EXPLANATORY MEMORANDUM TO

THE MENTAL HEALTH (NORTHERN IRELAND) (AMENDMENT) ORDER 2018

2018 No. 1360

1. Introduction

1.1 This explanatory memorandum has been prepared by the Northern Ireland Office and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The purpose of this instrument is to amend Article 77 of the Mental Health (Northern Ireland) Order 1986 ("the 1986 Order") to address an anomaly created by the Mental Health Review Tribunal (Amendment) Rules (Northern Ireland) 2016 ("the 2016 Amending Rules"). Presently, a patient who is admitted, to a hospital, and detained for assessment in accordance with Article 4 of the 1986 Order may be discharged by the Mental Health Review Tribunal ("the Tribunal") during their assessment even if they meet the Article 4 criteria for admission and detention for assessment. This is because, as an unintended result of the 2016 Amending Rules, the Tribunal is required to apply more stringent criteria, which relate to continued detention of patients outside of their initial assessment, when deciding whether to continue detention for assessment purposes. This instrument addresses this unintended consequence by aligning the Tribunal criteria for discharge of patients who are under assessment with the Article 4 criteria.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The power under which the Order is being amended is s.84(2) of the Northern Ireland Act 1998. This enables an Order in Council (subject to approval by each House of Parliament) to amend the law in any part of the United Kingdom so far as it appears to Her Majesty to be necessary or expedient in consequence of any provision made by or under Northern Ireland legislation. This power is being exercised in consequence of the 2016 Amending Rules on the grounds that it is necessary and expedient to rectify the 1986 Order to correct an unintended anomaly resulting from the interaction between the 1986 Order and the 2016 Amending Rules.

3.2 This instrument comes into force on the day after the day on which it is made. This is considered appropriate as the present legislative position creates a risk that patients with mental disorders that warrant detention for assessment may be released during assessment because there has not been adequate time to diagnose them with a mental illness or severe mental impairment. Whilst these measures impact upon the liberty of patients the Government is of the view that such considerations are outweighed by the need to ensure the safety of patients and members of the public. Furthermore, the Northern Ireland Court and Tribunal Service, Northern Ireland Department of Justice (as the parent Department to the Court and Tribunal Service), Health and Social Care Trusts, and a number of health professionals have been consulted and been made

aware of the proposed changes so that there is little or no disturbance upon their operations when they come into force.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.3 The application of this instrument is limited to Northern Ireland.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is Northern Ireland.

4.2 The territorial application of this instrument is Northern Ireland.

5. European Convention on Human Rights

5.1 The Secretary of State for Northern Ireland has made the following statement regarding Human Rights:

"In my view the provisions of the Mental Health (Northern Ireland) (Amendment) Order 2018 are compatible with the Convention rights."

6. Legislative Context

6.1 The 1986 Order provides for a person to be detained in hospital. Article 4 allows admission and detention for assessment for a maximum of 14 days if the patient is suffering from a *mental disorder* that warrants detention for assessment and there is substantial likelihood of serious physical harm to the patient or others if the patient is not detained. Article 12 provides that a patient who is admitted for assessment can continue to be detained, after the end of the assessment period, for treatment if the patient is assessed to be suffering from *mental illness or severe mental impairment*, (a more stringent criteria than that under Article 4), which warrants their detention and there is substantial likelihood of serious physical harm to the patient or others if the patient is not detained. Article 13 allows for the renewal of a detention for treatment on the basis of the criteria in Article 12.

6.2 Any detention involving the State must be compliant with the European Convention on Human Rights ("ECHR"). Article 5(4) ECHR provides that a person who is detained must have the right to "*take proceedings by which the lawfulness of the detention shall be decided speedily by a court*". In the 1986 Order this is manifested in a right to apply to the Tribunal.

6.3 Article 71(1) of the 1986 Order provides that a patient who is detained under Article 9 or 12 can apply to the Tribunal at any time in the first six months of their detention. This covers admissions for assessment and detention for treatment. Rule 20 of The Mental Health Review Tribunal (Northern Ireland) Rules 1986 ("the Court Rules"), provided that at least 14 days' notice must be provided before a Tribunal hearing, unless all parties consented to a shorter period.

