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Liberty's Response to the Government's consultation on the composition of Mental Health Review Tribunals

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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 Policy

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
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Introduction

1. Liberty is extremely concerned as to Government proposals to remove the requirement that Mental Health Review Tribunals include lay members, rather than single Tribunal Judges sitting alone. This requirement is set down by provision in the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 which requires that the Senior President of Tribunals (SPT), when determining panel composition, to have regard to the constitution of former tribunal panels.

2. Above all, Mental Health Review Tribunals make decisions on individuals' liberty and their 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, especially in an area which relies on clinical expertise and complex legal provision, as mental health law does. We remain profoundly concerned that the Government appears willing to disregard the need for lay member expertise in order to cut costs.

3. Even worse, the Impact Assessment itself identifies what are very limited costs savings to the taxpayer, amounting to a mere fraction of the Ministry of Justice's budget, even on the most optimistic of assessments it offers. At an annual cost of £21 million, non-legal panel members are currently a proportionally small portion of the budget of Her Majesty's Courts and Tribunals Service, which in total amounts to £1.7 billion each year.[1] As the paper proposes as its first suggested option, a total ban on the use of lay members will save £21 million, with £5 million the least the proposals are thought to save. Lay member expertise likely represents a real bargain for taxpayers. For what amounts to a comparatively minimal saving, the Government risks serious and ramifying detriment to the review of mental health decision-making.

4. Liberty is also concerned with the manner in which the consultation is being pursued, as set out by the Impact Assessment of September 2016.[2] Repetitious usage of words such as "flexibility", "restrictive", and "traditional" provide little illumination as to the real motivations or likely impact of the proposals. For example, it is entirely unclear what is meant by the suggestion, in the Impact Assessment, that the proposals "fit better" with future, unspecified proposals focusing on "digitising justice".

[1] Ministry of Justice, 'HM Courts & Tribunals Service: Annual Reports and Accounts 2015-16', July 2016, p. 43, available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/536080/hm-courts-and-tribunals-service-annual-report-and-accounts-2015-16.pdf.

[2] Ministry of Justice, 'Composition of First-tier Tribunal panels: Impact Assessment', 15 September 2016, available here: https://consult.justice.gov.uk/digital-communications/panel-composition-in-tribunals/supporting_documents/panelcompositionia.pdf.

The proposals provide no clear meaning to this expression, much less an explanation as to how the loss of lay member expertise on Tribunal panels will serve whatever goals it entails.

The importance of lay member expertise

5. Decision-making by Mental Health Tribunal Panels involves several fundamental rights. Foremost among these will be the rights against inhuman or degrading treatment, the right against arbitrary detention, and the right to privacy – each covered by Articles 3, 5, and 8 of the Human Rights Act (HRA), respectively. But, in addition, those who will appear before the Tribunals may have psycho-social disabilities of various kinds, implicating their rights to equal treatment under the Equality Act and Article 14 of the HRA. And since the hearings will decide matters that are crucial to their fundamental rights, they will also have the right to a fair hearing and a fair procedure, guaranteed by Article 6.

6. Tribunal panels are currently composed of three individuals, a Tribunal Judge and two non-legal members. The two non-legal members must be a registered medical practitioner – usually a psychiatrist – and another member "who has substantial experience of health, or social care matters", such as a nurse or social worker.[3] They are appointed by way of the Judicial Appointments Commission, and they are independent of the psychiatric and other professional decision-making under assessment by the Tribunal.

7. One of the most important features of many Tribunals is the mixed, but shared, expertise of the combination of legal and non-legal members, especially in areas which concern decisions requiring specialist knowledge, such as mental health. As two prominent mental health law academics have stated, the Mental Health Review Tribunal has a core function which requires legal and non-legal panel members: it "conducts an inter-disciplinary review and is more inquisitorial in structure".[4] These findings were also made by Sir Andrew Leggatt, a former Lord Justice of Appeal, in his review of the Tribunal system. As he wrote, Tribunal decisions "are often made

[3] See Senior President of Tribunals, Practice Statement, 'COMPOSITION OF TRIBUNALS IN RELATION TO MATTERS THAT FALL TO BE DECIDED BY THE HEALTH, EDUCATION AND SOCIAL CARE CHAMBER ON OR AFTER 18 JANUARY 2010', 21 July 2014, available here: https://www.judiciary.gov.uk/wp-content/uploads/2014/08/amended-practice-statement-by-spt-composition-of-tribunals.pdf.

