

Transforming our justice system: panel composition in tribunals

Mind's response to a Ministry of Justice consultation, November 2016

Panel composition in tribunals

Question 7: Do you agree that the SPT should be able to determine panel composition based on the changing needs of people using the tribunal system?

The composition of panels needs to provide access to justice, a fair process and robust safeguards of peoples' rights. We do not object at all to the SPT determining panel composition in accordance with the needs of people using the tribunal system but we do not agree that the proposal being made supports this aim.

We strongly disagree with the proposal to make single member panels the default position and to bring in additional members on a case by case basis, (at least for the tribunals where we have an interest / knowledge, ie mental health and social security). We set out the significance of non-legal members in these hearings below.

We understand that the proposal would limit the scope for the SPT to determine that whole classes of First-tier tribunal require non-legal members, or even prevent this, as it would mean the SPT going against the presumption in the amended order.

Therefore we recommend that these types of tribunal be excluded from the changes to the order (or that the order is not amended at all).

General points

We disagree with the idea that to have regard to the pre-unification composition of tribunals is unduly restrictive – learning from the experience of those tribunals should contribute to the quality of hearings.

The proposal appears (7.3.9 and impact assessment) to be driven more by cost savings – this may be a legitimate aim but must not come at the cost of the quality of decision-making or standard of justice. (Please see *R(Osborn) v Parole Board*, discussed in more detail below.)

The proposal appears to intend that non-legal members will be appointed to panels on a case by case basis. However, the cases heard by panels dealing with mental health and social security routinely need the input of non-legal members and this does not vary by the individual case (see below).

It is not clear whether the intention is for some types of First-tier tribunal not to have single member panels by default, or if all First-tier tribunals will be affected. In either case, further information is required about how this would work in practice and how decisions about panel composition would be made for each type of hearing.

First-tier Tribunal (Mental Health)

Gravity of the decision

The First-tier Tribunal (Mental Health) determines whether or not people remain detained in hospital, or on a community treatment order, under the Mental Health Act 1983. It can also make recommendations about aftercare and leave. It is therefore making extremely serious judgments about very vulnerable people, their liberty and health care. There are also strict limits as to when and how often people can apply to the Tribunal during their detention. Poor decisions risk people being deprived of their liberty unnecessarily (and therefore unlawfully) or people being discharged when this is detrimental to their own health and safety or sometimes the safety of others. It is clearly an essential safeguard.

Medical evidence integral to the decision

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 First-tier Tribunal (Mental Health) is based on an understanding of the illness and associated needs and risks. Medical evidence is therefore an integral part of its process.

It is for the detaining authority to prove that a patient meets the criteria for continued detention. If there were no medical member on the panel, there would not be any independent medical professional evaluation of the Responsible Clinician's (RC's) evidence.

Independence and fair process

This lack of independent expertise would inevitably give more weight to the RC's evidence and would place the patient at a substantial disadvantage; they would lose an important safeguard. The only way for the patient to counteract this would be to get their own independent medical expert, which would put pressure on the Legal Aid Agency as the patient would be entitled to have these costs covered.

The loss of medical expertise on the panel would bring into serious doubt the fairness of the process and could potentially breach Article 6, right to a fair hearing and Article 5(4) as the system of safeguards may not be sufficiently robust for a deprivation of liberty. *R(Osborn) v Parole Board* recognises that where there is a deprivation of liberty there should be greater scrutiny. The judgment also states that "the board must be, and appear to be, independent and impartial. It should not be

predisposed to favour the official account of events, or official assessment of risk, over the case advanced by the prisoner." In the case of a single member Mental Health Tribunal, it would be difficult for the legal member, however independent minded they were, to maintain their independence as they would rely on the detaining authority's medical evidence and risk assessment.

Value of both lay and medical members and quality of decisions

The conduct and decision-making of the Tribunal also benefits greatly from the lay member. They bring their own broader knowledge of mental health care which can help the panel understand the patient's concerns and the options for their care that can be considered. Without the non-legal members, the Tribunal would lose valuable expertise. We understand that judges value non-legal input and some may not feel competent to make decisions without it. They may make decisions in a risk averse way (as regards public protection) thus risking unnecessary detention.

In a joint pilot project by the Administrative Justice and Tribunals Council and Care Quality Commission, which explored the experiences of users of the First-tier Tribunal (Mental Health), the authors reflect some of the positive overall experiences even of people who were not discharged: "Some commented on the importance of being heard, which shows that the tribunal is an important safeguard for patients, not only as a means of challenging their detention, but also in finding out about and measuring their progress and in checking whether care plans are appropriate and meeting their needs." (Patients experiences of the First-tier Tribunal (Mental Health), Administrative Justice and Tribunals Council and Care Quality Commission, 2011.) This important function would also be put at risk by the loss of non-legal specialists.

Medical and lay members can robustly scrutinise and challenge the RC and the care plan. This improves decision-making and outcomes when the patient isn't discharged, and goes towards satisfying the patient that appropriate and rigorous scrutiny has been given to decisions relating to their liberty.

Reforms need to be informed by direct engagement with tribunal users

This project reported that that there was an 18 per cent satisfaction rate among Mental Health Tribunal users in 2006. As a consequence of this and the joint pilot there has been a lot of work done to improve tribunals, for example through training, recruitment and administration. The learning from the joint pilot underlines the importance and value of direct engagement with tribunal users, and the authors state: "We hope that this joint project will be the first step in involving the people who use the service in improving the operation of the First-tier Tribunal (Mental Health)."

We see the proposal for single member panels as regressive and would want changes to the justice system to be informed by the experiences of those who use and operate it.

