treatment or if it decides that detention is not justified for the child's own safety or that of others.

The MHRT can order the conditional discharge of the child or young person. This allows the child/ young person to leave the hospital if he/she complies with certain

conditions set by the Tribunal e.g. that he resides with his parents or that he attends the outpatient hospital or that a suitable residential placement is found for the child. A conditional discharge allows the tribunal to retain residual control over the child/young person who is not at that time suffering from a mental disorder or not to a degree requiring continued detention in hospital.

When making a decision, the MHRT can include a recommendation that the child be granted a leave of absence or be transferred into another hospital or be granted a leave of absence with a view to discharging the child at a future date. If the Tribunal make a decision which includes a recommendation it needs to specify the period at expiration of which, the Tribunal will further hear the case if the recommendation is not complied with.

Legal Aid for Mental Health Review Tribunals

Depending on financial circumstances legal aid is available to enable a child or adolescent to be legally represented by a solicitor at a Mental Health Review Tribunals. If a child is aged 16 years of age or over their own financial circumstances will be assessed. If they have a low income it is likely they will be entitled to receive legal aid. If the child is under 16 years of age their parent or guardian's financial circumstances will be taken into account in assessing whether they are financially eligible for legal aid. The Law Society of Northern Ireland can recommend solicitors specialising in Mental Health Review Tribunals who also carry out legal aid work and the solicitor can then assess entitlement to legal aid. We can also apply for legal aid to represent children in certain cases which fall within our casework policy.

5. Legal Requirement to Disclose a Mental Disorder

If a child or adolescent is treated for a mental disorder, they may legally be required to disclose this fact to certain people and organisations. If the child or young person was assessed only under Article 10 of the Mental Health (NI) Order 1986 are excluded from any legal requirement to disclose this unless they are directly asked about the assessment in the court of judicial proceedings.¹⁸ For further guidance on whether disclosure if required a solicitor or the Children's Law Centre should be consulted. It is likely that a child or young person will be required to disclose the fact that they have suffered from a mental disorder to the following organisations or people:

Disclosure to an employer

It may be a condition of employment that an employee furnishes details of any previous medical illness to the employer and in these circumstances the employee may be required to disclose the fact that he/she has or has had a mental disorder. However an employer is not necessarily permitted to make adverse decisions regarding employment based on that disclosure. Under Part 11 of the Disability

¹⁸ Judicial proceedings are quite widely defined under the Order and refer to any legal action brought before a court, tribunal or body with power. It also includes legal proceedings before an employer, professional organisation or association where this is provided for in the rules governing the organisation or association and includes an agreement for arbitration to determine a matter.

Discrimination Act 1995 (as amended) employers have a legal duty not to discriminate against a disabled person. In order to come within the protection of the Act a person must satisfy the statutory definition of “disability”. Under this Act, “disability” is defined as “a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities”. A mental impairment includes a mental illness. In order to meet the criteria for long term adverse effect it must have lasted or be likely to last at least 12 months. The Act also applies to people who have had mental illness in the past but have now recovered provided impairment/illness lasted at least 12 months and otherwise met the definition above.

In addition to prohibiting direct discrimination and discrimination for a disability related reason that cannot be justified the Act places a positive obligation on an employer to make reasonable adjustments for an employee who is placed at a substantial disadvantage because of his/her disability (e.g. adjustments to working patterns or practices). The reasonable adjustment duty arises where an employer knows or ought reasonably to have known that an individual has a disability that places them at such a disadvantage. It is therefore important that an employee makes their employer aware of their disability and any adjustments s/he he may need as a consequence.

Disclosure to DVLNI if they hold/ wish to apply for a Driving Licence

Any person detained under the Mental Health (NI) Order 1986 as a result of mental handicap, severe mental illness or mental disorder is legally required to notify the DVLNI of the condition if they hold a driving licence or are applying for a driving licence. The DVLNI will then assess whether the medical condition affects fitness to drive. The DVLNI have medical advisers based in the NI Civil Service Occupational Health Service who will assess whether the person satisfies the medical standard required for safe driving. The fact that a person was detained in hospital for a mental disorder will not render them unfit to drive. Rather it will depend on their individual assessment and the medication they are taking.

Disclosure to an Insurance Company

Insurance companies assess people against risk and will therefore need a full medical history which will invariably include information on a detention in hospital under Article 12 of the Mental Health (NI) Order 1986 as this may affect the risk of an insurance claim being made against that insurance company in certain circumstances.

