Mr Chris Matthews
Director
Mental Health, Disability & Older People Policy
Directorate

Department of
Health, Social Services and Public Safety
www.dhsspsni.gov.uk

To:
The Attorney General for Northern Ireland
Chief Executive of each HSC Trust;
Chief Executive of the HSC Board
Chief Executive of the PHA
Chief Executive of the RQIA
Chief Executive of the Patient and Client Council
Royal College of Psychiatry (NI Division);
British Association of Social Workers (NI);
Royal College of Nursing (NI).
British Medical Association
GAIN

Castle Buildings
Stormont
Belfast BT4 3SQ

Our Ref: HSC circular MHU 1/14

15 September 2014

Dear Colleague,

THE MENTAL HEALTH (NORTHERN IRELAND) ORDER 1986 – IMPLICATIONS OF RECENT JUDICIAL REVIEW ACTIONS

1. The purpose of this guidance is to bring to your attention the implications arising from recent Judicial Review proceedings relating to the Mental Health (NI) Order 1986 (the Order). (The Order can be viewed at http://www.nidirect.co.uk/the-mental-health-act). They concern the provisions relating to three important safeguards in that Order: (a) the "nearest relatives" provisions; (b) the second opinion appointed doctor (SOAD) provisions; and, (c) applications to the Mental Health Review Tribunal (MHRT). This guidance sets out the action now required to reflect policy changes pending future legislative reform through the proposed Mental Capacity Bill. It should be noted that the revised SOAD provisions will not become effective until 1 April 2015.

A) Nearest Relatives

2. "Nearest relative" is defined at Article 32 of the Order and is an important safeguard for patients subject to that Order.

3. The Order confers various functions on the nearest relative such as making applications for assessment (Article 5), exercising the right to discharge the patient (Article 14) and making applications to the MHRT (Article 71 (4)). The

nearest relative also has to be informed and/or consulted when certain actions have been taken under the Order or when these are being proposed.

Change of Nearest Relative

4. Article 36 of the Order enables the County Court to appoint an acting nearest relative. Upon an application to the County Court, on one of the four grounds set out in Article 36 (3), the County Court may direct that the functions of the nearest relative are exercisable by the applicant or by any other person specified in the application. There is however no explicit statutory mechanism in Northern Ireland whereby the patient can apply to the County Court to change their nearest relative. The absence of such a mechanism was challenged in recent judicial review proceedings.

Outcome of legal action

5. In his judgement of 4 April 2014, Mr Justice Treacy ruled that the inability of a patient to be heard on the identity of his nearest relative amounts to an infringement of the patient's rights under Article 8 of the European Convention on Human Rights (ECHR), which does not pursue a legitimate aim (see para 50 of the judgement). He went on to state that this infringement can, however, be addressed by reading Article 32 and Article 36 in an ECHR compliant manner. This requires *'or the applicant*' to be read into the list of people in Article 36(2) who are entitled to apply to the County Court to change a nearest relative. It also requires the following words be read into the list of grounds in Article 36 (3) on which the application to change a nearest relative can be made, namely "*that the nearest relative of the patient is otherwise not a suitable person to act as such".* This means that there are now five grounds upon which an application can be made. This interpretation mirrors the provisions in the Mental Health Act 1983, (the England & Wales legislation). The full judgement is attached at Annex A for ease of reference.

Implications and Actions

6. This judgement means that where a patient wishes to exercise their right to apply to the County Court to have their nearest relative changed then this must be facilitated by the HSC Trust and Approved Social Worker (ASW).

7. It is important that ASWs, independent advocates, patients and nearest relatives are made aware of this significant change to the operation of the Order as soon as possible.

B) Second Opinion Appointed Doctors

8. The provisions for the appointment of a Second Opinion Appointed Doctor (SOAD) are set out in Articles 63 and 64 of the Order, and paragraphs 181 to 187 of the Guide to the Mental Health (Northern Ireland) Order 1986, (the Guide).

