

# Mental Health Review Tribunals

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## Special Report

Presented to Parliament by the Lord High Chancellor  
by Command of Her Majesty

June 2000

# Overview

This Special Report is made to the Lord Chancellor and the Scottish Ministers and is laid before Parliament and the Scottish Parliament by the Council on Tribunals in accordance with the terms of the Council's governing Act, the Tribunals and Inquiries Act 1992, and the Scotland Act 1998.

The Council on Tribunals have prepared this Report on Mental Health Review Tribunals (MHRTs) to supplement their official response to the Government's proposals for consultation on Reform of the Mental Health Act 1983.

The Report first sets out the Council's conclusions, from their earlier Report "Tribunals: their Organisation and Independence" (Cm.3704), on the conditions for the proper independence and integrity of tribunal systems. The Report then examines the operation of the Department of Health's Mental Health Review Tribunals within the framework of those conditions. It also sets out the Council's main views on the Government's proposals for reform of the Mental Health Act 1983.

In particular, the Report considers and makes recommendations in respect of:

- a Presidential Model for the new Tribunal to replace MHRTs;
- the attendance of clerks at tribunal hearings;
- proper planning and management information systems;
- a robust training policy for tribunal chairmen and members;
- legal aid for representation before mental health tribunals;
- standards of accommodation for tribunal hearings.

The Council's aim in preparing this Report, in conjunction with its formal response to the Government's consultation proposals on Mental Health Reform, is to identify the lessons which the Council believe could be learned from their findings on the working of MHRTs. The views expressed in this Report are based primarily on Council members' observations of Mental Health Review Tribunal hearings and discussions with tribunal Chairmen and members.

The Council invite those responsible for the development of the new Tribunal to consider carefully the recommendations in this Report in working up the arrangements for the new Tribunal.

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# Mental Health Review Tribunal

## Part 1: Introduction

### The Council on Tribunals

- 1.1 The Council on Tribunals is an independent advisory body which was established in 1958 by Act of Parliament following the publication of the Franks Report on Administrative Tribunals and Enquiries. Our functions are set out in the Tribunals and Inquiries Act 1992 and include keeping under review the constitution and working of a large number of tribunals and, from time to time, reporting on their constitution and working.
- 1.2 An important aspect of our functions in keeping the working of tribunals under review is our programme of visits to tribunal hearings. This enables us to see at first-hand how tribunal procedures operate in practice and also provides us with the opportunity to discuss relevant issues with tribunal Chairmen and members. Our visits are not, however, visits of inspection.

### The Purpose of this Report

- 1.3 The purpose of the Report is to bring together findings which have resulted from visits made by members of the Council to the Mental Health Review Tribunals (MHRTs). During this time we have noted the same issues of concern arising over and over again. We have highlighted many of these concerns in our Annual Reports over the past few years. We now take the opportunity to draw together many of those concerns in this Report in order to ensure that the new tribunal system proposed in the Government's Green Paper addresses those issues.
- 1.4 We invite those responsible for the development of any new mental health legislation to consider carefully the recommendations made in this Report, particularly when working up the arrangements for the new Tribunal to replace the existing MHRTs.

### Background to this Report

- 1.5 In November 1999, the Department of Health (the Department) issued the Government's Green Paper, "Reform of the Mental Health Act – Proposals for Consultation" [Cm 4480], along with the Report of the Expert Committee [ISBN: 1-84-183-123-9], set up under the Chairmanship of Professor Genevra Richardson. The Expert Committee was commissioned "to advise the Government how mental health legislation should be shaped to reflect contemporary patterns of care within a framework which balanced the need to protect the rights of individual patients and the need to ensure public safety".
- 1.6 We considered the Government's consultation proposals at our full Council meeting on 16 February 2000 and submitted our formal

response to the consultation in March 2000. Details of the key points raised in our response are included in Part 3 of this Report.