Failed to disclose a full medical history is likely to result in the insurance company refusing to indemnify that person if a claim was made under the policy. Medical history will be relevant to most types of insurance and particularly travel insurance, life insurance, unemployment insurance and health insurance. There is likely to be a condition in the policy which states that the person insured is under a continuing obligation to notify the insurance company of any change in their medical condition, which will include a detention under Article 12 of the Mental Health (NI) Order 1986.

The Disability Discrimination Act 1995 also applies to services and provides that insurance companies cannot discriminate against people with a disability unless it is justified. An example of when it might be justified to discriminate is when the person seeking insurance has a mental disorder which renders them incapable of entering into an enforceable agreement.

Under the Act, the insurance company are also required to make decisions based on relevant information e.g. medical reports, medical research information rather than a generalisation about people suffering from a mental disorder. If an insurance company are aware of a mental disorder they should not assess the person as being a higher risk unless there is evidence

The Association of British Insurers, which regulate the insurance company have issued guidance to insurance companies (2003) on this and provided useful examples including the following,

“A 42 year old woman with a diagnosis of manic depression applies to you for motor insurance. Based on actuarial data relating to the risks posed by a person driving when in a manic episode, you advise her that she will have to pay double the normal premium because of her condition. However, she produces credible evidence to show that she has been stable on medication for some years and that she has an unblemished driving record. In these circumstances, charging a higher premium is unlikely to be justified. In the circumstances of the particular case, you accept the motor insurance on standard terms with no extra premium.”

Disclosure when applying for a US Visa

The fact that a person has been detained in hospital for a mental disorder could impact on their prospects of obtaining a visa for entry into the USA as the person must satisfy health related grounds to obtain entry.

Section 212(a) of the Immigration & Nationality Act states that a person could be ineligible if he is determined to have a physical or mental disorder and behaviour associated with the disorder that may pose or has posed a threat to the property, safety or welfare of the person or others, or has had a physical or mental disorder and a history of behaviour associated with the disorder, which behaviour has posed a threat to the property, safety or welfare of the person or others and which behaviour is likely to recur or to lead to other harmful behaviour.

Jury Service

The Juries Act 1974 provides that people are excused from jury service if they have suffered from mental illness, psychopathic disorder, mental handicap or severe mental handicap and on account of that condition either-

- (a) is resident in a hospital or other similar institution; or
- (b) regularly attends for treatment by a medical practitioner.

The Comprehensive Legislative Framework produced in August 2007 as part of the Bamford Review of Mental Health & Learning Disability recommends at 5.52 that periods of compulsory treatment for children shall, without prejudice to the child, be disregarded for certain purposes (otherwise than in legal proceedings) when that child becomes an adult. The Framework proposals are a description and explanation of what is considered necessary for reforming existing legislation. It is proposed that the comprehensive legislative framework should be taken forward through a joint initiative involving the DHSSPS, the Civil Law Reform Division of the Department of Finance and Personnel, The Northern Ireland Court Service and the Northern Ireland Office. The Children's Law Centre fully supports this particular recommendation and is anxious to see developments in the legislative reform process as soon as possible.

6 Voluntary patients

The vast majority of children and young people with mental health difficulties are not treated compulsorily under the Mental Health (NI) Order 1986 but rather receive treatment on a voluntary basis. By receiving treatment on a voluntary basis, the child or young person may avoid the stigma often associated with involuntary admission but they are denied the safeguards and protection of the mental health legislation.

This problem was highlighted by the European Court of Human Rights in the case of *H.L. v The United Kingdom*, 2004 (application no. 45508/99) often referred to as the *Bournewood* case. In this case an individual who lacked the capacity to consent to or refuse admission to hospital for treatment was admitted informally to Bournewood Hospital. The European Court of Human Rights found that the absence of procedural safeguards for voluntary patients failed to protect against deprivations of liberty on grounds of necessity and consequently breached Article 5 (1) of the European Convention on Human Rights. In the judgement the ECHR stated,

“the court finds striking the lack of any fixed procedural rules by which the admission and detention of compliant incapacitated persons is conducted. The contrast between this dearth of regulation and the extensive network of safeguards applicable to psychiatric committals covered by the 1983 Act is, in the Court's view significant.

