

Consultation Response

Tribunal Procedure Committee proposal to amend the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008

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About this consultation

This consultation seeks views on two key proposals to change the way that the First-Tier Tribunal operates in relation to mental health cases under the Mental Health Act 1983 (MHA).

Firstly, there is a proposal to remove rule 34 of the Tribunal Procedure (First tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, which requires that, in cases where a patient is detained under section 2 of the MHA (compulsory admission for assessment), there must be a medical examination of the patient (known as a pre-hearing examination, or PHE) by the medically-qualified member of the tribunal before the case is heard, unless the tribunal is satisfied that the patient does not want such an examination.

Secondly, there is a proposal to change the rules on when a decision can be taken by the tribunal without a hearing only in relation to the consideration of references to the tribunal by hospital managers or the Secretary of State for Health (as opposed to requests by or on behalf of detained patients). Currently a hearing is required in the case of a patient aged 18 or over and subject to a Community Treatment Order whose case has been referred to the tribunal under section 68 of the MHA, unless the patient or their representative has specifically opted not to have a hearing. If the change goes ahead, the position would be reversed: the default position would become that decisions are taken without a hearing, unless one is requested by a patient or their representative or where the patient is under 18, it is a discretionary reference under s.67 or s.71 of the MHA, or where the tribunal directs an oral hearing.

Key points and recommendations

- There has been a significant increase in the number of older people who are being detained under the MHA.
- A PHE, can obtain the necessary information upon which to base a more accurate assessment of a person's mental health treatment needs, is a necessary step to safeguard a person's right to liberty and should therefore be retained.
- An oral hearing allows for far greater safeguards for the rights and needs of a service user than does a paper hearing, since clinicians must explain the course of treatment and their clinical assessment, and should therefore be retained.
- We urge the Government to wait until the Independent Review of the Mental Health Act has delivered its final report (and recommendations) later this year before pursuing any significant changes to tribunal procedure.

1. Introduction

Age UK is a national charity that works with a network of partners, including Age Scotland, Age Cymru, Age NI and local Age UKs across England, to help everyone make the most of later life, whatever their circumstances.

In the UK, the Charity helps more than seven million older people each year by providing advice and support. It also researches and campaigns on the issues that matter most to older people. Its work focuses on ensuring that older people: have enough money; enjoy life and feel well; receive high quality health and care; are comfortable, safe and secure at home; and feel valued and able to participate.

A January 2018 Care Quality Commission report¹ shows that there has been a 36% rise in the number of detentions under the Mental Health Act (MHA) since 2010. This rise has been a result of a number of factors (increased police awareness of mental health issues, overrepresentation of BME groups) but has also in part been due to the increase in the number of older people being detained under the MHA. Because of delays in getting an assessor visit under Deprivation of Liberty Safeguards (DOLS), staff are increasingly using the MHA for authorisation of care.

We are very concerned that these proposals will have a particular impact on older people with Alzheimer's and Dementia being detained under the MHA. Furthermore, we are not aware that any impact assessment has been conducted to assess the impact on this group of people.

2. Proposal 1: Removing the right to a pre-hearing psychiatric evaluation

The PHE provides an up-to-date assessment of the person's current mental health in an environment that is more conducive than a tribunal to the eliciting of accurate information based on a face to face interview with the person themselves. Relying on other reports obtained weeks before the date of the hearing or from a clinician who has little knowledge of the patient's circumstances, or from information obtained directly from the person during the tribunal hearing when they may feel nervous, is not likely to obtain an accurate enough assessment of the person's treatment needs in that instance.

The MHA concerns people who are extremely vulnerable and facing full restriction of their liberty without their consent or agreement. It is on this basis that a PHE is an extremely important safeguard against the undermining or abuse of a person's right to liberty.

3. Proposal 2 (allowing tribunals to take decisions without oral hearings when people are automatically referred).

¹ Care Quality Commission, [Mental Health Act: The rise in the use of the MHA to detain people in England](#), 2018.

We are concerned that Proposal 2 will result in a system in which people who lack capacity, and who are therefore unable to request a hearing, will have their detention too easily renewed.

An oral hearing allows for far greater safeguards for the rights and needs of a service user than does a paper hearing, since clinicians must explain the course of treatment and their clinical assessment, and expect to be cross-examined by the tribunal. It also allows an opportunity for advocates to make a case based on the best interests of a service user. The rules already allow for a paper hearing where the service user has requested one.

Mental health tribunals make decisions about people's liberty, more specifically, whether they are to be forcibly detained for the purposes of mental health treatment. This relates directly to the human rights of individuals within society. As such, mental health tribunals must conduct the highest levels of decision making, incorporating both clinical expertise and legal provision which must not be undermined by the need to save time or cut costs.

Age UK is very concerned that allowing tribunals to take decisions without an oral hearing will have a profound impact on those most vulnerable members of our community, particularly older people, resulting in their indefinite detention.

We urge the Government to wait until the Independent Review of the Mental Health Act to deliver its final report (and recommendations) later this year before pursuing any significant changes to tribunal procedure.