- 1.7 The issues covered in our response related primarily to the proposals for the new Tribunal to replace the existing MHRTs. Whilst our most recent Annual Report for 1998-1999 acknowledged there had been some improvements in the operation of MHRTs, we considered that there was still room for further improvement in a number of areas: particularly in relation to issues such as ever-increasing workloads and lengthening delays in hearing dates; the high incidence of unclerked tribunal hearings; and the question of inadequate resources, which we regard as the main cause of many of the continuing problems within the MHRT.
- 1.8 In addition to providing our formal response to the proposals for reform to the mental health legislation, we considered that it would be helpful to provide some specific feedback on the operation of MHRTs, gathered from our observations of MHRT hearings, and discussions with MHRT Chairmen and members, so that those planning for the future could learn from the lessons of the past.

### **Tribunals: their Organisation and Independence**

- 1.9 In our earlier Special Report "Tribunals: their Organisation and Independence", issued in July 1997, we set out a statement of general principles of the fundamental purpose of tribunals. We concluded that the principal hallmark of any appeal tribunal was that it must be independent, and equally importantly that it must be perceived as such. The Report also set out a list of pre-conditions which we considered must be met in order for any Tribunal to achieve and maintain a proper state of independence and integrity. These pre-conditions are:
  - (i) proper rules of procedure;
  - (ii) high quality appointments of chairmen and members;
  - (iii) proper training for chairmen and members;
  - (iv) appropriate standards of judicial performance, with guidance and support for chairmen and members (including the means for monitoring performance, particularly of newly appointed chairmen and members);
  - (v) the freedom to take judicial decisions uninfluenced by resource or other external considerations;
  - (vi) proper administrative support in terms of hearing clerks and support staff, legal and other text books;
  - (vii) adequate and appropriate hearing accommodation in premises which are not connected with one or other of the parties; and
  - (viii) sufficient resources properly allocated to meet those needs.

1.10 Moreover, we also pointed out in that Report that the independence and integrity of a tribunal system would be best served if someone from the judicial side was given a specific role, as a judicial Head or President, for ensuring and monitoring the extent to which the particular tribunal system was meeting some or all of those pre-conditions.

### **Framework for this Report**

1.11 In this Report, we set out in Part 2 the considerations which we believe have to be dealt with in any attempt to find a satisfactory basis for replacing MHRTs. These paragraphs summarise the main points we have made in previous Annual Reports and in the Special Report of 1997, but also take account of the most recent impressions we have derived from our ongoing work.

1.12 In Part 3, we highlight our main concerns relating to the Government's proposals for reform of the mental health legislation. We also ask that, in advance of the statutory consultation with us on the subordinate legislation that will eventually be needed, we should be consulted further as the policy thinking develops.

# Part 2: Issues relating to Mental Health Review Tribunals

## The Absence of a Presidential Tribunal Head

- 2.1 We remain concerned at the lack of a central, judicial Head to provide the necessary degree of leadership and direction which a significant tribunal system of this kind requires. We have frequently expressed concern about the fragmented nature of the judicial functions of MHRTs which are regionally based, and in which the Regional Chairmen all have equal status. We recognise the considerable efforts being made by the Regional Chairmen of MHRTs to achieve greater consistency across the system. We were particularly disappointed that this important issue did not feature more prominently in the Government's consultation proposals, particularly since it was endorsed so favourably in the Report of the Expert Committee.
- 2.2 We have frequently advocated the presidential model of tribunal organisation, whereby a particular type and size of tribunal has a national President or Chairman appointed as its Head. We have also recommended, where the number of tribunals in a particular tribunal system justifies it, the appointment of regional chairmen too. A significant advantage of the presidential model lies in the greater degree of judicial independence and separation it provides from the sponsoring Government department.
- 2.3 In terms of appointment and status, the judicial Head need not necessarily be called a "President", but should stand apart from, if not above, other judicial colleagues by having overall responsibility for matters such as judicial management, monitoring the effectiveness and efficiency of the system, developing training programmes and providing central direction. The appointment of the judicial Head will normally be made by the Lord Chancellor, in respect of tribunals in England and Wales, and the office and main functions of the post will usually be provided for in statute. The eventual status and title of the judicial Head will largely be governed by the size, organisation and structure of the tribunal concerned, but we consider it essential to the effective performance of the functions of the post that the person appointed is of sufficient weight and standing to reflect the level of responsibility which will be required to discharge those functions.
- 2.4 Within the presidential system, the judicial Head is sometimes responsible for both the judicial and administrative functions (including resource management), although many tribunal systems now prefer to keep these functions separate. The judicial Head can often also have responsibility for, among other things:
  - appointing, or advising on the appointment of, tribunal chairmen, members, clerks and other administrative staff;

