LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's submission to the Tribunal Procedure Committee on their 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.

June 2018

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research. Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at
http://www.liberty-human-rights.org.uk/policy/

Contact

Sam Grant
Policy and Advocacy Officer
Direct Line: 020 7378 3258
Email: Samg@libertyhumanrights.org.uk

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?

Who We Are

1. Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty has advocated in the area of mental health since 1951. We are a member of the Mental Health Alliance, a coalition of more than 75 organisations from across the mental health spectrum and beyond that work together to advocate for fair implementation of the Mental Health Act in England and Wales.

Concerns

2. Liberty is extremely concerned by the proposals to limit pre-hearing examinations (PHEs) for people detained under s.2 of the Mental Health Act 1983 (the Mental Health Act). PHEs allow for doctors to examine an individual before an FTT hearing begins. We believe the changes would curtail access to justice and have a detrimental impact on safeguards for people detained under the Mental Health Act. It would further undermine the TPC's statutory obligation under s.22(4) of the Tribunals, Courts and Enforcement Act 2007 to exercise the power to make Tribunal Procedure Rules with a view to securing an 'accessible and fair system.'

3. The FTT makes decisions on liberty and other fundamental human rights – many of which will result in forcible detention and treatment, a profoundly serious matter. This alone justifies the highest standards of deliberation and decision-making. We are concerned that the Tribunal Procedure Committee (TPC) appears willing to weaken scrutiny and safeguards in the name of efficiency.

4. The PHE is an essential safeguard to ensure that people are detained lawfully and in accordance with the purpose of the Mental Health Act in terms of assessment, treatment, and recovery. The value of a recent examination for the decision-making of the tribunal is important to the efficient running of tribunals, and provides an independent and objective assessment of the patient's mental state. Without a PHE, there is no guarantee of a thorough review of key medical evidence for detaining the patient; this therefore risks the removal of a vital safeguard required to guard against arbitrary detention.

Patient Focused

5. The TPC proposal argues that 'PHEs appear to make little material difference to the outcome of cases.' However, focusing only on the outcome of the hearing ignores the importance of the process. Many frontline mental health organisations report that their clients place a significant value on the second medical opinion provided by the PHE. As Professor of Medical Law, Nicola Glover-Thomas writes '…for many patients, discharge from hospital may not be the goal, but a tribunal hearing provides a forum to scrutinise the patient's progress, consider next steps and evaluate the patient's continuing needs.'[1] Weakening the process will undermine the sense in

[1] Mental Health Tribunals: Examining current practice, rising caseloads and next steps, Nicola Glover-Thomas, The UK Administrative Justice Institute, February 2018

which a patient is involved in their own treatment decisions. The FTT system provides detained patients with an important opportunity to be heard and weight should be attributed to the patient experience within the FTT system.

Unintended Consequences

6. There is a real risk that deterioration in the quality of decisions will lead to increased costs and time spent in challenges and appeals against wrongful detention. This would not only create further anxiety and uncertainty for individuals – it also risks slowing down the process.

Summary

7. We agree with the TPC's conclusion, articulated only three years ago, that there is 'considerable force in the arguments that a preliminary examination enables at least some patients better to present their cases to the tribunal.'[2] As such, given the risk to important safeguards, we strongly urge the TPC to maintain current requirements for PHEs in all appeals for s.2 cases, and for other appeals where requested.

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?

8. The requirement should not be removed. The FTT currently has discretion when a service user has requested not to have a PHE, and to direct that a PHE take place if a service user has not requested one for an appeal other than a s.2 appeal. This should remain the default. However, if the TPC do decide to remove the default PHE it is imperative that the Tribunal have the discretion to insist on a PHE. This would still run the risks outlined in our answer to question one, but some discretion to insist on a PHE would be better than none.

3. Do you agree with the proposal that, with references to the tribunal, other than the exceptions set out in para. 3.2 above, (as opposed to applications from patients), a decision on the papers alone should become the default position, as outlined in the proposal above?

9. Liberty strongly disagrees with the proposal that the default position of the FTT should be to make decisions on the papers alone. This proposal would form an unacceptable erosion of vital safeguards for people deprived of their liberty under the Mental Health Act.

10. The majority of automatic referrals will be in cases where a patient has not made an application to the FTT, either because they are unwilling or unable. People who lack capacity to make their own applications to the FTT are likely to be amongst the most vulnerable group of those detained. It is for this very reason that the highest standards of justice must be delivered and perceived to be delivered.

[2] 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. Page 5, paragraph 22, March 2018

Paper Hearings Vs Oral Hearings

11. An oral hearing secures greater safeguards for the service user than a paper hearing, since clinicians must explain the course of treatment and their clinical assessment, and expect to face questions from the FTT. It also allows an opportunity for advocates and other representatives to make a case based on the best interests of a service user.

12. Paper hearings do not provide the same level of scrutiny as an oral hearing and may result in lower discharge rates. Looking at data from social security and immigration cases, it is apparent that individuals who opt for oral appeals experience higher success rates than those whose cases are determined on the papers.[3] In social security cases, the data shows that 48 per cent of appeals were allowed, as opposed to 15 per cent of paper appeals. Regarding immigration appeals, 50 per cent of oral appeals were allowed compared to 29 per cent of paper appeals.[4] A 2003 National Audit Office report on social security appeals noted that 'especially for medically assessed benefits, it is likely that the presence of the customer provides crucial evidence'.[5] This will undoubtedly be the case in the FTT as well.

