Mental Capacity Act (Northern Ireland) 2016

Emergency Code of Practice

Coronavirus Act 2020

Version 2
10 July 2020
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Code of Practice

Introduction

1. The Mental Capacity Act (Northern Ireland) 2016 (the 2016 Act) provides a statutory framework for deprivation of liberty (DoL). The provisions in the Act provide safeguards, and therefore protect persons against arbitrary decisions and ensure that all people’s human rights are protected; in particular the right to life (ECHR Article 2), the prohibition against inhuman and degrading treatment (ECHR Article 3), the right to liberty (ECHR Article 5) and the right to private life (ECHR Article 8).

2. The Coronavirus Act 2020 provides modifications to the safeguards which relax the requirements of the Mental Capacity Act in the time of an emergency. The purpose of the Coronavirus Act is to enable Government to respond to an emergency situation and manage the effects of a COVID-19 pandemic. A severe pandemic could affect up to 80% of the population leading to a reduced workforce and increased pressure on health services. The Act contains temporary measures designed to amend existing legislative provisions to mitigate these impacts.

3. Section 10 of the Coronavirus Act 2020 and Schedule 11 to the Act provides temporary modifications to the 2016 Act. The modifications relax some of the requirements of the 2016 Act in a time of emergency, to ensure that persons can still be deprived of liberty when needed, even where a significant proportion of the workforce is unavailable, while still maintaining safeguards to protect the person subject to deprivation of liberty.

4. The provisions in the Coronavirus Act are permissive and do not remove the normal procedures. Rather they provide an alternative when the normal procedures cannot be followed. In most cases where the emergency modifications have been used, there is a requirement to tell the patient and the nearest relative that they have been used. There are also monitoring and reporting requirements included.

5. Please note, even when the emergency modifications are in force, it is expected that the normal processes in the Deprivation of Liberty Safeguards are followed as far as possible. Only when all other options have been tried should the emergency modifications be used.

Version 2 of the Code – revocation of Mental Capacity Regulations

6. On 10 July 2020 the Mental Capacity (Deprivation of Liberty) (Amendment) Regulations (Northern Ireland) 2020 were revoked with the effect that the temporary amendments to the Mental Capacity (Deprivation of Liberty) (No. 2) Regulations (Northern Ireland) 2019 were stopped. The original Regulations are now in force.

7. This Code of Practice has been amended to account for these changes with all references to the Regulations being removed.

Deprivation of Liberty during Coronavirus

8. The requirement to follow legal procedures does not end during a time of emergency. Therefore, COVID-19 and emergency planning does not allow detention or deprivation of liberty without processes. In general, the Mental Capacity Act works on a system of protection from liability. It does not provide powers, but provide protection against liabilities that otherwise exist. This is the foundation for the Deprivation of Liberty Safeguards.
9. The Coronavirus Act does not amend the requirement of compliance with European Convention of Human Rights Article 5 – the right to liberty. This would be outside the competence of the Act and would require setting aside the Human Rights Act. The emergency modifications relax some of the professional requirements and time-lines to ensure that the Deprivation of Liberty Safeguards are operational even in a Coronavirus emergency.

10. Even if a person has tested positive for COVID-19 the person cannot be detained, deprived of liberty or secluded without proper processes and legal support. If a person who lacks capacity is isolated and therefore prevented from leaving it is likely that the person is deprived of liberty. If this is the case, legal authority, through the Deprivation of Liberty Safeguards or any other process, must be adhered to.

**Emergency provisions**

11. The Mental Capacity Act contains emergency provisions providing protection from liability even if all additional safeguards are not met. Articles 65 and 66 of the Act provide that as long as the D (the doer of the deprivation of liberty) takes all reasonable steps to put the additional safeguards in place D is protected from liability.

12. However, the situation is not an emergency if the reason why the additional safeguard is not in place is an unreasonable failure by D to take steps to put the safeguard in place.