- monitoring the performance of tribunals and arranging training for chairmen, members and clerks, as necessary;
- co-ordinating and communicating between tribunals of the same type in order to foster a sense of corporate identity and team spirit;
- acting as the spokesman for the tribunal and focal point for relationships and communication, working in partnership with the sponsoring Government department and other bodies, including ourselves, to promote joined-up Government;
- making interlocutory decisions and giving guidance to tribunal chairmen and members on issues such as the allocation of cases and other matters of practice and procedure where a consistent approach is required.

### **Recommendation 1**

We recommend that the new Tribunal to replace the MHRT adopts the presidential organisational model, with the appointment of a national judicial Head or President.

### **Tribunal Clerks**

- 2.5 We have commented on a number of occasions in our Annual Reports about the absence of tribunal clerks at MHRT hearings. We have seen this problem for ourselves when we observe MHRT hearings and have heard about it in our discussions with MHRT chairmen and members, who regularly express their dissatisfaction about this issue. We consider that there should be a clear policy that each hearing is supported by a clerk.
- 2.6 The role of the tribunal clerk varies considerably between different tribunal systems. However, generally speaking, clerks tend to be involved more usually with the administrative arrangements associated with tribunals, including having responsibility for matters such as receiving appeal applications, sending out notices to appellants, requesting medical statements and copying them to interested parties, arranging and notifying the time and place for the hearing and sending out the appeal papers to all interested parties. The clerk also provides administrative support to the tribunal on the day of the hearing by ensuring that the hearing room is set up correctly, meeting appellants and advising on procedure and notifying interested parties of the tribunal's decision. The clerk may also advise the tribunal on procedure and may often draft the note of the proceedings and the decision, for endorsement or amendment by the Chairman.
- 2.7 The absence of a clerk at a tribunal hearing places a considerable additional burden on the tribunal in so far as tribunal chairmen and members necessarily have to take on the duties of the absent clerk. We consider it completely unacceptable that any member of a judicial body should have to undertake the functions of a tribunal clerk. The tribunal should be able to focus completely on the judicial tasks before them

without being distracted by administrative duties. We are concerned that such failings serve to undermine the independence of MHRTs in the eyes of those who appear before them. The lack of a clerk is also a greater problem with these types of tribunals which sit in many different venues, where tribunal members may not be familiar with the facilities. Moreover, from the patient's perspective, the presence of the clerk may sometimes be important in that it can help to distinguish the tribunal hearing from what some patients might otherwise believe to be just another case conference meeting.

2.8 Last year the Department of Health set up a working group to examine the role of the tribunal clerk in MHRT hearings. The specific terms of reference of the group were:

- to examine the role of the tribunal clerk and define key responsibilities and duties;
- to identify the contribution of the clerk to the overall aim of the secretariat (i.e. to enable patients detained under the Mental Health Act 1983 to exercise their statutory rights to a speedy review by the Tribunal); and
- to examine the differences between full-time and part-time clerks.

2.9 The working group produced a most helpful Report, covering issues such as the role and skills required by the clerk and the use of part-time clerks. One of the Report's key recommendations was **"As a matter of principle, a clerk should attend all tribunal hearings. We recognise that, as a result of this recommendation, the Department will need to consider the resource implications this represents, and make decisions as to how this level of attendance at tribunal hearings is to be achieved."** We endorse wholeheartedly this recommendation and would encourage the Department to ensure the Working Group's recommendations are taken forward in making the necessary arrangements for the new Tribunal.

#### **Recommendation 2**

We recommend that the Department adopts a consistent policy of ensuring that every tribunal hearing is properly supported by a tribunal clerk, and monitors closely that this is being achieved.

