Response of the Equality and Human Rights Commission to the Consultation:

Consultation details

<table>
<thead>
<tr>
<th>Title:</th>
<th>Proposal to amend the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 in relation to pre-hearing examinations, and decisions without a hearing in the case of references by the hospital or Department of Health.</th>
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<tr>
<td>Source of consultation:</td>
<td>Ministry of Justice</td>
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<tr>
<td>Date:</td>
<td>March 2018</td>
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For more information please contact

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About the Equality and Human Rights Commission

1. The Equality and Human Rights Commission (the Commission) is a statutory body established under the Equality Act 2006. It operates independently to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights. The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. It encourages compliance with the Human Rights Act 1998 and is accredited at UN level as an ‘A status’ National Human Rights Institution, in recognition of its independence, powers and performance.
2. We welcome the opportunity to respond to this consultation as the proposals fall within the remit of several of the Commission’s strategic priorities i.e. improving provision of, access to, and experiences of mental health services, and helping more people get access to justice. The Commission is also actively engaged with the independent review of the Mental Health Act (MHA). We want to see reductions in the use of involuntary treatment and improved safeguards for people detained under the Act.

Summary

3. The Commission is concerned that the proposals in the consultation have the potential to weaken safeguards for patients against wrongful detention and enforced treatment under the MHA. The proposals would result in the removal of two safeguards without setting out the evidence to demonstrate why such removal is necessary, and how rights would be protected in the absence of these safeguards.

4. Our key concerns in relation to both the proposed ending of pre-hearing examinations (PHE) and paper only tribunals for cases referred by hospital managers and the Secretary of State relate to:

- The lack of comprehensive evidence to support the rationale for the proposed changes.
- The lack of an equality impact assessment to inform the proposals set out in the consultation paper and to ensure, particularly, that they do not disproportionately disadvantage people with protected characteristics, in particular disability.
- The potentially detrimental implications of the proposals on access to justice.
- The potential violation of the human rights of patients if wrongful decisions to continue detention or enforced treatment are taken as a result of insufficient evidence being presented to the Mental Health Tribunal (MHT), and/or insufficient consideration by the MHT of evidence including the mental health status of patients, and views of patients and their representatives.
5. We also consider that the proposals are incompatible with two of the overarching principles of the MHA Code of Practice\textsuperscript{1}, namely:

‘Least restrictive option and maximising independence: Where it is possible to treat a patient safely and lawfully without detaining them under the Act, the patient should not be detained. A patient’s independence should be encouraged and supported with a focus on promoting recovery wherever possible.

Empowerment and involvement: Patients should be fully involved in decisions about care, support and treatment. The views of families, carers and others, if appropriate, should be fully considered when taking decisions. Where decisions are taken which are contradictory to views expressed, professionals should explain the reasons for this.’

6. Our view is that decisions made by tribunals without a PHE being conducted, or an oral hearing held, may not allow sufficient consideration of the least restrictive options that maximise independence for a patient. PHEs and oral hearings provide opportunities to increase patient involvement in decisions about their care, and as such abolishing them or reducing them appears contrary to the empowerment and involvement principle.

7. We are also concerned that the Ministry of Justice (MOJ) is proposing significant changes to MHA tribunal procedures before the Government’s independent review of the MHA\textsuperscript{2} has been completed. The independent review offers an opportunity to gather evidence of the effectiveness of tribunal procedures in safeguarding the rights of patients and to subsequently make recommendations for reform where necessary. Our view is that the MOJ should not make any changes to tribunal procedures until the independent review is completed and its recommendations have been published.

The relevant legal framework

8. In exercising their functions, the MOJ and the Tribunals Procedure Committee (TPC) are required under the public sector equality

\textsuperscript{1} Mental Health Act 1983: Code of Practice, Department of Health 2015
\textsuperscript{2} The independent review of the Mental Health Act, Interim report, Gov.uk, 2018: https://www.gov.uk/government/publications/independent-review-of-the-mental-health-act-interim-report
duty (PSED) to have due regard to the need to: eliminate unlawful discrimination, advance equality of opportunity (including having regard to the need to remove or minimise disadvantages) and foster good relations.\(^3\) This requires the MOJ and TPC to assess the impact of any new procedure or change to existing procedures on people who share protected characteristics and to take this consideration into account before and at the time a decision is being taken. We can see no evidence of this consideration in the consultation documentation. The Commission’s technical guidance on the PSED provides practical approaches to complying with the duty.\(^4\)

9. Article 6 of the European Convention on Human Rights (ECHR) sets out the right to a fair trial in both civil and criminal proceedings. Read with Article 6, Article 14 of the ECHR guarantees freedom from discrimination in relation to the right to a fair trial. Most rights in the ECHR, including the right to a fair trial, have been given domestic effect by the Human Rights Act 1998 (HRA). Section 6(1) of the HRA provides that public authorities must not act incompatibly with the incorporated rights.

10. As well as complying with the UK’s obligations under the ECHR, the proposals also require consideration to be given to other international human rights obligations. Of particular relevance are the following Articles from the United Nations Convention on the Rights of People with Disabilities (UNCRPD): 12 (Equal recognition before the law); 13 (Access to justice); 14 (Liberty and security of person); 19 (Living independently and being included in the community); and 26 (Habilitation and rehabilitation).

11. The Commission responds to the Government’s proposed changes to tribunal procedures with this legal framework in mind.