[4] See Bartlett, P., and Sandland, R., *Mental Health Law: Policy and Practice*, Oxford University Press, 2014, p. 510.

jointly by a panel of people who pool legal and other expert knowledge, and *are the better for that range of skills*."[5]

8. As the Mental Health Alliance, of which Liberty is an Associate Member, has stated in its letter to the Minister of State for Courts and Justice, Sir Oliver Heald QC, in response to the consultation:

> "The Mental Health Act criteria for detention and discharge are based on a person having a mental disorder, so psychiatric diagnosis is fundamental to decision-making under the Act. As a consequence, the focus of the Mental Health Tribunal is based on an understanding of the illness and associated needs and risks. Medical evidence is therefore an integral part of its process.
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> "It is for the detaining authority to prove that a patient meets the criteria for continued detention. If, as proposed, the medical member of the Tribunal were removed, there would not be any independent medical professional evaluation of the Responsible Clinician's (RC's) evidence. This would inevitably give more weight to the RC's evidence and would place the patient at a substantial disadvantage. The tribunal will lose this valuable expertise as well as the patient losing an important safeguard. This would bring into serious doubt the fairness of the process and could potentially breach Article 6, right to a fair hearing."[6]

9. And as a prominent blogger on mental health law in the UK has stated:

> "…the Tribunal psychiatrist has a very important role to play. They may be the only psychiatrist not employed by the NHS (or a private hospital) to interview and independently assess the patient. It is the patient's only chance to put their views about detention to someone not involved in their treatment. The lay member also has an important role to play, to explore the social dimension of the patient, and to provide a "lay", if also expert, opinion. Unless, like a Coroner, the Judge is qualified in both Law and Medicine, I find it hard to understand how a Judge alone can make the complex judgments required

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[5] Leggatt, A., *Tribunals for Users – One System, One Service*, HM Stationary Office, 2001, available here: http://webarchive.nationalarchives.gov.uk/+/http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm. (Emphasis added.)

[6] Mental Health Alliance, 6 October 2016, available here: http://www.mentalhealthalliance.org.uk/news/MHA-Justice-System-Consultation.pdf.

to reach a just conclusion in the absence of the other two Tribunal members."[7]

10. To take another, very different area of law in which lay involvement is crucial: Liberty has long campaigned to protect the right to jury trial. With those charged with serious crimes facing the judgment of their peers, jury trial not only gives greater legitimacy – through greater inclusion and civic participation – but also wider experience and expertise than the legal professionals who serve as lawyers and judges.

11. It is imperative that the broadest and deepest range of expertise is available for decisions of such gravity and a procedure of such importance. Lay and medical members guarantee that these decisions are made with the requisite expertise and judgment – something which cannot be safeguarded by a legal member alone, someone who lacks any medical or other professional qualifications and experience.

12. It is therefore entirely unclear what the Government's proposals mean when they suggest that "unnecessary" deployment of panel members will be reduced. Real mental health expertise will almost always be necessary in decisions relating to detention and treatment. Individuals have fundamental rights against inhuman and degrading treatment, as well as arbitrary imprisonment and invasions to their private life. The Human Rights Act requires that these rights be protected, including through decision-making of the Mental Health Review Tribunal. Removing lay member expertise seriously risks faulty decision-making in respect of these rights, resulting in serious rights violations for those with mental illness.

The objectives of the proposals

13. The Impact Assessment states three objectives which it claims the proposals would meet:

    i. "A reduction in the use of multi-member panels may mean appeals could be dealt with more quickly due to less discussion."

    ii. "Cases could also be listed more quickly as there is only the need to find availability for a single rather than multiple panel members. This could improve the end-to-end process time of the appeal so benefitting users."

