

The Joint Committee on Human Rights

Memorandum by the Council on Tribunals on the Mental Health Bill

1. This memorandum is submitted in response to the Committee's call for evidence on the Mental Health Bill, with particular reference to human rights compatibility issues raised by the Bill.

2. The Council on Tribunals was set up by the Tribunals and Inquiries Act 1958 and now operates under the Tribunals and Inquiries Act 1992. The Council's main statutory function is to keep under review the constitution and working of the tribunals under its supervision and, from time to time, to report on them. These include the Mental Health Review Tribunals (MHRTs), constituted under section 65 of the Mental Health Act 1983.

3. The Council must be consulted before procedural rules are made for any tribunal under its supervision. The Council must make an Annual Report to the Lord Chancellor and the Scottish Ministers, which is laid before Parliament and the Scottish Parliament. Over the past decade and more, the Council has paid particular attention to the operation of MHRTs and the proposals for reform of the Mental Health Act and has reported its views and concerns extensively in its Annual Reports (in particular 1994/95, pp.31-35; 1995/96, pp.8-12; 1996/97, pp.29-31; 1997/98, pp.38-40; 1998/99, pp.37-39; 1999/2000, pp.15-18; 2000/01, pp.17-18; 2001/02, pp.22-24; 2002/03, pp.20-21; 2003/04, p.17; 2004/05, pp.12-14; 2005/06, pp.18-20). The Council will be pleased to supply extracts if desired.

4. In June 2000 the Council also published a Special Report on the operation of MHRTs (a copy of which is enclosed) to supplement its response to the Government's consultation on Reform of the Mental Health Act 1983. The key recommendations made in the Report included:

- The new Tribunal to replace the Mental Health Review Tribunals should be headed by a national President, appointed by the Lord Chancellor;
- Every tribunal hearing should be properly supported by a tribunal clerk;
- Proper planning and management information systems should be put in place for the new Tribunal;
- There should be a robust and comprehensive training policy for all tribunal Chairmen and members;
- Good quality legally-aided representation at hearings should be more widely available to mental health patients;
- The need for a review of tribunal accommodation, with a view to securing greater consistency and an improvement in standards.

5. The Council recognises the positive progress that has been made since the publication of its report, for example, in the appointment of a lead Liaison Judge for the MHRT, improved arrangements for training, and most recently the transfer of the MHRT for England in April 2006 to the Tribunals Service under the sponsorship of the Department for Constitutional Affairs.

6. In the paragraphs below, the Council comments on some of the matters to which the Committee is paying particular attention, focusing on those which are most pertinent to the Council's statutory remit.

Mental Health Review Tribunals for England and Wales

7. The Council's primary interest lies in how the Bill's provisions affect the MHRTs, but it also has an interest in how the proposed changes to the definition of mental disorder and the criteria for detention will impact on the operation of the MHRTs. The Council is broadly content with the Bill's provisions so far as they relate to MHRTs, in particular the creation of a President for each of the Tribunals in England and Wales. However, the Council has serious concerns as to whether the MHRT will be able to cope with the significant increase in its workload, particularly as a result of the new provisions for Community Treatment Orders in the Bill. The Council welcomes the inclusion of a power to reduce the period within which patients must be referred to a MHRT, but would have liked to see, at least in the Explanatory Notes, some indication of by how much the Government aims to reduce the referral periods and by when.

Guiding principles and the Code of Practice

8. In commenting on the Mental Health Bill 2004, the Council supported the proposal to include guiding principles on the face of the legislation, to govern the operation of the new provisions and guide their interpretation. Therefore, whilst it is pleasing to see an expanded explanation of the guiding principles underlying the 1983 Act in the revised draft Code of Practice the Council is disappointed that these principles could not be inserted into the Act itself. At the very least, the Council would wish to see in the statute those which reflect the internationally recognised principles of self-determination and respect for human dignity. A clear statement of principles would also greatly assist Tribunals in carrying out their judicial functions under the Act.

9. The Council welcomes the new chapter 23A in the draft Code of Practice on the MHRT, which provides a source of helpful information and guidance on the MHRT and clarifies a number of issues the Council has raised in the past. In particular, the Council is pleased to see clarification of the role of the Responsible Clinician in attending the hearing, whether as a witness or the nominated representative of the detaining authority.

10. The Council notes that the National Assembly for Wales is considering publishing a separate Code of Practice providing guidance on the operation of the Act to professionals practising in Wales. The Council is concerned that if the two Codes differ significantly, it may be difficult to ensure that the Act is applied consistently in the two jurisdictions. This may cause particular problems where the Code is relied on to establish the principles on which the legislation is based or to remind practitioners of their obligations under the ECHR (see paragraph 12(b) below).