In particular and most obviously, the Court notes the lack of any formalised admission procedures which indicate who can propose admission, for what reasons and on the basis of what kind of medical and other assessments and conclusions. There is no requirement to fix the exact purpose of admission (for example, for assessment or for treatment) and consistently, no limits in terms of time, treatment or care attach to that admission. Nor is there any specific provision requiring a continuing clinical assessment of the persistence of a disorder warranting detention. The nomination of a representative of a patient who could make certain objections and applications on his or her behalf is a procedural protection accorded to those committed involuntarily under the 1983 Act and which would be of equal importance for patients who are legally incapacitated and have, as in the present case, extremely limited communication abilities.

As a result of procedural regulation and limits, the court observes that the hospital's health care professionals assumed full control of the liberty and treatment of a vulnerable incapacitated individual solely on the basis of their own clinical assessments completed as and when they consider fit.

Following the Bournemouth case, the UK government reviewed legislation and introduced the Mental Health Act 2007 in England and Wales, which is intended to give protection to patients who do not have the capacity to consent to treatment voluntarily and are deprived of their liberty. Similar legislation has not been introduced in Northern Ireland and this legal loophole for involuntary patients known as the Bournemouth gap still remains.

Treatment of voluntary patients under the Common Law

When the child is a voluntary patient, a doctor cannot treat the child except in an emergency without the consent of either the parent, guardian, child or the court. Treating a child or young person who is a voluntary patient without consent could be unlawful and might constitute the crime of battery or common law assault. The only treatment that a doctor can carry out on a voluntary patient without consent is emergency treatment that is both necessary and reasonable for the purpose of saving the life of, or preventing serious deterioration in the health of, a child or young person. This is known as the doctrine of necessity. The law is not always clear as to what rights children and young people have and what rights parents or guardians have to consent to voluntary admission to hospital and to treatment at hospital. In the case of *Nielsen v Denmark* (1989) 11 EHRR 175, the European Court of Human Rights held that the informal admission of a 12-year-old boy to a psychiatric hospital against his wishes but with parental consent was not a deprivation of liberty contrary to Article 5 of the European Convention on Human Rights. The common law has laid down guidance on the issue of consent and children and young people.

Child under 16 years of age

Children under 16 years mature differently and whilst one child aged 14 may have the maturity and intelligence to decide for themselves whether they are willing to be admitted to hospital for treatment another child the same age may not. The common law therefore says that it is possible for a child under 16 years of age to have the capacity to consent to treatment but it will depend on the maturity of the child as assessed by the doctor. The leading case is *Gillick v West Norfolk & Wisbeck Area Health Authority and Department of Health & Social Security* [1985] 3 All ER 402, in which the House of Lords considered whether a doctor could lawfully give contraceptive advice or treatment to a girl under 16 without her parents' knowledge or consent. The House of Lords held that the parents' right to determine consent *yielded* to that of the child when the child achieved sufficient intelligence and understanding to make its own decision. The doctor must be satisfied that the child has sufficient maturity and intelligence to understand the nature and implications of the proposed medical treatment.

It stands to reason that the child's legal capacity to make a decision may depend on the complexity and importance of the decision being taken. If the decision relates to a straightforward procedure with few risks then the doctor may deem the child to have sufficient capacity to consent to that treatment but if there are very extreme and

serious consequences which could arise from the decision made by the child, the doctor may conclude that the child does not have the legal capacity to make such a serious decision and may seek the consent of the person with parental responsibility for the child. If that person will not consent and the doctor considers that the treatment is in the best interests of the child, the health authority could make an application to the court for an order permitting the treatment. This application would be made to the High Court who could exercise its inherent jurisdiction and override a competent child or his parents.

In the case of *Re R (A Minor: Wardship Consent to Treatment)* [1991] 3 WLR 592 wardship proceedings were issued in the High Court when a 15 year old girl suffering from a psychiatric illness characterised by periods of violent and suicidal behaviour followed by lucid thought refused to take her medication. The court found that the child was not competent but held that the High Court when exercising its wardship jurisdiction was entitled to override a minor's decision consenting to or refusing treatment irrespective of competence, if it was in the best interests of the child to do so.

Children 16 & 17 years

Under the Age of Majority Act (Northern Ireland) 1969, young people aged 16 and 17 years who have capacity can make their own treatment decisions and can admit and discharge themselves in the same way as adults provided they are deemed "capable of expressing their own wishes". If they do not have capacity, the permission of their parents, guardian or care authority is required.