### **Planning, Resources and Targets**

2.10 We consider that proper management information systems should be put in place for the new Tribunal which will replace MHRTs. We have mentioned in our Annual Reports the need for MHRTs to develop a clear strategy for tackling their ongoing resource problems in order to manage better their steadily increasing workloads. The fact that there has been no proper strategic planning system in place has left MHRTs in a vulnerable and exposed position with the sponsoring Department, in terms of not having sufficient, reliable management information available to support requests for increased resources to enable them to cope with

their ever-increasing caseload. With proper planning processes, it might have been possible to forecast increases in workloads earlier and, as a consequence, the Department would have been able to react more quickly to take the necessary remedial steps. As it is, they have had to commission separate, special research to establish the underlying causes of these unforeseen workload variations.

- 2.11 Any efficient, modern organisation needs to put in place proper planning and management information systems in order to be able to manage its business as effectively as possible. Indeed, the objective of "Better Business Planning" is one of the six key themes of the Government's Programme of Reform for the Civil Service, the intention being that each Government Department should develop business planning processes, setting out its aims, including long and short-term targets in measurable form, for each area of its business.
- 2.12 One of the key advantages of having proper planning processes is that they act as a useful measurement tool to provide information about the extent to which the organisation's operational objectives are being achieved. They also assist in the measurement of business trends which can be used to provide a more accurate assessment of future workloads and resource needs.
- 2.13 A proper planning strategy and system would enable MHRTs to tackle a number of other areas where there are still unresolved problems. The increasing workload, and lack of additional resources to deal with the numbers of extra cases, has had a negative impact on the extent to which the tribunals are meeting the target times for hearing appeals. We acknowledge and applaud the fact that a number of work-streamlining measures relating to the MHRTs have been put in place, which have had the result that some areas are now meeting some of the targets for hearing appeals. However, it must be recognised that the point will arrive soon where efficiency savings will have been maximised and further improvements may not be possible without an injection of additional resources.
- 2.14 Another advantage of a proper planning system is that it provides more reliable management information upon which to base calculations as to the numbers of chairmen and members needed to clear cases within the set target times. Again, at the present time, the recruitment of sufficient numbers of chairmen and members appears more often to be a reactive rather than a proactive process. This results in unsatisfactory delays between identifying the need for additional chairmen and members and getting the extra numbers in place, through having to allow for the time needed to recruit and train new people.

### **Recommendation 3**

We recommend that the Department ensures that proper planning and management information systems are put in place for the new Tribunal.

## Training

- 2.15 A new Tribunal calls for a comprehensive training policy for the Tribunal judiciary. The training provided for MHRT Chairmen and members has been improving over the last few years, although principally in the provision of induction training for new Chairmen and members. However, we still receive regular complaints from some long-serving tribunal Chairmen and members to the effect that they either receive no refresher training or that it is insufficient, both in quantity and quality. Training is also reported to be provided very much on an ad-hoc basis, rather than being properly planned according to members' needs.
- 2.16 We are aware that the MHRT Regional Chairmen are currently working together to implement best practice in a number of the tribunals' functions and operational guidance is being re-drafted in order to comply with the requirements of the European Convention on Human Rights.
- 2.17 We regard the provision of good quality training for tribunal chairmen and members as essential, including comprehensive induction training for new entrants and regular refresher training for existing chairmen and members. We have consulted all tribunal systems under our jurisdiction for details of training plans in respect of the implementation, in October 2000, of the Human Rights Act 1998 which will have significant implications for tribunal operations and procedures. We also intend that our future Annual Reports should provide more detailed information about the arrangements for training within each of the tribunal systems under our jurisdiction.
- 2.18 We believe it should be a relatively straightforward matter to consult on and develop a robust and comprehensive training policy statement for MHRT Chairmen and members, which sets out a clear commitment to the provision of initial training for new entrants and regular refresher training for existing members. Once agreed, the training policy statement should be made widely available so that it is clear to Chairmen and members what training they can expect to receive and be expected to undertake.
- 2.19 In respect of the new Tribunal which will take the place of the MHRTs, it will be particularly important to consider the need for appropriate training to build effective teams of legally-qualified Chairmen, clinical members and lay members.