[7] *The Masked AMPH*, 'What Exactly is the Ministry of Justice Intending to Do with Mental Health Tribunals?', 27 September 2016, available here: http://themaskedamhp.blogspot.co.uk/2016/09/what-exactly-is-ministry-of-justice.html.

iii. "There could also be a reduction in costs to HMCTS associated with lower expenditure on travel and subsistence, training, appraisal and general administration."

14. These claimed objectives provide a truly woeful basis on which to make such a profound change to the composition of Mental Health Review Tribunal panels and do not justify proposals which risk the rights of those involved.

15. It is deeply concerning that essential discussion between Tribunal members is viewed by the Government as a feature of the judiciary which may be exchanged in order to achieve a reduction in budgetary expenditure. Tribunals make profoundly important decisions about those with mental illness: individuals may be detained and treated against their will as a result of their decisions. It is essential that the Ministry of Justice understands that the utmost standards of expert deliberation should be upheld. The suggestion that this may be, in essence, sold off as a costs-saving measure is deplorable.

16. Whilst more efficient and effective decision-making is a worthwhile aim, the paper contains no evidence that this will be the effect of the proposed changes. Indeed, it is difficult to understand how decisions to which less thought is given will be more effective. The Government provides no evidence to substantiate its further suggestion that losing the expertise of lay members will speed up the Tribunal process, especially in view of the real risk that deteriorating decisions and increased appeals as a result of the lost expertise will cause the process to slow, rather than accelerate. Whilst it accepts – without any further consideration – that "there is a risk" that times could increase, it "assumes" without evidence or argument that it would speed up decision-making, concluding that "it is not envisaged" that the proposals will have any negative effect of the users of Mental Health Review Tribunals and that any burden of increased appeals "should not be significant."

17. As the Government's Impact Assessment itself admits, the current Order still permits *ad hoc* changes to panel composition, where appropriate.[8] The Government presents nothing to suggest that there is any real need to move from this current system, in which changes can be made where appropriate – against a background of wide, multi-member panel expertise – to one in which loss of lay member expertise is routine.

Alternative improvements to treatment of mental health patients

[8] See its paragraph 4, p. 3.

18. If the Government genuinely wishes to improve the 'end-to-end' process time, and other aspects of the experience of the tribunal system for its users, there are many other changes it might consider. For example, the consultation paper ignores findings by the Care Quality Commission – in their 2011 study of Tribunal users' experiences – that "a significant cause for concern" with the "nearly half" of Tribunal users who reported delay was actually "a lack of information". Indeed, it is striking that "nearly half" of all respondents received "little or no information about how long the tribunal process was likely to take".[9]

19. The Government proposes nothing to target this serious problem of a lack of information and explanation for the users of Tribunals. Instead, it suggests the blunt instrument of removing Tribunal expertise, providing no evidence or even basic rationale for thinking that this will reduce delay – beyond a startlingly crude model of leaving one, instead of three, people to decide each case.

Conclusion

20. Liberty urges the Government to rethink its proposals. It provides no evidence for such a sweeping and risky reform, and seeks to justify it only by the cutting of costs. Not only are these costs proportionally small, they will likely be overwhelmed by the increased resource burden in faulty decision-making and unduly lengthy detention which the changes will cause.

21. Overall, Liberty remains extremely concerned that the Government's approach to Tribunals is one of sacrificing justice for expediency. Employment Tribunal fees have been introduced which have eviscerated access to justice in employment and equality law. This Government has since tried to multiply Immigration Tribunal fees by 500% and is now seeking to reintroduce a system for the fast-tracking of asylum claims within detention which the Court of Appeal has already found systematically unfair and unlawful. With the most fundamental rights at stake, the Government should commit to upholding just and proper Tribunal decision-making by protecting some of the most vulnerable users of Tribunals in the UK, those with mental illness and other psycho-social disabilities. Liberty urges the Government to abandon its proposals.

Sam Hawke

[9] See Care Quality Commission and Administrative Justice & Tribunals Council, 'Patients' experiences of the First-tier Tribunal (Mental Health)', March 2011, p. 5, available here: http://ajtc.justice.gov.uk/docs/AJTC__CQC_First_tier_Tribunal_report_FINAL.pdf.