13. Further, a Nuffield Foundation study that looked into panel members' confidence in their own decision-making in the context of Disability Living Allowance (DLA) decisions found that 'when there is identical information in an oral hearing and a paper case panel members' confidence in their decisions is still higher when it follows an oral hearing.'[6] Further to this, 'most DLA tribunal members feel it is difficult to decide paper cases.' Considering that paper cases only make up 2.5% of FFT decisions right now,[7] this is important information to consider when suggesting a shift from oral to paper hearings.

14. These proposals will create a system where those unwilling or unable to apply receive a lesser standard of justice. The rules already allow for a paper hearing where the service user has requested one. We also note that no impact assessment of the extent to which the proposals will affect particular groups (including those who lack capacity), or any assessment of whether the proposal would comply with Article 5 of the Human Rights Act has been carried out.

Legal Aid

15. The TPC points to the right to legal aid without means testing as a strong safeguard to ensure that those who need an oral hearing receive one. However, having access to legal aid will not provide the safeguard the TPC expects when that access is itself under strain. There is evidence to suggest that mental health lawyers represent clients for free in the FTT[8] and whilst legal aid cuts have affected the area of mental

[3] R. Thomas, 'Oral and paper tribunal appeals, and the online future', January 2017.
[4] Ibid
[5] Getting it right, putting it right Improving decision-making and appeals in social security benefits, Report by the Comptroller and Auditor General, HC 1142 Session 2002-2003: November 2003, P35
[6] Tribunal Decision-Making: An Empirical Study, Professor Dame Hazel Genn and Professor Cheryl Thomas, December 2013
[7] Parliamentary Question by Barbara Keeley MP on 24/05/2018, revealed that *"[t]he First-Tier Mental Health Tribunal does not centrally record the outcomes of tribunal hearings broken down by whether the case was considered on paper or at an oral hearing"* but that "*in 2017/18 cases considered on paper composed 2.5% of all hearings in the tribunal*".
[8] The plight of the mental health lawyer, Law Society Gazette, September 2010

health less than other areas such as immigration, the impact of legal aid cuts has still seen a general reduction in the number of mental health legal aid providers.[9]

16. Further, Mind's 2018 report 'An unjust system', shows how the changes made by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) have disproportionately affected people with mental health problems.[10] The report includes case studies of clients who were unable to get any information about legal aid or advice about what steps to take. Given the growing evidence on the negative impacts of legal aid cuts, the fact that this is being cited as a safeguard against negative effects of these proposals should be cause to worry.

Social Entitlement Chambers

17. The TPC also suggests that the FTT could function in the same way that the Social Entitlement Chamber (SEC) works. The SEC hears appeals concerning Industrial Disablement Benefit. In this Chamber decisions can be made without a hearing. Yet, the comparison between the SEC and the FTT is inappropriate. It would be a leap in logic to say that because the SEC functions 'satisfactorily' its procedures can be applied to other Tribunals, especially considering that the FTT makes decisions about deprivation of liberty and forced treatment whereas the SEC does not.

18. Further, even within the SEC, judges have spoken out against dispensing judgments via paper hearings. Judge Wikeley, responding to a SEC case where an individual was denied an oral hearing, held that 'justice must not only be done, but must be seen to be done', further arguing that an oral hearing was 'a fundamental tenet of the justice system', enshrined in common law and Article 8 of the European Convention on Human Rights.[11]

Summary

19. Considering that the FTT makes decisions concerning fundamental human rights – many of which will result in forcible detention and treatment, only the highest standards of deliberation and decision-making are acceptable. Again, we are profoundly concerned that the TPC appears willing to weaken scrutiny and safeguards for vulnerable people. The current system, whereby oral hearings are the default form of the tribunal, unless the service user has requested otherwise, should be retained.

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?

20. The current system, whereby oral hearings are the default form of the FTT, unless the service user has requested otherwise, is appropriate. When service users have

[9] An Analysis of the Evidence, Sir Henry Brooke, Bach Commission on Access to Justice: Appendix 5, page 9. In 2012-13 there were 203 mental health legal aid providers giving legal support and representation in 2016-17 that number was 178, a reduction of 25 providers.
[10] 'An Unjust System'- How changes to the justice system have affected people with mental health problems, Mind, May 2018
[11] TMcG v SSWP [2012] UKUT 411 (AAC)

requested a paper hearing, it is appropriate that the FTT should exercise its discretion in considering whether an oral hearing would be appropriate instead. We strongly believe that oral hearings should remain the default scenario in other circumstances.

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

Sacrificing Justice for Expediency

21. The combined impact of both proposals which the TPC is currently consulting on should be considered. Taken together, limiting both PHEs and in person oral hearings would have a significant and detrimental impact on safeguards for those who rely on the oversight of the FTT to ensure that their detention under the Mental Health Act is necessary to prevent harm to themselves or to others.

22. We also note that this consultation is occurring at the same time as an Independent Review of the Mental Health Act 1983, which published its Interim Report on the May 2, 2018[12]. This report made clear that the Review will be further considering the role of the FTT as a safeguard, and considering options for further reform alongside additional amendments to the Mental Health Act itself. Given the shifting policy landscape in this area, it would be appropriate to allow that process to finish in autumn 2018 before contemplating other changes to the FTT.

23. Individuals have fundamental rights against inhuman and degrading treatment as well as arbitrary detention. The Human Rights Act 1998 requires that these rights be protected, including through decision-making of the FTT. Limiting PHEs and in person hearings seriously risks faulty decision-making in respect of these rights, resulting in serious rights violations for those with mental illness.

24. Liberty remains extremely concerned that the TPC approach to the FTT is one of sacrificing justice for expediency. With the most fundamental rights at stake, the TPC should commit to upholding fair and accessible Tribunal decision-making. Liberty urges the TPC to abandon its proposals.

[12] The independent review of the Mental Health Act, Interim Report, April 2018.