Mental Health Tribunal for Scotland (MHTS) Consultation

Analysis of Responses

June 2018

Scottish Government
Riaghaltas na h-Alba
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Question	Summary of Consultation Responses	Scottish Government Response
Part 2 Questions on the Transfer of MHTS		
Do you have any comments on the draft transfer of functions and members Regulations?	Opposition to MHTS becoming the judicial forum unless composition, (objection to the presence of a medical member), remit and processes are suitably changed. An urgent and radical revision of Scotland's mental health and incapacity legislation is required. No legislation passed that infringes on human rights.	The Mental Health Tribunal for Scotland is the proper forum to hear these cases and is fairly constituted. Scottish mental health and incapacity legislation is based on rights and principles and is compliant with the European Convention on Human Rights. We have recently implemented the Mental Health (Scotland) Act 2015 and are undertaking a range of work through the Mental Health Strategy to move forward Scottish mental health and incapacity legislation. This includes 2 key reviews which are underway - the AWI reform work and the review of how the 2003 Act meets the needs of those with learning disability and autism. We are not proposing a full review of mental health and incapacity legislation at this stage but are considering what legislative development is needed therefore the views, findings and recommendations from our current work streams will help inform and reform legislation going forward.
Are you content with the provisions relating to the transfer of members?	Non Scots Law qualified members of MHTS should not be prejudiced by the transfer.	Whilst in principle Ministers take the view that a qualification and practice in Scots law is a necessary requirement when dealing with devolved case law and legislation, this is dealt with on a case by case basis, and exceptions may be made where it is considered appropriate to do so.

Are you content with the proposal to align the eligibility requirement for MHTS legal members with legal members of the First Tier Tribunal?	All members should be permitted to remain in office until end of appointment or until age 75. The time limit in practice for lawyers should be raised to 10 years' experience	On these matters, the position is set out in primary legislation: The Judicial Pensions and Retirement Act 1993 is clear that all tribunals members (not just Mental Health members) are required to retire from post at age 70 unless in the public interest. The legal experience requirements are set out in Schedule 3 (5) of the Tribunals (Scotland) Act 2014. MHTS lawyers need to be 7 years qualified and we are reducing to 5 years to allow for consistency across the tribunal service.
Are you content with the provisions regarding transitional arrangements?	People may be disadvantaged if cases are moved to a different panel on day of transfer to Tribunal Service. Clarity is sought as to the location for holding the Tribunal and request for this to be held in local Sheriffdoms.	We will take on board the concerns raised regarding the potential for people to be disadvantaged if panel membership changes on the day of transfer and will consider how best to ensure this does not happen. The location will be for the Chamber President to determine taking into account the overriding objective, with the best interests of the patient in mind.

Part 3. Questions on the First-tier Mental Health Chamber Rules of Procedure		
Do you have any comments on rule 36, which provides that certain cases are able to be transferred to the Upper Tribunal, and, in particular, whether this should be restricted only to cases transferred on a point of law?	Prefer that appeals continue to be heard by the Sheriff Principal. Appeals should not be restricted to a point of law. Another ground for appeal should be that there had been a procedural impropriety in the conduct of a hearing.	Appeals can still be made to the Sheriff Principal. On this matter, the position is set out in primary legislation. An appeal to the Upper Tribunal will be made on a point of law only as set out in the Tribunals (Scotland) Act 2014. If the issue is one of procedural impropriety the correct avenue would be a Judicial Review for the Court of Session to consider.
Do you have any comments on rule 37, which sets out the restricted grounds on which a case may be dismissed as being incompetent?	A majority of respondents agreed that the former power to dismiss cases which are considered frivolous or vexatious should be removed. All parties should be provided with an opportunity to make representation in all cases before a determination is made on competency.	We will amend the wording in the regulations from “may” to “must”, to ensure parties have a chance to make representations before a decision is made on whether a case is incompetent.
Do you have any comments on the proposal to simplify proceedings for interested third parties and to remove the requirement or ability to seek leave from the Tribunal to enter the proceedings as a party.	The First-tier Tribunal should be able to consider a request to make representations on the day of the hearing, without a request in writing. The Relevant Person status should not be removed as this has proven to be a safeguard and benefit for adults, particularly those experiencing incapacity for welfare decisions in the absence of a proxy.	We do not agree on fair notice grounds, the patient and other parties need to be given an opportunity to say why they disagree. Relevant persons will still have rights to make representations or apply to be a party, so safeguards will remain. This change is to ensure that 3rd parties do not automatically receive otherwise confidential documents, potentially against the patient’s wishes. A Curator will be appointed where there is a lack of capacity.