### **Recommendation 4**

We recommend the development of a robust and comprehensive training policy for all tribunal Chairmen and members.

## Legal Aid for Representation before MHRTs

- 2.20 We consider that good quality legally-aided representation should be available to all mental health patients seeking a review of their status. We have frequently reported on the unsatisfactory position concerning the representation of appellants at MHRT hearings, particularly given the personal liberty issues at stake in these proceedings.
- 2.21 The current position is that the provision of legal aid for representation before MHRTs is limited to legal practices specifically approved for this purpose by the Legal Services Commission (previously the Legal Aid Board). The intention behind this new policy is to improve the quality of the service provided by representatives under the legal aid scheme. However, unless and until more legal practices are franchised to do this work, the choice of legally-aided representation available to patients can often be very restricted.
- 2.22 The latest figures available to us suggest that there are currently only 43 legal practices across the whole of England and Wales which have a franchise to offer legal representation services to patients appearing before a MHRT. We consider this to be a most unsatisfactory position. Whilst we welcome the underlying aim of the new franchising arrangements, which are intended to secure improvements in the quality of representation before the MHRT, we are concerned that this may have led directly to a reduction in the general availability of this service to mental health patients.
- 2.23 This issue will be brought even more sharply into focus with the forthcoming incorporation into domestic law of the European Convention on Human Rights under the Human Rights Act 1998.
- 2.24 The question of the provision of legal aid for representation before Tribunals is, of course, a matter for the Lord Chancellor and not for Ministers in the Department of Health. Responsibility for the Legal Aid fund passed to the new Legal Services Commission (LSC) from 3 April 2000 and we hope the LSC will ensure an adequate spread of franchised providers of legally-aided representation at Mental Health Review Tribunals.

### **Recommendation 5**

We recommend that good quality legally-aided representation at MHRTs is made more widely available to mental health patients.

## Accommodation for MHRT Hearings

- 2.25 We urge a review of the accommodation available for MHRT hearings. Most hearings, of necessity, take place in National Health Service accommodation. They can also take place in a variety of different types of dispersed units. Service providers may not regard the provision of accommodation for tribunal hearings as being high on their list of priorities. Moreover, spare accommodation in NHS hospitals and units

may often be at a premium. However, we would normally expect a Tribunal to have, at the very minimum:

- the use of an adequate room for the tribunal hearing and deliberations, large enough to accommodate a table for the tribunal;
- sufficient space for the parties to the appeal (usually around 5 in number);
- access to a private waiting room for each of the parties to the appeal;
- adequate directions in advance, informing the tribunal members and the parties to the appeal of the location of the hearing.

2.26 Regrettably, our members frequently report a most unsatisfactory picture of the physical surroundings in which many MHRT hearings have taken place. The most frequent observation is that the hearing room is too small and cramped, sometimes with no table provided for either the tribunal or the parties. The worst example was of a venue at which hearings have taken place in the hospital lobby. There is also, frequently, no separate waiting room for the parties to the appeal.

2.27 We would urge that efforts are made to bring the worst tribunal venues up to a more acceptable standard. This would involve drawing up a clear statement of what the minimum standards of acceptability should be, identifying those venues which are not meeting that standard, and attempting to resolve the matter through other means such as, for example, a memorandum of agreement with service providers.

#### **Recommendation 6**

We recommend a review of tribunal accommodation for MHRTs with view to securing greater consistency and an improvement in standards.

## Part 3: Next Steps

### Our Response to the Government's Consultation Paper

- 3.1 In our response to the Government's consultation proposals, there were a number of issues on which we urged a re-think. Our response was largely influenced by our observations of MHRT hearings over many years. We recognise that the policy debate on these proposals is likely to continue to move forward for some time to come, but include here some of the key points in our response. We hope our views will inform the debate on the further development of the new proposals, particularly in relation to the new Tribunal to replace MHRTs.

