Changes to the Mental Health Review Tribunal from November 2008

1. This paper outlines the major changes to the Mental Health Review Tribunal (MHRT) in England from 3 November 2008. The paper is aimed at current users of the MHRT, including patients and their nearest relatives, NHS bodies and independent hospitals, and their staff, and local social services authorities. The paper covers:

   (1) the evolution of the MHRT
   (2) new rules of procedure and practice directions
   (3) new appeals arrangements

(1) Evolution of the MHRT

The Tribunals, Courts and Enforcement Act 2007

2. The Tribunals, Courts and Enforcement Act 2007 (TCE Act 2007) received Royal Assent on 9 July 2007. The Act contains provisions for a new judicial and legal framework to complement the common administrative arrangements of the Tribunals Service. The Act allows for the creation of two new tribunals, the First-tier Tribunal and the Upper Tribunal, into which most existing tribunal jurisdictions will be transferred.

3. Each tribunal will consist of a judge and other members presided over by a Senior President of Tribunals. It is intended that the Upper Tribunal will primarily, but not exclusively, review and decide appeals, arising from the First-tier Tribunal. Both of the new tribunals are intended to be adaptable institutions, able to take on any existing or new tribunal jurisdictions.

4. The TCE Act 2007 provides for the establishment of “chambers” within the two tribunals so that jurisdictions can be transferred into the tribunals and grouped together appropriately; a Chamber President heading each chamber. It is intended that the current jurisdiction of the MHRT will sit within a Health Education and Social Care chamber (HESC) as of Monday 3 November 2008. Therefore, the MHRT England would, in itself, no longer exist from this date its functions subsumed by the new First-tier Tribunal.

5. This transition should have few implications for patients or for hospitals or local social services authorities. The Tribunals Service will continue to provide the secretariat, and hearings will remain largely as they are now.

(2) New rules and practice directions

The Tribunals Rules Advisory Group (TRAG)

6. TRAG was established in December 2005. The group comprised of various experts and practitioners in the field of Mental Health legislation and application under the chairmanship of Professor Jeremy Cooper. One of TRAG’s aims was to review the existing Mental Health Review Tribunal Rules 1983 in light of

relevant legislative, case law and Human Rights developments. To this end, TRAG met on 6 occasions between December 2005, and July 2006.

7. A summary of the findings and recommendations of TRAG for the revision and amendment of the Mental Health Review Tribunal Rules 1983 was produced in November 2006. In October 2007 TRAG again met to further discuss specific sections of the TRAG report and to identify any areas in their report that would need to be altered and added to in light of the Mental Health Act 2007.

8. Subsequent to TRAG's work it was decided that the proposed changes to the MHRT procedural rules should be included in work the Ministry of Justice and Tribunals Service was undertaking on generic rules of procedure for the chambers of the First-tier Tribunal.

HESC Rules

9. It is intended that the MHRT will sit within the HESC chamber of the First-tier Tribunal. Therefore, instead of operating under the existing MHRT Procedural Rules, it will operate under the procedures largely set out in the new HESC chamber Rules, which will be supplemented by accompanying Practice Directions.

10. The consultation on the Tribunal Procedure Committee's[1] consultation on rules for the HESC Chamber of the First–tier Tribunal is currently out to consultation. The intention is that the Rules will, in general, allow current procedures to be maintained. The consultation can be found at the following web address:

    www.tribunals.gov.uk/latestnews.htm

Reports to the Tribunal

11. As a result of the Mental Health Act 2007 the Tribunal will need to take decisions as to whether people should be discharged from supervised community treatment (which is to be introduced from 3 November 2008).

12. Draft Rule 16 of the HESC Rules (Cases in which the notice of appeal is to be sent to the Tribunal) requires responsible authorities (that is hospital managers or local social services authorities) and (where relevant) the Secretary of State to submit reports to the Tribunal, as they do now. It is intended that the detail of what is to be included in reports will be captured in a practice direction.

13. TRAG have proposed a draft practice direction based on requirements that they identified which can be found at Annex A.

14. As part of the consultation on Rules we would welcome your comments on this draft practice direction. Post consultation this practice direction will be submitted to the Chamber President for further consideration. We envisage that the Practice Direction will be shared with interested parties subsequent to the Chamber President's scrutiny.

[1] The TCE Act 2007 created a 'Tribunals Procedure Committee' to make and amend rules governing the practice and procedure in the First-tier Tribunal and Upper Tribunal.

Parties to mental health cases

15. Under the draft HESC Rules, the parties in mental health cases fall into the following categories:

- the patient;
- the person who has made the application or reference (if this is not the patient);
- the responsible authority. That is the managers of the hospital in which the patient is detained, the managers of an SCT's patients responsible hospital, or (for guardianship patients) the responsible local social services authority);
- (for restricted patients) the Secretary of State for Justice.

