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

EXPLANATORY NOTES

BACKGROUND AND POLICY OBJECTIVES

3. While mental capacity legislation has been introduced in other parts of the United Kingdom, mental capacity issues in relation to health and welfare interventions have largely been governed by the common law in Northern Ireland (case law which has been developed by the courts). That law, broadly speaking, provides for a presumption of capacity in persons aged 16 and over, a test of incapacity, and protection from liability when intervening in someone's life, provided it is reasonably believed that the person lacks capacity to consent to the intervention and it is in his or her best interests. This is known as the common law "doctrine of necessity".

4. These rules do not, however, apply to decisions governed by the Mental Health (Northern Ireland) Order 1986 ("the Mental Health Order"), under which there are clear statutory powers to remove and detain people for the assessment and treatment of a mental disorder provided certain criteria are met, regardless of whether or not the person has capacity.

5. There are a number of factors that have driven the need for legislative change in this area of the law in Northern Ireland. In other parts of the United Kingdom, mental capacity legislation has been on the statute books for some time and (albeit separate) mental health legislation there has also been reformed. There is currently no mental capacity legislation in Northern Ireland and, while the Mental Health Order has worked well, it is out of step with the growing recognition of the right to personal autonomy.

6. This was highlighted in a report published in 2007 'A Comprehensive Legislative Framework'. It was one of a series of reports that came out of a review commissioned by the Department of Health (hereafter referred to as "the Department") into the delivery of mental health and learning disability services in Northern Ireland, and the policy and legislation underpinning those services. That review was known as the Bamford Review.

7. The key recommendation in the 2007 report was that: "There should be a single comprehensive legislative framework for the reform of mental health legislation and for the introduction of capacity legislation in Northern Ireland". This, the report concluded, would help to reduce the stigma associated with having separate mental health legislation and provide an opportunity to enhance

protections for persons who lack capacity and are unable to make a specific decision in relation to their health (mental or physical), welfare or finances, including those subject to the criminal justice system.

8. The report also recommended that this new single legislative framework should be based on agreed principles that have regard to the dignity of the person and provide equally for all circumstances in which a person's autonomy might be compromised on health grounds. This reflected recommendations made in a separate Bamford Review report in 2006 on 'Human Rights and Equality of Opportunity'.

9. The objective of extending a mental capacity approach to healthcare decisions to the criminal justice system is to comply with the recommendations of the Bamford Review. The Bamford Review recommended a legislative framework which integrates capacity and mental health legislation, to be applicable to all people in society including those in the criminal justice system. With this framework in mind, the Review made specific recommendations in respect of the various interfaces between the health and criminal justice system.

10. The Department of Justice therefore chose to draft criminal justice provisions on the basis of these recommendations. This meant the creation of a capacity-based approach to care, treatment and personal welfare in respect of those aged 16 or over who are subject to the criminal justice system. In addition, where possible the Department of Justice aimed to build a legislative model which did not contain potentially stigmatising references to "mental disorder".

11. Taking account of the various interfaces between the mental health and criminal justice system, the Department of Justice also sought to retain the existing statutory powers currently available within the system to transfer individuals to the health service for medical treatment. These powers include police powers to remove persons from a public place to a place of safety, court powers to impose particular healthcare disposals on offenders at remand, sentencing or following a finding of unfitness to plead, and Departmental powers to transfer prisoners for in-patient treatment in a hospital.

12. Whilst the Department of Justice preserved these powers, it also sought to create provisions which respect the autonomy of individuals who retain capacity to make decisions about their medical treatment, whilst providing safeguards and protections for persons who lack the capacity to make those decisions.

13. The Department of Justice also considered amendments to the civil law to take account of any introduction of capacity legislation. These changes include the introduction of a new Office of the Public Guardian, additional powers for the High Court, and restructuring of the Mental Health Review Tribunal.