6.4 The Court Rules, in combination with the 1986 Order, created the effect that no challenge to the admission for assessment could be made as the assessment period can only last 14 days and 14 days' notice for a Tribunal hearing was required.

6.5 The Court Rules were amended by the 2016 Amending Rules to enable the notice period to be shortened where it is in the interests of justice to do so. The changes to

the Court Rules therefore made it possible to have a hearing in the assessment period and the first such hearing was held in 2017.

6.6 A conflict between the Court Rules and Article 77 of the 1986 Order that results from the changes made by the 2016 Amending Rules, has now been identified. Article 77 sets out the circumstances in which the Tribunal may discharge a patient. Article 77(1)(a) provides that if the Tribunal is not satisfied that the patient is suffering from "mental illness or severe mental impairment … of a nature or degree which warrants [the patient's] detention in hospital for medical treatment" the patient must be discharged. This matches the criteria for post-assessment detention for treatment under Article 12, and must be used even if the Tribunal is considering whether an admission for assessment, in accordance with Article 4 (which uses the broader "mental disorder" criterion), is appropriate.

6.7 The provisions of Article 77, in combination with the amended Court Rules, could have the effect that a patient who is detainable for assessment, in accordance with Article 4, is discharged before the assessment period is completed even if they meet the criteria for detention assessment (but not the criteria the Tribunal must use). This applies regardless of whether there has been adequate time to determine whether the patient has a mental illness or severe mental impairment.

7. Policy background

What is being done and why?

7.1 Due to the ongoing absence of devolved Government in Northern Ireland it has been necessary for the UK Government to take certain legislative interventions to ensure good Governance is maintained in the interim. The Mental Health (Northern Ireland) (Amendment) Order 2018 is one such intervention which the UK Government is bringing forward to correct a legislative deficiency which has become apparent during the period of the current political impasse.

7.2 As explained in the legislative context section above, the 1986 Order is being amended in consequence of the changes made by the 2016 Amending Rules so that the same criteria for admitting and detaining a patient for assessment apply to the discharge of patients by the Tribunal during the assessment period.

7.3 During the assessment period medical professionals are still in the process of gathering the evidence of what risk or illness the patient may be presenting with. A patient may present with complex needs which require time to make a diagnosis. Where a Tribunal hearing take places before the 14 day assessment period is complete, in many instances, particularly those which are the most complex, there may not have been sufficient time to complete a diagnosis.

7.4 If the criteria used by the Tribunal to assess if the patient should remain detained is left unamended this will continue to enable the release of patients, who have not yet been diagnosed with a mental illness or severe mental impairment, even if they are suffering from a mental disorder that poses a substantial risk of serious physical harm to themselves or others if they are released. Moreover, there is concern that left unamended the legislation is in conflict with professional codes of practise for health professionals.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

9.1 Not applicable.

10. Consultation outcome

10.1 Consultation is not considered necessary as the change to legislation is minor and, as a matter of patient and public safety, is in the public interest.

11. Guidance

11.1 The Northern Ireland Department of Health issues regular circulars to the Health and Social Care Trusts regarding information that needs to be shared with health and social care staff.

12. Impact

12.1 There is no significant impact on business, charities or voluntary bodies.

12.2 There is no significant impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because it has no impact on business, charities, the public sector or voluntary bodies.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is that the impact will be monitored by the Northern Ireland Department of Health.

14.2 The regulation does not include a statutory review as the relevant provisions of the Small Business, Enterprise and Employment Act 2015 do not apply.

15. Contact

15.1 Eamon Graham at the Northern Ireland Office Telephone: 02072100226 or email: eamon.graham@nio.gov.uk can be contacted with any queries regarding the instrument.

15.2 Jonathan McAdams Deputy Director for Economic and Domestic Policy at the Northern Ireland Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 Secretary of State for Northern Ireland, Karen Bradley can confirm that this Explanatory Memorandum meets the required standard.