9. Currently where it is proposed to extend the compulsory treatment involving administration of medicine to a detained patient beyond 3 months (Article 64 (1)(b) of the Order) the Responsible Medical Officer (RMO) must obtain the approval of a SOAD, appointed by the Health and Social Care Regulation and Quality Improvement Authority, (RQIA). A Form 23 is then completed by the SOAD and submitted to RQIA. The SOAD may be a Part IV doctor, however in the case of treatment in accordance with Article 64 (1)(b) of the Order the option is available that the SOAD may be a Part II doctor (see Article 64(4) of the Order). The practical effect of this option at Article 64(4) is that the RMO may approach a Part II colleague in the same hospital to perform the functions of the SOAD.

Current Position in England and Wales

10. In England and Wales when an RMO requires a SOAD with respect to administering medication beyond the non-consensual 3 month period they must apply to the Care Quality Commission (CQC), which independently appoints a SOAD to perform this function. The appointed SOAD must not work in the same hospital in which the treating doctor is based or in which the patient is detained. Nor should the SOAD have worked there within the previous 2 years.

Implications and Actions

11. The Department, having considered the matter, considers that it is better practice for the RMO to no longer appoint a Part II SOAD. The following sentence at paragraph 187 of the Guide is to be treated as if now reading:-

    "In the case of the administration of medicine, the responsible medical office may, instead of contacting RQIA for a Part IV doctor, himself obtain the second opinion from a Part II doctor who must carry out the requirements of the Order in the same way as a Part IV doctor. The responsible medical officer however is strongly encouraged to avoid relying on an opinion from a Part II doctor. Best practice is for an opinion to be obtained from a Part IV doctor. "

12. An application for a SOAD shoud be made in a timely fashion to RQIA. RQIA will then appoint a Part IV SOAD from another HSC Trust to perform the SOAD functions under the Order.

13. As a direct result of the foregoing Form 23 has been revised to remove reference to Part II doctor other than in exceptional circumstances **(see example of new Form at Annex B)**. HSC Trusts must ensure stocks of the revised Form 23 are available and that relevant clinicians use the revised form.

14. This change will not become effective until **1 April 2015** to allow an adequate opportunity for RQIA to recruit and train Part IV doctors for this increased role.

15. It is important that relevant clinicians are made aware of this significant change to the operation of the Order as soon as possible.

C) Applications to the Mental Health Review Tribunal on behalf of patients lacking capacity

16. Articles 71-73 of Order make provision relating to another important safeguard for detained patients: access to the MHRT.

17. Currently, a detained patient who **lacks capacity** to apply to, and has not been referred to, the MHRT, is automatically referred to the MHRT by the relevant Trust two years after the date of their admission to hospital (after one year if aged under 16). This mandatory automatic referral is repeated after each subsequent 2 year (1 year, if under 16) period where the patient has not accessed the MHRT. However, a detained patient who **has capacity** to apply to the MHRT could have applied twice during their first year of detention and then annually thereafter and thus have had three opportunities to have his detention reviewed during a similar two year period.

18. The nearest relative also has the power, in certain circumstances, to make an application to the MHRT on a patient's behalf under Article 71(4).

Recent legal developments

19. A European Court of Human Rights judgment in October 2013 [MH v The United Kingdom] scrutinised analogous legislative provisions in England and Wales. That case concerned a detained patient who lacked capacity to challenge the lawfulness of her detention. In the circumstances of the particular case, it was held that the detained patient's rights under Article 5(4) of the ECHR had been violated in relation to the initial 28 days of detention but not thereafter. In so deciding, the Court summarised a number of principles relating to Article 5(4) and the right of detained patients to have the lawfulness of their detention reviewed speedily by a court or tribunal. One of the principles is that "special procedural safeguards might be called for in order to protect the interests of persons who, on account of their mental disabilities, were not fully capable of acting for themselves"[see paragraph 81]. This was raised with the Department recently in judicial review pre-action correspondence.

Implications and Actions

20. In light of these recent developments, HSC Trusts are reminded of their duties under the Order and need to consider, in each individual case, what is required to ensure compliance with Article 5(4) of ECHR (i.e. anyone deprived of their liberty is entitled to have the lawfulness of their detention reviewed speedily by a court). In particular, HSC Trusts are asked to review, and if necessary update, arrangements currently in place where there is a doubt about a patient's capacity to apply to the MHRT.