13. What is reasonable depends on the individual circumstances.

14. In all cases D must have reasonable belief that the person lacks capacity, that the DoL is in P’s best interests and that the prevention of serious harm condition is met.

15. Use of the emergency provision must be considered on a case by case basis and cannot be used as a blanket measure not to put certain additional safeguards in place, such as authorisations.

**Applications for trust panel authorisation and medical reports**

16. An application for trust panel authorisation must contain a medical report. This requirement is not removed during the emergency, as the European Court of Human Rights has found that any authorisation for a deprivation of liberty must include consideration of medical expertise.

17. During an emergency an application can hence not be made without a medical report meaning that if a medical report is not available, a trust panel cannot consider the case and cannot therefore provide an authorisation.

18. However, there may be circumstances where it is deemed that a deprivation of liberty is necessary and not putting one in place would cause an unacceptable risk of harm to P. If it is not reasonably possible to carry out a medical examination, D can rely on the emergency provision in the absence of the additional safeguard of trust panel authorisation.

19. At all times D must have reasonable belief that the person lacks capacity, that the DoL is in P’s best interests and that the prevention of serious harm condition is met.
Status of this Code of Practice
20. This temporary Code of Practice is statutory guidance as per paragraph 19 of Schedule 11 to the Coronavirus Act 2020.

How to read this Code of Practice
21. This Code of Practice must be read together with the original Code of Practice published under Article 288 of the Mental Capacity Act. This temporary Code provides an addendum to the original Code. During the emergency period, all persons who work with people who lack capacity must have statutory regard to both the original Code and this temporary Code.

Emergency definition
22. This Code of Practice uses the terms ‘emergency’ and ‘period of emergency’. This means the time during which the provisions in section 10(4) of, and parts of Schedule 11 to the Coronavirus Act 2020 are in force. It does not refer to a general period of emergency, or difficult workforce situations; it only refers to a time when the provisions in the Act are in force. It also does not relate to emergency as defined in the Mental Capacity Act.

Forms
23. The modifications in the Coronavirus Act 2020 include modifications to some forms. See Annex A. These forms are not statutory and there are no requirements to use these forms. If the original forms are used, they should be annotated appropriately.

Transitional provisions
24. If a person has been deprived of liberty using the provisions in the Coronavirus Act 2020 the DoL is valid even if the Coronavirus emergency provisions end. That means no decision taken during the Coronavirus period is automatically ended by the ending of the period.

Monitoring and reporting
25. A number of modifications require monitoring and justification, on a case by case basis, by each Health and Social Care Trust. The monitoring, together with a report from each HSC Trust containing an evaluation of each instance and an opinion whether the reliance on the modification were appropriate, must be provided to the Department no later than 3 months after the end of the emergency period. A template is provided with the forms in Annex A to this Code. One template can be used for all reporting from each Trust.

26. Before a report is made, the HSC Trusts are invited to discuss with the Department of Health the format and contents of the report.

27. The following modifications must be monitored, evaluated and reported:
   a. A panel has extended an interim decision beyond 28 days (but within 56 days); and
   b. A panel has extended the time to consider an application for extension from 7 to 28 days.

28. Each HSC Trust must:
   a. Monitor each occasion, on a case by case basis with full case identifiers, when a modification that requires monitoring is used;
b. Evaluate and provide an opinion, against each case, on the appropriateness of using the modified provisions; and

c. Evaluate the overall use of the modifications and provide a report to the Department within 3 months of the emergency ending.

Modifications to the Mental Capacity Act

Trust panel meetings

29. The Mental Capacity Act requires the three trust panel members to meet in person. During the emergency period the Act is modified to allow remote meetings where the three members are not all present. This option is only available when the members each provide a written opinion on the application and the decision of the panel is unanimous.

30. If the modifications are used, P and P’s nominated person must be notified in writing of the use of the emergency provisions. This written note can take any form, including an addition to the normal notification form (Form 18). A Form CVA1 has also been provided for ease.