In *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1992] 4 All ER 627, a 16 year old patient with anorexia nervosa refused to be transferred to a specialist treatment clinic. The appeal court considered that section 8 of the Family Law Reform Act 1969 only covered consent to treatment and did not cover refusal of treatment. The court held that a competent child under 18 years of age could be required to have treatment against her will if the refusal could have "irreparable consequences," the doctor felt it was necessary and any person with parental responsibility consented to it. It confirmed that from aged 16-18 the right to consent was shared with the parents and the court.

Power to compulsorily detain a voluntary patient

A voluntary patient can be compulsorily detained under the Mental Health (NI) Order 1986 for up to 48 hours by a medical practitioner on the hospital staff if it appears that an application for assessment under the Order 'ought to be made'. A nurse of the prescribed class (a nurse trained to work with mental illness or learning disabilities) can detain a voluntary patient who is receiving treatment for a mental disorder for up to six hours, or until a doctor with authority to detain her or him arrives, whichever is earlier.

7. Mental Health of Children in the Youth Justice System

The Youth Justice Agency provides custodial facilities for boys and girls aged 10 to 17 years of age who are in conflict with the law at the Juvenile Justice Centre for Northern Ireland in Bangor.

The Youth Justice Agency state on their website that,

“ In carrying out its duties, the Youth Justice Agency will strive to protect the human rights of all those with whom it comes into contact and meet its obligations under domestic and international law. The Agency will pay due regard to the principles and provisions of the United Nations Convention on the Rights of the Child (UNCRC). Children will receive the highest standards of care while they are with us and at all times the Agency will comply with its child protection policy and procedures. ”¹⁹

The United Nations Convention on the Rights of the Child is an international human rights treaty which was ratified by the UK government in 1991. Article 27 of the United Nations Convention on the Rights of the Child guarantees to children the right to the highest attainable standard of healthcare and health care services. Children in custody should therefore expect to receive a level of care and treatment for their mental health equivalent to that which they would receive if they were treated in the community.

7.1 Criminal Court’s power to remand to hospital rather than custody

The Mental Health (NI) Order 1986 makes special provision for people who are suffering from a mental disorder and who are in conflict with the law.

- Article 42 of the Mental Health (NI) Order 1986 gives a Criminal Court the power to remand a person charged with a criminal offence to a hospital instead of remanding that person into custody to enable a report to be prepared on their mental condition. The maximum time a person can be remanded to hospital under this order is 28 days at a time and not more than 12 weeks in total.

The Court can only make an article 42 order in the following circumstances:

- (i) If it hears oral evidence from a psychiatrist appointed by the Mental Health Commission that there is reason to suspect that the person is suffering from a mental illness or severe mental impairment and the court considers that it would be impracticable for a report on the persons mental condition to be made if the person were released on bail.
- (ii) If the criminal court is a Magistrates Court, it must be satisfied that the child committed the offence/ has already been convicted of the offence and it carries a custodial sentence or there is consent to the order being made. If the criminal court is a Crown Court, the child or young person must already be in custody

¹⁹ Page 7, Youth Justice Agency Corporate Plan 2006 – 2009/ Business Plan 2006 - 2007

but not yet sentenced or otherwise dealt with and the sentence must not be fixed by law.

- Article 43 of the Mental Health (NI) Order 1986 gives a criminal court the power to remand a person charged with a criminal offence to a hospital for treatment of their mental condition.

The circumstances under which an Article 43 order can be made are similar to those for an article 42 order except the court must be satisfied on the oral evidence of a psychiatrist appointed by the Mental Health Commission and on the written or oral evidence of another medical practitioner that the child/young person is suffering from a mental illness or severe mental impairment of a nature or degree warranting detention in hospital for treatment.

7.2 Criminal Court's power to make a Hospital Order

Article 44 of the Mental Health (NI) Order 1986 permits a criminal court to make a hospital order committing a person convicted of a criminal offence, which carries a prison sentence to a psychiatric hospital for medical treatment instead of dealing with the person by way of imprisonment, a fine or probation.