Do you have any comments on the principle that the Tribunal must only assess documents received from persons who have sought leave to provide representations, to determine if those should be withheld from the patient and other parties?	Rule 47 should not be amended. The Tribunal has the power to assess all documents under Rule 47 and there should be no restriction on this discretion. It is unacceptable that any document should be withheld from the patient or their representative. There is no need for the Tribunal to assess whether any document or evidence should be disclosed to one Party, but not the other. Where a party has indicated they are content for a third party to see papers, this must be respected – there are Article s 6 & 8 ECHR implications.	The Tribunal should consider 3rd party submissions i.e. from those not under any professional obligation to consider the needs of the patient. We do not want to fetter the Tribunal's discretion. Documents will only be withheld from the patient if it is thought it would be harmful to them or a third party. Lay representatives are not subject to the same professional responsibilities as a curator/ legal representative. Victims also have rights to be protected.
Do you have any comments on the proposal to clarify the terminology in rule 52 on the circumstances in which the Tribunal may decide a case at a hearing without oral evidence or oral representations?	No Tribunal should be able to decide a case without oral evidence or representations unless the individual in question or their supporters are agreeable.	Agreed.
Do you have any comments on the proposal that there should be no ability for the First-tier Tribunal Mental Health Chamber to review its own decisions	If a Tribunal becomes aware of matters it failed to take sufficient account of, then it should be permitted to review that decision. It should be open to the same panel to review its decision if the appellant wishes it to do so. The First-tier Tribunal should not have the ability to review its own decisions.	To ensure that a patient's appeal is heard promptly, we do not intend to bring in a right of review for a decision of the First-tier Tribunal.

Do you have any other comments on the draft regulations for the First Tier Tribunal Mental Health Chamber Rules of Procedure?	In new Regulation 40(6) where the patient has clearly indicated that they wish a third party to see papers then this must be respected.	We do not agree that it is in the patient's best interests for a lay representative to see papers which are not disclosed to the patient. There is a real risk that the lay person could share that information with the patient. Lay representatives are not subject to the same professional responsibilities as a curator or legal representative.
	Rule 49 Curator ad Litem –this role should be defined and regulated by the Rules. In particular, obliging such officers of the court to act in accordance with the will and preference of the patient and not according to their own views and opinions.	The curator role definition is replicated from current rules. There is no evidence to indicate that this approach is not working.
	The role of Independent Psychiatrist should also be regulated.	The role of the independent psychiatrist is not within the scope of the consultation or rules.
	Rule 54 Evidence- those giving written evidence should be required to do so on oath.	Most parties are giving evidence in a professional capacity. This is a Tribunal not a Court and is a fact finding/inquisitive forum rather than an adversarial one so this would not be appropriate. There are, in any event, repercussions for dishonest behaviour under the Scottish Tribunals (Offences in relation to proceedings) Regs 2016/342. Amongst other things, these regulations create the offence of making a false statement in an application or case.
	The proceedings should be recorded on digital audio medium and made accessible on request to both parties.	All hearings are recorded and it is possible to receive a copy at the discretion of the President. We do not believe it is appropriate for such matters to be included in the rules.
	Rule 55- Witness expenses should be paid.	In most circumstances, expenses are met by the Tribunal, failing which decisions on expenses

		would be made with reference to the overriding principles.
	Rule 67 Decisions of the Tribunal. Any dissenting opinion on the panel and the reasons for it, should be included in the tribunal's written decision.	This is not an appropriate for this forum. The panel must decide all cases together contributing their differing expertise to that process.

Part 4. Questions on the Upper Tribunal Rules of Procedure		
Do you have any comments on the proposal that the Upper Tribunal should be able to suspend a decision made either by itself or the First Tier Tribunal, which is the subject of an appeal, in rule 7	There are concerns at the potential for care and treatment being unauthorised whilst an appeal is heard. The autonomy of the patient is paramount and decisions, which over-ride the patient's autonomy ought to be suspended unless they have been proved beyond reasonable doubt to be necessary and proportionate.	There is no compelling evidence to suggest that this Rule would not benefit the patient. The ability to suspend a decision is at the discretion of the Tribunal, who will deal with matters as expeditiously as possible.
Do you have any comments on the criteria for fresh evidence, in rule 19(4)?	Previous tribunal findings must be revisited where there is fresh evidence. Any relevant experience not previously taken into account should be considered by the Tribunal. Rule 19 ought to state that the First-Tier Tribunal must provide the appellant on request with an audio recording of the hearing. If the appellant wishes to make use of that evidence in the appeal he/she must have it transcribed at his/her own expense and confirmed as an accurate record by a Notary Public. The Rules ought also to state whether or not documents presented to the First-Tier Tribunal are admissible as evidence in appeals, or only the transcript of an audio recording of the hearing. It should be open to the appellant to argue that the Tribunal's findings in fact or its decision are not supported by the evidence given on oath at the hearing. Therefore the evidence presented to the First-Tier Tribunal must be made available for an appeal.	On this matter, the position is set out in primary legislation: An appeal to the Upper Tribunal is on a point of law only. The Upper Tribunal may ask for any evidence it deems necessary for the fair hearing of the appeal.