<table>
<thead>
<tr>
<th>What</th>
<th>Provisions</th>
<th>What does it do</th>
<th>Form</th>
<th>Report</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trust panel meeting in person</td>
<td>297 MCA 2</td>
<td>3 CVA 3</td>
<td>The trust panel does not have to meet in person if each member provides a written opinion and the panel’s decision is unanimous. P and the nominated person must be notified in writing. This can take any form. Form CVA1 has been provided for ease.</td>
<td>18 CVA1</td>
</tr>
</tbody>
</table>

Trust panel decision – time limits

31. Normally the trust panel has seven working days after an application for trust panel authorisation to make a decision. In an emergency that time is extended to 28 working days.

32. Similarly, the time the trust panel has to make a decision after an application for trust panel extension authorisation is extended from seven to 28 working days.

33. Normally notification of application for trust panel or trust panel extension authorisation is made using Form 17. Form 17 states that a decision must be made within seven working days. Form 17 can be amended to remove this line or Form 17(emergency) can be used.

34. If the modifications are used, P and P’s nominated person must be notified in writing of the use of the emergency provisions. This written note can take any form, including an addition to the normal notification form (Form 17 or Form 17(emergency)). A Form CVA1 has also been provided for ease.

1 Report in line with monitoring and reporting above.
2 MCA – Mental Capacity Act (Northern Ireland) 2016.
3 CVA – Coronavirus Act 2020 Schedule 11.
35. If the modifications are used in relation to applications for trust panel extension authorisations, each HSC Trust must monitor, justify and report on the use of the modification. See above for further information.

<table>
<thead>
<tr>
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<th>Form</th>
<th>Report</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trust panel decision – time limits</td>
<td>Sch 1, 19(2)</td>
<td>The time the trust panel has to make a decision is extended from 7 to 28 working days. P and the nominated person must be notified in writing. This can take any form. Form CVA1 has been provided for ease.</td>
<td>17 17(emergency) CVA1</td>
<td>No</td>
</tr>
<tr>
<td>Trust panel decision (extension) – time limits</td>
<td>Sch 3, 9(2)</td>
<td>The time the trust panel has to make a decision is extended from 7 to 28 working days. P and the nominated person must be notified in writing. This can take any form. Form CVA1 has been provided for ease.</td>
<td>17 17(emergency) CVA1</td>
<td>Yes</td>
</tr>
</tbody>
</table>

**Interim trust panel authorisation**

36. Normally a trust panel can grant an interim authorisation lasting 28 days. During an emergency this time is extended to 56 days.

37. If the modifications are used, P and P’s nominated person must be notified in writing of the use of the emergency provisions. This written note can take any form, including an addition to the normal notification form (Form 18). A Form CVA1 has also been provided for ease.

38. If the modifications are used, each HSC Trust must monitor, justify and report on the use of the modification. See above for further information.

<table>
<thead>
<tr>
<th>What</th>
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<th>What does it do</th>
<th>Form</th>
<th>Report</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interim trust panel authorisation</td>
<td>Sch 1, 20</td>
<td>The length of an interim trust panel authorisation is extended from 28 to 56 days.</td>
<td>17 18 CVA1</td>
<td>Yes</td>
</tr>
</tbody>
</table>

**Short-term detentions – time limits**

39. The Mental Capacity Act requires a medical report (Form 6) for a short-term detention authorisation to be made within two days of examining P and the short-term detention authorisation report (Form 8) to be made within two days of consulting P. In an emergency both time limits are extended to five days.