Before the court will make a hospital order it must be satisfied:

- (i) on the basis of evidence supplied by two doctors that the child or young person has at least one mental disorder (with both doctors agreeing on at least one of the types of mental disorder the person is suffering from) *and*
- (ii) that the mental disorder is of a nature or degree which makes it appropriate for the child or young person to be detained in hospital for medical treatment (and, in the case of psychopathic disorder or mental impairment, that the treatment is likely to alleviate or prevent a deterioration of the person's condition) *and*
- (iii) that making the Order is most appropriate way of dealing with the child or young person, bearing in mind all relevant matters including the offence *and*
- (iv) that a specific hospital has agreed to admit the child or young person within 28 days.
- (v) in the case of a Crown Court that the child or young person has been convicted of an offence which could be punished with imprisonment.
- (vi) in the case of a Magistrates Court, that the child or young person has been convicted of an offence which could be punished with imprisonment or
- (vii) in the case of a Magistrates Court, that the child or young person has been charged with an offence which could lead to imprisonment if convicted, the child or young person has mental illness or severe mental impairment and the Court is satisfied that that the child or young person did what they are accused of doing.

Effect of hospital order

If the court make a hospital order in relation to a person, that person will be subject to almost the same rules as patients detained for treatment for their mental disorder under the Mental Health (NI) Order 1986. This means that the person can apply to the Mental Health Review Tribunal to consider their discharge and have the same rights as detailed earlier in this paper. The nearest relative of a person subject to a hospital order cannot, however, discharge that patient. There are other small differences which are detailed in Schedule 2, part I of the Mental Health (NI) Order 1986.

Under Article 47 (1) (b) of the Mental Health (NI) Order 1986, the Court can attach a restriction order to the hospital order if it appears to the court, having regard to the nature of the offence, the antecedents of the person and the risk of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm to do so. This will subject the person to special restrictions as set by the Court either without limit of time or for a certain period of time. If a restriction order is in place, the responsible medical officer shall at such intervals (not exceeding one year) as the Secretary of State directs, examine and report to the Secretary of State on that person. The Secretary of State has power to remove the restriction order. The Secretary of State can also order the persons conditional or absolute discharge from hospital. If the person is conditionally discharged they are liable to be recalled to hospital.

7.2 Power to transfer a sentenced prisoner to hospital

Under Article 53 of the Mental Health (NI) Order 1986, the Secretary of State may direct that a sentenced prisoner suffering from *mental illness or severe mental impairment* is transferred to hospital. The Secretary of State must have received written reports from at least two medical practitioners, one of whom is a medical practitioner appointed by the Commission confirming this. If the Secretary of State is notified by the Responsible Medical Officer that the person no longer requires treatment in hospital for mental disorder or that no effective treatment for the disorder can be given the Secretary of State may direct the person be remitted to prison or released on licence if he would have been eligible to have been released had he been in custody.

8. Child and Adolescent Mental Health and the Human Rights Act 1998

The European Convention on Human Rights has been part of the law of Northern Ireland since the Human Rights Act 1998 came into force in October 2000. Individuals may challenge the actions of a public authority perceived to be in breach of the European Convention on Human Rights by way of civil proceedings, judicial review or by introducing the argument into other ongoing court or Tribunal proceedings.

The European Convention on Human Rights contains a number of important rights for children and adolescents with mental health problems. The most significant rights are contained in Articles 2, 3, 5, 6 and 8 of the European Convention on Human Rights, which are discussed below:

Article 2 ECHR

Article 2 of the ECHR guarantees a right to life and places a positive obligation on the state to “take appropriate steps to safeguard life” as stated by the European Court of Human Rights in the case of *Association X v UK* (1978) application no 7154/75 14 DR 31²⁰. The court considered that the duty on the state under Article 2 of the ECHR extended to the provision of adequate and appropriate medical care. In order to bring a challenge on Article 2 grounds it is not necessary for a life to have already been lost. It may be possible to bring a challenge to treatment being received where there is a real and immediate risk to life as a consequence of inadequate health care.

Article 3 ECHR

Article 3 imposes a duty on the state to prevent individuals from suffering “torture, inhuman or degrading treatment.” In order to come within the scope of Article 3, the treatment must reach a high threshold of severity and the court must be satisfied “beyond all reasonable doubt” that a breach of Article 3 occurred. This high threshold was not reached in the case of *Herczegfalvy v. Austria* (1992) application no 10533/83 15 EHRR 437²¹, however the judgement in this case was useful for mental health law practitioners. The court in this case stated that increased vigilance was required by the Court because of the vulnerability of people with mental health problems. It stated that the court must satisfy itself that the medical necessity has been convincingly shown to exist. The court did, however, add that if medical experts assess a measure to be a ‘therapeutic necessity’ it is unlikely that the court will find it to be a breach of Article 3. In this particular case Mr Herczegfalvy had been handcuffed to a security bed for some weeks and force fed food and medicine. The Austrian government had successfully argued that Article 3 had not been breached as the measures had been agreed by Mr Herczegfalvy’s guardian, their sole aim was therapeutic and they had been terminated as soon as the state of the patient permitted this.