Our responses to the consultation questions

**Question 1:** Do you agree that the requirement that the First-tier Tribunal must conduct a PHE in all s.2 cases, and others where one has been requested, should be removed?

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\(^3\) Equality Act 2010, s.149

\(^4\) EHRC (2014), Technical guidance on the Public Sector Equality Duty: England
12. No, we do not agree that the requirement that the First-tier Tribunal must conduct a PHE in all s.2 cases, and others where one has been requested, should be removed.

13. Abolition of PHEs may result in tribunal members making decisions about patients’ detention and treatment plans without considering evidence about patient’s mental health gathered from the tribunal’s independent medically-qualified member’s interactions with patients’ outside of the tribunal hearing.

14. In light of the impact which we know tribunal hearings have on individuals⁵, and contrary to any evidence to demonstrate otherwise, we are concerned that the absence of a PHE may result in misleading impressions of some patients’ mental health due to the stress many patients experience when taking part in MHT hearings.

15. In theory, the PHE provides the independent medical tribunal member with an opportunity to discuss the patient’s views of their care plan with them prior to the actual hearing. This is likely to be particularly important in cases where the patient’s views of their treatment have not been adequately recorded during assessment and ongoing treatment reviews by clinical and nursing staff. We note that the Care Quality Commission’s (CQC) monitoring of the operation of the MHA⁶ found that in 2016/17:

- 32% of care plans reviewed showed no evidence of patient involvement.
- 17% showed no evidence of consideration of the patient’s particular needs.
- 31% showed no evidence of the patient’s views
- 17% showed no evidence of consideration of the least restrictive options for care.
- 24% showed no evidence of discharge planning.

⁵ ‘Patients’ experiences of the First-tier Tribunal (Mental Health) Report of a joint pilot project of the Administrative Justice and Tribunals Council and the Care Quality Commission’: March 2011

⁶ Monitoring the Mental Health Act in 2016/17: Care Quality Commission, 2018
16. PHEs may help to ensure that patient’s views about their detention and treatment are taken proper account of by tribunal panel members, in line with the MHA Code of Practice principles.

Question 2: If the requirement were removed, do you consider that the First-tier Tribunal should have some discretion as to whether to conduct a PHE if it considers it appropriate?

17. If the requirement to carry out a PHE were to be abolished, we believe it is essential that the tribunal panel should have the discretion to request an examination of the patient by the independent medical member of the panel. This would be particularly important where a patient appears inhibited or aggravated by the tribunal environment and as such may be unable to fairly participate in the proceedings. Equally, where the patient is unwilling, or too unwell to attend the tribunal hearing, an examination by the independent medical member of the tribunal, with the patient’s permission, should be considered essential to ensuring the tribunal has an up to date and independent assessment of the patient’s mental health status.

18. In addition, our opinion is that where any patient, or their representative, requests a PHE, one should be carried out. Availability of a PHE can be a particularly important safeguard where a patient is stressed by the tribunal hearing itself. As discussed above, evidence shows that many patients are likely to find the tribunal hearing environment intimidating, and as such may be less able to express their views on their proposed detention or treatment.

Question 3: Do you agree with the proposal that, with references to the tribunal, other than the exceptions set out in the consultation paper (as opposed to applications from patients), a decision on the papers alone should become the default position?

19. No, we do not agree with the proposal that, with references to the tribunal, other than the exceptions set out in the consultation paper (as opposed to applications from patients), a decision on the papers alone should become the default position.

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7 ‘Patients’ experiences of the First-tier Tribunal (Mental Health) Report of a joint pilot project of the Administrative Justice and Tribunals Council and the Care Quality Commission’: March 2011
20. The Commission considers that oral hearings for references to the tribunal by hospital managers or the Secretary of State are an essential safeguard of a patient’s human rights to liberty, freedom from degrading treatment and a fair hearing.

21. Oral hearings allow for in-depth questioning of treating clinicians by tribunal members and provide an opportunity for representatives such as lawyers and Independent Mental Health Advocates to make representations on behalf of patients who are unable or unwilling to attend tribunal hearings.

22. As above, at paragraph 14, the CQC’s monitoring of the operation of the MHA\(^8\) shows that many care plans do not record patient’s views; consideration of patient’s particular needs; consideration of the least restrictive options for care, or discharge planning. Given the CQC’s findings, we are concerned that inappropriate detention and treatment decisions could be made where decision-makers rely solely on documents such as care plans.

Question 4. Are there any classes of case in which you consider that the First-tier Tribunal should always conduct an oral hearing, irrespective of whether the parties have expressed a preference?

23. The Commission’s view is that paper-only decisions should not be used, except when requested by patients. The fundamental impact on patient’s rights of MHT decisions requires a high degree of scrutiny and deliberation which, in our view, paper-only decisions may not allow.

Question 5. Do you have any other comments on the proposals made, or on the operation of the rules generally?

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8 Monitoring the Mental Health Act in 2016/17: Care Quality Commission, 2018

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- 31% showed no evidence of the patient’s views
- 17% showed no evidence of consideration of the least restrictive options for care.
- 24% showed no evidence of discharge planning.
24. As the MOJ will be aware, the Independent Mental Health Act Review\(^9\) (the Review) is considering whether current MHT procedures provide an effective and proportionate safeguard for patients subject to the MHA. As such, our view is that this consultation is premature.

25. The Review will be gathering evidence on the effectiveness of MHTs which should provide a sound basis to make recommendations for reforms where necessary. We do not think the MOJ should make changes to tribunal procedures before the Review is completed and published its recommendations.

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