#### *Proposals for Orders for Compulsory Treatment and Detention*

- 3.2 On the proposals for a new process for compulsory powers of treatment and detention, we were particularly concerned at the implication that the same body or individual would have responsibility for imposing an order for compulsory treatment and/or detention and, thereafter, for reviewing the order and/or sanctioning the discharge of the patient. We suggested that this could lead to a most unsatisfactory position where the same tribunal could be involved in making assessments about the same patients repeatedly, at different stages in the process of compulsory treatment and detention. We supported the view expressed by the Expert Committee that, for example, the Tribunal hearing an application for variation of a compulsory order should not have the same membership as the tribunal making the initial order.
- 3.3 The proposed new process for assessment and provisional treatment will involve an initial assessment period of up to 7 days, followed by a review by "an independent reviewer", and thereafter consideration by a Tribunal. The patient will also have the right to request an expedited Tribunal hearing during the first 14 days of assessment and treatment. We considered the proposed new process to be over-elaborate and likely to be very resource intensive. We suggested that the tribunal hearing should take place at an earlier stage in the process, rather than having an initial independent review which, in our view, would be difficult to achieve within 7 days, in terms of having sufficient time to arrange a satisfactory assessment of an individual's care needs.
- 3.4 We supported fully the recommendation of the Expert Committee that any patient who is subject to a compulsory order of three months or more should have a right to apply to a Tribunal for discharge on one occasion during the currency of the order. We were disappointed that this matter was not addressed in the Government's consultation proposals.

#### *The New Tribunal*

- 3.5 Given the nature of the cases which come before this type of Tribunal, and the important issues which arise at hearings concerning an individual's personal liberty, we were opposed in principle to the consultation proposal for single-member tribunals and any move towards paper-based tribunal hearings. In our view, single-member tribunals and paper-based hearings in cases of this kind would work against the principle of natural justice. We, therefore, recommended the continuation of the conventional three-person tribunal model and provision for a tribunal hearing in all cases.
- 3.6 On the question of the constitution of the new Tribunal, we suggested that the ideal composition would be a legally-qualified Chairman, a consultant psychiatrist and a member with experience or knowledge of mental health services. Further careful consideration will clearly have to be given to the question of the Tribunal's composition, particularly in the light of the additional new power it will have to prescribe conditions for care and treatment in the community.
- 3.7 We acknowledged the potential resource and manpower implications, particularly as regards the availability of consultant psychiatrists, either as members of the Tribunal or as independent experts, and that it might take some time to achieve the ideal position.

#### *Other Observations*

- 3.8 We expressed our disappointment that the consultation paper omitted a number of important policy issues concerning the constitution of the new Tribunal; appointments to the Tribunal to be made by the Lord Chancellor; proper resourcing for the new Tribunal; the need for tribunal clerks; and the importance of a national presidential structure. We considered some of these matters to be of fundamental importance to the debate on ensuring the independence of the new Tribunal and expressed our regret at their omission, particularly since these issues had been fully addressed in the Report of the Expert Committee.
- 3.9 We were also disappointed that the consultation paper did not include any discussion of the issues concerning the availability of legal advice and legal aid for representation before the new tribunal, particularly in view of the personal liberty issues which arise in these types of cases and the implications of the incorporation into domestic law of the ECHR.

#### **Conclusion**

- 3.10 We hope that, as the Department take forward their thinking in this field, they will be ready to consider the issues noted and the recommendations made in this Report. In view of the complexity and sensitivity of the issues that are likely to continue to arise, and because of the extent of our interest and experience in this area, we would very much welcome the opportunity to comment further as the policy thinking develops.
- 3.11 The Department of Health will, in any event, consult us about the procedural requirements presented by the new arrangements.

## Annex A: Synopsis of our Recommendations

1. We recommend that the new Tribunal to replace the MHRT adopts the presidential organisational model, with the appointment of a national judicial Head or President.
2. We recommend that the Department adopts a consistent policy of ensuring that every tribunal hearing is properly supported by a tribunal clerk, and monitors closely that this is being achieved.
3. We recommend that the Department ensures that proper planning and management information systems are put in place for the new Tribunal.
4. We recommend the development of a robust and comprehensive training policy for all tribunal Chairmen and members.
5. We recommend that good quality legally-aided representation before MHRTs is made more widely available to mental health patients.
6. We recommend a review of tribunal accommodation for MHRTs with a view to securing greater consistency and an improvement in standards.