40. If the emergency modifications are used, Forms 6 and 8 should be read as five days instead of two. This can be amended on the existing forms. No new forms are provided.
<table>
<thead>
<tr>
<th>What</th>
<th>Provisions</th>
<th>What does it do</th>
<th>Form</th>
<th>Report</th>
</tr>
</thead>
<tbody>
<tr>
<td>Time limit for medical report for short-term detention</td>
<td>Sch 2, 4(2)</td>
<td>The period between examination and making of the medical report is extended from 2 to 5 days.</td>
<td>6</td>
<td>No</td>
</tr>
<tr>
<td>Time limit for short-term detention authorisation report</td>
<td>Sch 2, 5</td>
<td>The period between examination and making of the authorisation report is extended from 2 to 5 days.</td>
<td>8</td>
<td>No</td>
</tr>
</tbody>
</table>

**Reasonable objection to a short-term detention – consultation with an approved social worker**

41. When a short-term detention authorisation is made, the author of the authorisation has to consider the views of the nominated person. If the nominated person provides a reasonable objection to the short-term detention the Mental Capacity Act provides a requirement to consult with an approved social worker, even if the author is an approved social worker.

42. In an emergency the requirement to consult with an approved social worker is modified to include consultation with an approved social worker, or a relevant social worker. A relevant social worker is a person who is registered with the Northern Ireland Social Care Council as a social worker and who appears to the person making the short-term authorisation report (Form 8) has at least five years’ experience in the last 10 working as a social worker with people who lack capacity.

43. The author of the short-term detention authorisation report (Form 8) must also consider that waiting to consult with an approved social worker would involve an undesirable delay.

44. Where the author of the short-term detention authorisation report (Form 8) consults a relevant social worker, rather than an approved social worker, the author must inform P and, if practicable, Ps nominated person of this. This information does not have to be provided in writing.

45. The author must also provide a written statement specifying the following:
   a. That the author believes that the nominated person objects to the short-term detention of P and the author has consulted a relevant social worker;
   b. That the author has informed P; and
   c. That the author has informed the nominated person and considered the views of the nominated person or that the author has not informed the nominated person and the reasons why it was not practicable to do so.

46. The statement can take any form, but must include the above, and must be signed and dated by the author. Form 9A has been provided for ease.

47. The consultation with an approved social worker normally has to be done on Form 9. If the emergency modifications are used Form 9 can be modified to change “approved” to “relevant” in respect of social worker. A modified Form 9(emergency) has also been provided and can be used.
<table>
<thead>
<tr>
<th>What</th>
<th>Provisions</th>
<th>What does it do</th>
<th>Form</th>
<th>Report</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consultation with approved</td>
<td>Sch 2,</td>
<td>If the nominated person makes a reasonable objection a relevant social worker can be consulted (rather than an approved social worker). A relevant social worker is a person who is registered with the Northern Ireland Social Care Council as a social worker and who appears to the person making the short-term authorisation report (Form 8) has at least five years’ experience in the last 10 working as a social worker with people who lack capacity. A written statement has to be provided by the short-term detention report author noting that the emergency modifications have been made, that P has been informed and that either the nominated person has been informed and the views of the nominated person or that it has not been practicable to inform the nominated person and why not. The statement can take any form. Form 9A has been provided for ease.</td>
<td>9A (emergency)</td>
<td>No</td>
</tr>
</tbody>
</table>
**Form 9(emergency) – Consultation with relevant social worker**

*Form 9(emergency)* is only required if (i) the nominated person provides a reasonable objection to the short-term detention for examination or examination followed by treatment or care and (ii) the person making the authorisation report (*Form 8*) is consulting a relevant social worker instead of an approved social worker (as per Schedule 11 of the Coronavirus Act 2020).

1. **The person’s details (a label can also be affixed here)**

   Name:
   Address:
   Date of Birth:
   HSC number (if known):

2. **Relevant social worker consulted with**

   Name:
   Work address:
   Phone number:
   Job title, team and staff number:
   Professional relationship to person:

3. **Person completing Form 9(emergency) (if same as person completing Form 8, leave blank)**

   Name:
   Work address:
   Phone number:
   Job title, team and staff number:
   Professional relationship to person:
4. **Consultation with relevant social worker**

Provide details on how a relevant social worker has been consulted in relation to the short-term detention for examination or examination followed by treatment or care, including the views of the relevant social worker and the relevant social worker's opinion on whether the short-term detention is in the person’s best interests.