New single definition of 'mental disorder'

11. The new, broadly-drawn definition of 'mental disorder' in the Bill, in tandem with the new, wider criteria for compulsory detention, has the potential to draw ever greater numbers of people within the scope of compulsory powers because of the lack of clarity they will create. Such lack of clarity will also make it more difficult for the Tribunals, in exercising their decision making function, to discharge patients from compulsory detention.

Review of detention by the MHRT

12. The role of the MHRT is to consider whether the criteria for detention continue to be met in the patient's case, and the Act directs the Tribunal to discharge a patient where it is not satisfied on this matter. In order to meet the requirements of ECHR Article 5, detention must be based on "objective medical expertise"¹. At present, the Tribunal generally relies on the evidence of the patient's Responsible Medical Officer (RMO) to confirm that the conditions justifying detention continue to be met. The Council is concerned that some provisions in the Bill may require the MHRT to seek additional medical evidence to be satisfied on this point. In particular:

- a) The Bill replaces the RMO with the Responsible Clinician (RC) who may not necessarily be a medical practitioner, but could be a psychologist, nurse, social worker or occupational therapist. It may be difficult for some of these professionals acting as RCs to provide the Tribunal with the "objective medical expertise" necessary to satisfy the Tribunal that detention is justified.
- b) The Bill introduces a new "appropriate treatment test" into the criteria for detention under section 3 (and the corresponding criteria for renewal and discharge) that appropriate medical treatment must be available to the patient in question. This replaces the current 'treatability test' (that treatment in hospital is likely to alleviate or prevent a deterioration in the patient's condition). Although the Bill provides a basic definition of "appropriate medical treatment", it is left to the draft Code of Practice (chapter 2A) to remind clinicians of their obligations under ECHR Articles 3 and 8 when providing compulsory treatment under the Act. The Council is therefore concerned that it may be difficult for Tribunals to be satisfied that the 'appropriate treatment test' is met in a patient's case unless further details of the requirements of this test are spelt out in the statute, rather than relying on the Code, which can be departed from by clinicians and NHS Trusts in certain circumstances².

Community Treatment Orders

13. The Bill contains provisions for new community treatment orders (CTOs), under which a patient may be discharged into the community subject to certain conditions, but who will still be liable to be recalled to hospital, for example, for failure to comply with such conditions. There is a risk that CTOs may be used either as a fallback to discharging patients from detention or, alternatively, as a means of freeing up spaces in hospitals by discharging those who should rightfully be receiving treatment in hospital.

14. CTOs will also require Tribunals to acquire a greater knowledge and awareness of what treatment is available in the community and the judicial decision making process of Tribunals will involve a greater degree of risk assessment in respect of these cases, especially as Tribunals will have the power to recommend that the RC considers placing a patient on a CTO.

15. In the Council's view the overall impact of CTOs will be to increase significantly the numbers of people who at any given time are subject to compulsory powers, with

¹ *Winterwerp v The Netherlands* (1979) 2 EHRR 387

² *R v Ashworth Hospital Authority (now Mersey Care NHS Trust) ex parte Munjaz* [2005] UKHL 58

a consequential increase in the numbers of cases going before Tribunals to be discharged from such orders.

16. The Council has particular concerns that patients only have the right to apply to the tribunal for a CTO to be discharged and have no right to seek a review or variation of any conditions attached to the CTO. Some conditions imposed on patients (for example, that the patient resides at a particular place, or abstains from particular conduct) could amount to an interference with ECHR rights under Article 5 and Article 8, for which the Bill provides no effective right of challenge.

The 'Bournewood' Proposals

17. The Council's concerns about the Bournewood proposals relate mainly to the staggering complexity of the proposed processes, both the process of applying for authorisation to deprive a person of their liberty and the procedures for challenging authorisation. In particular, in relation to the latter, an initial challenge or subsequent review of authorisations must first be considered by the supervisory body (usually the relevant Primary Care Trust in England or Local Health Board in Wales or the local authority), which is the same body that granted the authorisation in the first place. The Council is concerned that this review lacks independence and will be carried out without any independent oversight, for example by the Council on Tribunals or other independent monitoring body.

18. Only after the internal review process has been exhausted will there be a right of appeal to the Court of Protection rather than to the Mental Health Review Tribunal, which already has the necessary expertise in dealing with cases involving a deprivation of liberty. The introduction of a two-track appeals process, whereby some cases go to Tribunals and others to the Court of Protection, could create a good deal of confusion.

19. The Council is concerned that the complexity and resulting confusion will make these processes unworkable, leaving vulnerable people who lack capacity to raise concerns on their own behalf without the protection and procedural safeguards demanded by the European Court in *HL v UK* and other cases dealing with deprivation of liberty of people lacking capacity.