Cost savings need to be considered across the whole system and in relation to adverse consequences

R(Osborn) v Parole Board shows that, in the context of parole, the costs involved in better decision-making are not so great when considered against the consequences of poorer decisions: "The easy assumption that it is cheaper to decide matters without having to spend time listening to what the persons affected may have to say begs a number of questions. In the context of parole, where the costs of an inaccurate risk assessment may be high (whether the consequence is the continued imprisonment of a prisoner who could safely have been released, or re-offending in the community by a prisoner who could not), procedures which involve an immediate cost but contribute to better decision-making are in reality less costly than they appear." (para 72) The same principle can apply to the First-tier Tribunal (Mental Health) where the right to liberty, and sometimes public safety, are at stake.

Procedural fairness

It is unclear how decisions would be made as to who should have a full panel. Any decision would depend on good written evidence, but papers are often not available ahead of the hearing. The need for strong written evidence would disadvantage patients who are unable to submit representations for whatever reason. Furthermore a person's mental state can change within short period of time. The focus for the tribunal system should be on testing relevant information and reaching sound decisions. There is a possibility that making a decision about whether a person needs a full panel will screen cases based on a patient's prospect for success.

Impact of changes to judiciary

We are concerned that as a result of proposed changes to the judiciary, there would be a less experienced and less diverse pool of panel members. Given the specialist knowledge required for First-tier Tribunals (Mental Health) and the diverse population of detained patients – which includes an over-representation of some black and minority ethnic groups – this is very worrying. The role of non-legal members is even more important in this context. Legal members tend to be white; the non-legal members can bring diversity from other ethnic groups and lay members often have lived experience of mental health problems.

Social security and child support tribunal

Our remit means that we are particularly concerned about First-tier tribunals hearing appeals about Employment Support Allowance (ESA) and Personal Independence Payment (PIP).

Often the reason an ESA or PIP claim has been appealed is because of the lack of mental health expertise in the original assessment process (with assessments often undertaken by physiotherapists, and other healthcare professionals without much

experience of mental health). The appeals are often the only part of the process that involve people with appropriate expertise to be part of the decision-making process.

Fifty-nine per cent of ESA decisions which go to appeal are overturned. We are often contacted by people with experience of mental health problems who have, on appealing the result of their Work Capability Assessment, received a dramatically different outcome. This frequently includes people who have had their outcome changed from 'Fit for Work' to 'Limited Capability for Work and Work Related Activity'. This has a significant impact on their entitlement to financial support and the conditions imposed on them. Therefore the current process is correcting some poor DWP decision-making.

Having someone with experience of working with disabled people on an appeal panel often means people are questioned more sensitively, and in a way which elicits more useful information when compared to the original assessment process.

Question 8: In order to assist the SPT to make sure that appropriate expertise is provided following the proposed reform, which factors do you think should be considered to determine whether multiple specialists are needed to hear individual cases?

We do not agree that the panel composition in First-tier Tribunal (Mental Health) or tribunals hearing benefits appeals should be decided on a case by case basis, we consider for all the reasons above that they should have full panels.

Factors which indicate the need for full panels include:

- Expertise that is integral to the decision being made
- Expertise that would elicit and evaluate facts in what is an inquisitorial (not adversarial) process – this includes assisting the person to participate and understanding their point of view
- Deprivation of liberty
- Human rights impacts, specifically fair hearing and deprivation of liberty.

These factors apply sufficiently across the board for mental health and social security hearings that we think they should not be single member panels and would therefore not need a case by case decision-making process.

Impacts and equalities impacts

Question 9: Do you agree that we have correctly identified the range of impacts, as set out in the accompanying Impact Assessments, resulting from these proposals?

There are additional impacts in the potential breaches of CRPD and HRA (outlined above) and the negative impact on tribunal users of less diverse panels. The assessment acknowledges that panels will be less diverse as a result of the proposed change; this should be considered as an impact on tribunal service users not just non-legal members of panels.

Neither option provides detailed information and the focus is on monetary savings. These do not appear to have been fully considered, as they will vary between types of hearing and setting.

There is no account taken of the potential increase in appeals given the less robust initial consideration.

R(Osborn) v Parole Board (see above) warns of the potential adverse consequences of measures to make savings.

Question 10: What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform?

We do not agree that there will be no indirect discrimination against tribunal users. Para 3.3 of the Equalities statement says that the SPT will continue to be responsible for ensuring that tribunals are accessible and handled fairly. However, the statement also anticipates a reduction in disability qualified panel members who are currently involved in disability related social security hearings. This would have a direct impact on the quality of decision-making and hence standard of justice for the tribunal users affected.

Also, we consider that tribunal users will be affected by a reduction in the diversity of panels, which goes against the direction of equality and diversity reforms within the judiciary.

In particular, Black and minority ethnic groups are over-represented in the detained population – in official statistics for 2014-15, the Black or Black British ethnic group had the highest rate of detentions, at 56.9 per 100 people who spent time in hospital. This compares with 40.1 detentions per 100 people overall and 37.5 detentions per 100 people who identified as being in the White ethnic group. (Mental Health Bulletin, HSCIC, 2015).

Disabled people will also be disproportionately impacted, including people with mental health problems who will often have multiple issues such as housing and employment, and will therefore be more likely to need to use the court system, not only in cases where their condition is at the heart of the decision being made.

Question 11: Do you agree that we have correctly identified the range of equalities impacts, as set out in the accompanying Equalities Impact Assessments, resulting from these proposals?

No, we think there needs to be more detailed consideration that takes into account the impact on the standard of justice if the tribunal composition order is amended in the way that is proposed.