In the case of *Price v The United Kingdom* (2001) application No. 33394/96 34 EHRR 1285²², a violation of Article 3 was upheld in relation to the treatment of a disabled lady detained in a prison rather than a psychiatric facility. The facts of this case were that a female wheelchair user was sent to prison for one week. During her time there she was forced to sleep in her wheelchair, she could not reach the emergency buttons or light switches and was unable to use the toilet. On one occasion she alleged that a female prison officer lifted her onto a toilet and then left her there for 3 hours until she agreed to allow a male nursing officer to clean her and help her off the toilet. The court found that there had been a violation of Article 3. The court in this case stated that whether the treatment meets the minimum level of severity

²⁰ The full text of this judgment can be found in the HUDOC case law search on the website of the European Court of Human Rights www.echr.coe.int/

²¹ The full text of this judgment can be found in the HUDOC case law search on the website of the European Court of Human Rights www.echr.coe.int/

²² The full text of this judgment can be found in the HUDOC case law search on the website of the European Court of Human Rights www.echr.coe.int/

depends on the circumstances of the case, including the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and the state of health of the victim.

The ECHR also upheld a breach of Article 3 in the case of *Keenan v UK* (2001) application no 27229/953, 33 EHRR 913²³. In this case it was the failure to provide a prisoner with adequate psychiatric care which may have prevented his suicide, which was held to amount to a breach of article 3. In its judgment the court stated “..in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3. Similarly, treatment of a mentally ill person may be incompatible with the standards imposed by Article 3 in the protection of fundamental human dignity, even though that person may not be capable of pointing to any specific ill-effects.

Article 5

Given that the Mental Health (NI) Order 1986 permits the state to detain children and young people suffering from a mental disorder against their will, Article 5 is an important and very relevant human right.

Article 5(1) provides that everyone shall have the right to liberty and security of the person. No one should be deprived of his liberty save in the following cases and in accordance with the procedures prescribed by law.....(e) the lawful detention of persons of unsound mind.....”

The term “unsound mind” used in Article 5 is not further defined and this was considered by the ECHR in the case of *Winterwerp v Netherlands* (1979) application No. 6301/73 2 EHRR 387²⁴. The court confirmed that it could not be defined as “its meaning is continually evolving as research in psychiatry progresses.” The court clarified what needed to be established before the competent national authority was a “true mental disorder” which called for “objective medical expertise.” The court further confirmed that “the mental disorder must be of a kind or degree warranting compulsory confinement” and the validity of continued confinement depends upon the persistence of such a disorder.”

In the case of *DG v Ireland* (2002) Application no. 39474/98, ECHR the Court took the view that the detention of a child in a penal institution for a period of three weeks to protect his welfare when he had committed no crime was unlawful. The High Court, on evidence presented to it, concluded that the applicant was not mentally ill but that he had a personality disorder; that he was a danger to himself and others, that he had a history of criminal activity, violence and arson, that he had absconded from non secure institutions, that he had failed to co operate with staff and with a psychiatric assessment and that it was “common case” that the young person needed to be placed in a secure unit where he could be looked after but that no such unit

²³ The full text of this judgment can be found in the HUDOC case law search on the website of the European Court of Human Rights www.echr.coe.int/

²⁴ The full text of this judgment can be found in the HUDOC case law search on the website of the European Court of Human Rights www.echr.coe.int/

existed in Ireland. The court held that the child had been deprived of his liberty contrary to Article 5(1) as there was no legal basis for justifying his detention.

Article 5(4) states that everyone who is deprived of his liberty by detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Were there is a delay in discharging a patient due to lack of alternative accommodation or appropriate support, Article 5(4) can be relied upon to challenge the lawfulness of this delay. In the case of *Johnson v the UK* (1997) application no 22520/93 ECHR 88, the ECHR²⁵ stated that unreasonable delay of a patient found to no longer need to be detained was a breach of the patient's rights under Article 5.

