

*These notes refer to the Mental Capacity Act (Northern Ireland)  
2016 (c.18) which received Royal Assent on 9 May 2016*

# Mental Capacity Act (Northern Ireland) 2016

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 10 – Criminal Justice**

#### *Chapter 2 – Powers of Court on Conviction*

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

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

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

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

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

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

This section provides the detention conditions that must be met in order for the court to make a public protection order with or without restrictions. The court must be satisfied, on the required medical evidence, that: the offender has an impairment of, or a disturbance in the functioning of, the mind or brain; appropriate care or treatment is available for the offender in the establishment specified in the public protection order; dealing with the offender in any other way not involving his or her detention would create a risk, linked to the impairment or disturbance, of serious physical or psychological harm to other people; and detaining the offender is a proportionate response to both the likelihood of the harm concerned and the seriousness of that harm.

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

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

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

***Section 170 - Further provision about making of public protection orders***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### ***Section 177 - Interim detention orders***

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

Before an interim detention order can be made, the court must be satisfied on the required medical evidence that: the offender has an impairment of, or disturbance in the functioning of, the mind or brain; that appropriate care or treatment is available for the offender in the hospital specified in the order; and

there is reason to suppose that the most suitable way of dealing with the case may be to make a public protection order or to pass a custodial sentence and give a hospital direction.

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

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

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

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

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