21. In doing so, HSC Trusts are also reminded of their statutory duty under Article 27(1) of the Order to take such steps as are practicable to ensure that the

patient understands the effect of the provision under which he is detained and the rights of applying to the MHRT which are available to him. This must be done as soon as practicable after the patient is detained. HSC Trusts are also reminded of the similar duty in respect of nearest relatives. To this end clinicians should familiarise themselves with paragraphs 92-98 of the Guide. ASWs and independent advocates commissioned by HSC Trusts should also be made fully aware of these rights.

22. Clinicians should also familiarise themselves with the discretionary provision at Article 72 of the Order, particularly in a case where there is reason to believe that a patient subject to detention or guardianship, who lacks capacity to make a referral to the MHRT, would wish to do so.

Article 72 provides:-

> "The Attorney General, the Department, or on the direction of the High Court, the Master (care and protection) may at any time refer to the Review Tribunal the case of any patient who is liable to be detained or subject to guardianship under Part II."

23. It is important to stress that while this is a discretionary power, recent case law suggests that once a request for a referral under Article 72 has been made to the Attorney General for Northern Ireland or the Department of Health, Social Services and Public Safety (as the case may be), there is in effect a duty on the Attorney General or the Department to refer the case to the MHRT if not to do so would involve an infringement of the patient's rights under Article 5(4) of the ECHR. The Attorney General or the Department, whichever the case may be, is then required under the Human Rights Act 1998 to exercise the Article 72 power compatibly with the rights enjoyed by individuals under the ECHR. Greater use of this provision could be made in cases of concern where, for example, there is a doubt about a patient's capacity to apply to the MHRT or where there is reason to believe that the patient would wish to make a referral to the MHRT but lacks capacity to do so.

24. Any person may ask the Attorney General or the Department to refer a case to the MHRT.

<u>Making a request to the Attorney General for Northern Ireland for a referral to MHRT under Article 72</u>

25. In relation to the process for making an application to the Attorney General, there is no need to go through the Trust or the Department as contact can be made directly with the Attorney General's office. The Attorney enjoys a broad discretion as to what factors may be of importance in an individual case. The Attorney General's office is happy to receive queries about the use of this power.

    Tel: 02890 725301

    Email: contact@attorneygeneralni.gov.uk

Making a request to the Department for a referral to MHRT under Article 72

26. Any person may ask the Department to refer a case to the MHRT. They should write to the Director of Mental Health, Disability and Older People Policy in the Department.

27. Where a request is made by the RMO or relevant service manager this should be forwarded through the relevant HSC Trust Director/s. The request should then be forwarded by the HSC Trust Director to the Director of Mental Health, Disability and Older People Policy in the Department, who will consider the case and make a referral to the MHRT, if appropriate.

Action Required

28. You are asked to bring this circular letter to the immediate attention of all relevant Directors, Service Managers, clinicians, Approved Social Workers and organisations commissioned by the Trust to provide advocacy services.

29. GAIN is asked to note the content of this circular letter and update relevant guidance published on its website accordingly.

Yours sincerely

Chris Matthews
Mental Health, Disability and Older People Policy Directorate

ANNEX A

Nearest Relative judgement

1825_001.pdf

Justice Treacy judgement of 4 April 2014

CERTIFICATE OF SECOND OPINION

FORM 23
Mental Health (Northern Ireland) Order 1986
Article 64(3)(b)

TREATMENT REQUIRING CONSENT OR A SECOND OPINION

(Full name and professional address)

I,

am a medical practitioner appointed for the purposes of Part IV of the Mental Health (Northern Ireland) Order 1986 by the Mental Health Commission

I have consulted

(full name, address & status of person(s) consulted)

who appear(s) to me to be principally concerned with the medical treatment of

(full name and address of patient)

I certify that this patient –
**(a) is not capable of understanding the nature, purpose and likely effects of
OR
**(b) has not consented to
(give description of treatment or plan of treatment)

_____

_____

_____

_____

_____

Please turn over

But that , having regard to the likelihood of that treatment alleviating or preventing a deterioration of the patients condition it should be given.

I am not the responsible medical officer for this patient.

Signed	Date