Also provide details on the reasonable objection from the nominated person and the views of the relevant social worker on the objection.
Form 9A – Statement to accompany Form 9(emergency)

Form 9A is the written statement that must accompany Form 9(emergency) on every occasion that a relevant social worker (rather than an approved social worker) is consulted in relation to a nominated person’s reasonable objection to the short-term detention for examination or examination followed by treatment or care.

1. **The person’s details**

See section 1 of Form 9(emergency) attached.

2. **Relevant social worker consulted with**

See section 2 of Form 9(emergency) attached.

3. **Person completing Form 9A**

This must be the same person completing Form 9(emergency). See section 3 of Form 9(emergency) attached.

4. **Summary of views expressed by P and/or P’s nominated person**


5. **Reason(s) as to why it was not practicable to consult with P’s nominated person**

*If the nominated person has been consulted, cross out this section.*

6. **Written statement**

**Statement**

I believe that the nominated person objects to the short-term detention of P.

I have consulted a relevant social worker (rather than an approved social worker) in relation to the nominated person’s objection (as per Schedule 11 of the Coronavirus Act 2020).

I have informed P that I have consulted a relevant social worker (rather than an approved social worker) in relation to the nominated person’s objection.

I have/have not (delete as appropriate) informed the nominated person that I have consulted a relevant social worker (rather than an approved social worker) in relation to his/her objection.

I have provided a summary of the views expressed by P and/or P’s nominated person in section 4.

Where I have not informed the nominated person, I have provided an explanation as to why this was not practicable in section 5.

Signature:

Date:
Form 17(emergency) – Notification of application for trust panel authorisation
and trust panel extension authorisation

Decision made in reliance of the Coronavirus Act 2020

To:
Name:
Address:

This is to notify you that the ________________________________ (trust name) has on
____________ (date) received an application under the Mental Capacity Act (Northern Ireland) 2016 in respect of
Name:
Address:

for a trust panel to (delete as appropriate):
  authorise a deprivation of liberty.
  extend an authorisation for a deprivation of liberty.

The trust has constituted a panel to consider the application. The panel has 28 working days to make a decision from
when the trust received the application.

The panel can authorise the intervention, refuse to grant an authorisation or provide an interim authorisation for a
maximum of 56 days.

If you like more information about the reasons for the application you can contact the trust directly.

Enclosed with this letter is a leaflet providing information on the trust panel and a person’s rights under the Mental
Capacity Act.

Trust details

Trust:
Address:

Reference number:
Contact person:
Phone number:
Email:
Form CVA1 – Notification of the use of emergency provisions  

Notification as required in the Coronavirus Act 2020

To (person):
Name:
Address:

To (nominated person):
Name:
Address:

This is to notify you that the ________________________________ (trust name) has on ____________ (date) used the emergency provisions in the Coronavirus Act 2020 in respect of the person named above.

The Coronavirus Act 2020 makes changes to the normal processes under the Deprivation of Liberty Safeguards.

The Trust has decided to use the following emergency changes (delete as appropriate):

a) The trust panel does not have to meet in person and make a decision based on written reports if the decision is unanimous.

b) An application for a trust panel authorisation has been received, and the Trust has decided that the panel has 28 days instead of 7 to make a decision.

c) An application for a trust panel extension authorisation has been received, and the Trust has decided that the panel has 28 days instead of 7 to make a decision.

d) An interim decision has been granted which the Trust has decided can last up to 56 days instead of 28.

If you like more information you can contact the trust directly.

Trust details

Trust:
Address:

Reference number:
Contact person:
Phone number:
Email:
### Reporting template

<table>
<thead>
<tr>
<th>Measure by panel</th>
<th>Name of person</th>
<th>Date of measure</th>
<th>Consideration of appropriateness</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interim decision 56 days</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Extension decision 28 days</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>