Do you have any comments on hearings automatically being held in private and the prohibition of public disclosure of documents and information.	A hearing should be open to the public if the individual wished it to be so.	We do not believe this is appropriate for mental health tribunal cases.
Do you have any comments on the proposals regarding time limits in the Upper Tribunal?	There were a range of views on what would be appropriate time limits for various elements of proceedings before the Upper Tribunal.	There is no evidence to support any change and therefore the existing Upper Tribunal time limits will be maintained.
Do you have any comments on the proposal that there should be no ability for the Upper Tribunal to review its own decisions in mental health cases?	The Upper Tribunal should be able to review its own decisions in cases where fresh evidence becomes available. If fresh evidence has been heard, the Upper Tribunal should first be offered the option of reviewing its own decision because it has had the benefit of hearing witnesses first hand. This will be quicker than an appeal to the Court of Session.	To ensure that a patient's appeal is heard promptly, we do not intend to bring in a right of review any decision of the Upper Tribunal.
Do you have any other comments you may wish to make on the draft regulations for the Upper Tribunal rules of procedure.	As is the practice in the MHT, a digital audio recording of the appeal hearing should be made, whether or not fresh evidence has been given and made available to both parties on request. The role of Curator ad Litem should also be regulated in the Upper Tribunal (Rule 14).	We see no reason for additional rules on these issues.

Part 5. Questions on Composition Regulations		
Do you have any comments on the proposals regarding the composition of the First-tier Tribunal Mental Health Chamber?	There was opposition to any health professional being a member. A medical member should be any kind of medical professional, but preferably not a psychiatrist. The member with mental health experience should be only a service user or carer and not a professional.	We see no strong evidence to amend the composition criteria. We believe it necessary for a health professional to be a member of the panel.
Do you have any comments on the proposals regarding the composition of the Upper Tribunal when hearing cases appealed or transferred from the First Tier Tribunal Mental Health Chamber?	There was opposition to any health professional being a member of the Upper Tribunal.	Ordinary members do not sit in the Upper Tribunal as cases can only be appealed on points of law.
Do you have any other comments you may wish to make?	No comments	

Part 6. Questions on Eligibility Regulations		
Do you have any comments on the proposals regarding the eligibility criteria for ordinary members with medical or general mental health experience	In order to reduce bias medical members should be non-psychiatrists and general members should be service users or carers. The eligibility criteria imply that ongoing experience is required. However, people who are currently service users or carers are less likely to be in a position to take up appointments. Medical members who are no longer in practice are more likely to have greater independence (not being part of the NHS) and greater experience (being more "worldly wise") than those who are currently in practice. The requirement for on-going experience should be relaxed to allow former service users and carers and former medical workers to be eligible for appointment.	Please note. The definition of an ordinary member (medical experience) has been revised to avoid confusion with other ordinary members with medical experience who will sit in other jurisdictions in the First-tier Tribunal. In the mental health context they will now be known as 'ordinary members (psychiatric experience). The ordinary member (psychiatric experience) plays an important role using their expertise to assist the panel.
Are there any additional criteria you would wish to see prescribed?	No comments	
Are there proposed criteria that you do not wish to see prescribed?	No comments	
Do you have any other comments you may wish to make?	Members of MHTS who are over 70 on date of transfer can on discretion of the President of Tribunals in consultation with Scottish Ministers continue as a member. The parameters and assessments used to determine eligibility should be open and transparent.	On this matter, the position is set out in primary legislation. The basis for continuation in office after reaching 70 years of age is prescribed in the Judicial Pensions and Retirement Act 1993 as being a matter within the discretion of the President of the Tribunals and Scottish Ministers, based on the public interest.

Part 7. Questions on Regulations amending the Time Limits for seeking permission to appeal		
Do you have any comments on the proposals regarding the amendment to time limits for seeking permission to appeal	A range of views indicated that - There should be no time limits; failing which one such as three years should be applied; 21 days appears to reflect the current position, but concerned that the date at which the 21 days start appears to be different. It may be unfair for a shorter timescale to apply to mental health cases than to others. Time limits should be extended to assist those with learning difficulties. People living in more rural locations should have a 30 day time limit.	The decision has been made to amend the time limits from 30 days to 23 days (which includes 2 days for postal delivery from the Tribunal to the recipient) to mirror existing practice. Greater clarity will be given to define the 'relevant date' for calculating the time limits. The rationale is to ensure that the appeal process (and consequently any subsequent hearing) moves forward as quickly as possible as the liberty of an individual is at stake. There is no evidence to suggest that these time limits impact on either those with learning difficulties or that they do not work for rural communities.
Do you have any other comments you wish to make?	No comments	

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