Article 5 can also be relied upon if there is delay in considering whether the detention is lawful. In *R V MHRT London South and South West Region* (2001) EWCA Civ 1110, a detained patient requested judicial review of a decision to list his mental health review tribunal hearing 8 weeks after his application. On appeal it was confirmed that Article 5 required that the lawfulness of detention should be heard as soon as reasonably practicable and 8 weeks was held to be too long.

Article 5 is also particularly pertinent to voluntary patients who do not have the capacity to consent to their admission to a psychiatric hospital but are classified as voluntary patients for legal purposes as they have not objected or fear that they will be compulsorily detained if they do object. The case of *HL v UK* (2004) application no 45508/99 ECHR 471²⁶ in which the ECHR held that detention of this kind breached Article 5 was discussed earlier in this paper.

In the case of *DG v Ireland* (2002) Application no. 39474/98, ECHR the Court took the view that the detention of a child in a penal institution for a period of three weeks to protect his welfare when he had committed no crime was unlawful. The court held that the child had been deprived of his liberty contrary to Article 5(1) as there was no legal basis for justifying his detention.

Article 6 ECHR

Article 6 of the ECHR guarantees a right to a fair and public hearing within a reasonable time by and independent and an impartial Tribunal. This right is particularly important for detained patients. In order to comply with Article 6 equality of arms should be a factor. This is particularly important as the patient is a child or young person suffering from a mental disorder and is particularly vulnerable. The child should be afforded adequate representation to ensure he or she is on a level playing field with the authorities who are making decisions regarding his or her treatment and care. The child or young person should also be able to participate effectively in any hearing. To comply with Article 6, Mental Health Review Tribunals should ensure that they give reasons for decisions they make and ensure that decisions are taken within a reasonable time.

²⁵ The full text of this judgment can be found in the HUDOC case law search on the website of the European Court of Human Rights www.echr.coe.int/

²⁶ The full text of this judgment can be found in the HUDOC case law search on the website of the European Court of Human Rights www.echr.coe.int/

Article 8 ECHR

Article 8 guarantees everyone the right to respect for his family and private life, his home and his correspondence. Any interference with a persons' private life, for example, by carrying out personal searches, secluding a person in a psychiatric facility, restricting family visits to patients in psychiatric facilities or perhaps interfering with the mail of patients in psychiatric facilities must be lawful and justified.

In the case of *J.T. v. the United Kingdom* (2000) application no. 26494/95 ECHR 132²⁷, it was clear that Article 8 was relevant to the selection of the 'nearest relative' under the Mental Health legislation. In this case the applicant complained under Article 8 of the Convention that she could not change her "nearest relative" appointed pursuant to section 26 of the Mental Health Act 1983 during her involuntary detention in a psychiatric institution. The applicant alleged that she had been sexually abused by her step father who resided with her mother. Consequently she wished to remove her mother as nearest relative and appoint a social worker in her place. Her mother would not agree to this. The UK government settled this case before it went to hearing and agreed as part of the terms of the settlement that the relevant legislation would be amended to provide the detainee with the power to make an application to court to have the "nearest relative" replaced where the patient reasonably objected to a certain person acting in that capacity.

Article 14 ECHR

Article 14 of the ECHR guarantees that all Convention rights should be enjoyed without discrimination. This includes discrimination on the grounds of age or disability including a mental health disability.

9. The United Nations Convention on the Rights of the Child (UNCRC)

The UNCRC is an international agreement containing 54 articles and 42 rights which over 190 countries throughout the world have signed up to. By signing the agreement in 1989 the UK government made a commitment to children and young people that these 42 rights would be put in place in the UK. The UNCRC states that these are the minimum rights children and young people should have and the government should ensure that all adults and children know about the Convention and how it affects them. Whilst these rights cannot yet be enforced directly in our courts the judiciary should take account of these rights when considering cases that involve children and young people and also when interpreting the European Convention on Human Rights in order to make a decision about a child or young person. The following Articles of the UNCRC are of particular relevance to children and young people with mental health difficulties:

²⁷ The full text of this judgment can be found in the HUDOC case law search on the website of the European Court of Human Rights www.echr.coe.int/

Article 3

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.

Article 4

States Parties shall undertake all appropriate legislative, administrative and other measures for implementation of the rights recognized in the present Convention.

Article 12

State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 23

State Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance, and facilitate the child's active participation in the community.

Article 24

State Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 29

States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential.