16. As a result, the following people will no longer automatically become parties to cases:

- the patient's nearest relative (unless they are the applicant);
- the NHS body which has been contracted for the care of an NHS patient detained in an independent hospital;
- the Court of Protection (in cases where there is an extant order of that Court in relation to the patient)
- other people who the Tribunal thinks should have an opportunity to be heard.

17. As part of the consultation on Rules we would welcome your views on the circumstances, and the extent to which, these and other people, should have the opportunity to engage in hearings.

(3) New appeals arrangements

Appealing against a tribunal's decision and the onward appeal process

18. There are currently a variety of judicial reviews (JRs) which are taken against the MHRT each year but no single mechanism for appealing against a tribunal's decision. Appeal rights differ from tribunal to tribunal. In some cases there is a right of appeal to another tribunal. In other cases there is a right of appeal to the High Court. In some cases there is no right of appeal at all.

Appealing against a tribunal's decision – the position under the TCE Act

19. The TCE Act provides for a unified appeal structure. Under it, in most cases, a decision of the First-tier Tribunal may be appealed to the Upper Tribunal. The rights to appeal may only be exercised with permission from the tribunal being appealed from or the Upper Tribunal. The Act also introduces a right to apply to the Tribunal to review its decision on appeal, and a decision of the Upper Tribunal may be appealed to a court. The grounds of appeal must relate to a point of law.

20. The Tribunals Procedure Committee has produced draft rules for the new provisions. The rules governing applications to the First-tier Tribunal, for review of decisions and for permission to appeal to the Upper Tribunal, are dealt with in the draft HESC Chamber rules. There are a separate set of draft procedural rules for the Upper Tribunal itself, which are also currently out for consultation. These can be found at the following web address:

    www.tribunals.gov.uk/latestnews.htm

21. The draft HESC Chamber Rules propose a single combined application for review and, or, appeal, rather than this being two separate applications. Under this procedure a party must make a single appeal, or review, application containing all representations about the decision. The First-tier Tribunal would then decide whether to review the decision, and would go ahead with the review if it thought it appropriate to do so. If the First-tier Tribunal made any change to the decision as a result of this review the time to apply for leave to appeal against the new decision would begin again. If the Tribunal did not review, or did not make any change on review, it would go on to consider whether to give leave to an appeal. If permission to appeal was refused by the First-tier Tribunal, parties would then be able to seek permission from the Upper Tribunal.

22. The Government believes the onward appeals process is likely to lead to a significant reduction in MHRT JRs because JR is the only current route available to appellants wishing to challenge decisions of the MHRT. It is expected there will be around fifty to sixty applications for permission for onward appeals per year under the new system, an increase of about a third on the current level of JR's for the MHRT.

23. Based on current behaviour in JR cases, it is estimated that only some of these will result in actual onward appeals, of which some will be dealt with orally rather than on the papers.

24. Section 12 of TCE Act 2007 set out the proceedings on appeal to the Upper Tribunal. In particular section 12 (2) sets out that the Upper Tribunal:

    (a) may (but need not) set aside the decision of the First-tier Tribunal, and
    (b) if it does, must either—
    (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
    (ii) re-make the decision.

25. The Upper Tribunal Judge would deal with these cases on points of law. The difference between JR and the onward appeal process being that a JR strikes out a decision, whereas, with an onward appeal process, the Upper Tribunal would deal finally with a case without any further delays and it could go nowhere else.

26. We foresee nominated members of the full-time judiciary sitting in the HESC Chamber and trained to make decisions about permissions for onward appeals, rather than the legal member who presided over the case taking the lead or the original panel reconvening. It is intended that the judge making the decision about permission to make an onward appeal should be able to refer to the original Chairman of the panel if required.

The responsible authority's role in the Upper Tribunal

27. Under the new system, if an onward appeal is made to the Upper Tribunal one of the parties to the case will become the "respondent". In the current JR process, the respondent to the claim can very often be the MHRT itself and so it has been the MHRT that has defended the action. This means that in the Upper tribunal:

- in non-restricted cases, if the patient (or nearest relative) appeals, **the responsible authority (that is the managers of the relevant hospital) will be the respondent;**
- in restricted cases, if the patient appeals, the Secretary of State for Justice will be the respondent;
- in any case, if the responsible authority or Secretary of State for Justice appeals, the patient will be the respondent.

28. Under this system responsible authorities have the same right to appeal against decisions of the First-tier Tribunal as the patient and any other parties to the case. It will therefore be for the responsible authority to decide whether to oppose the request for review, the request for permission to appeal, or the appeal itself (as the case may be) and, if so, on what grounds. This holds the advantage that the original decision-maker can play a part in the onward appeals process, because most cases will not be sent back to the First-tier Tribunal by the Upper Tribunal for further consideration.

29. In practicality, this may mean that the responsible authority will need legal advice. **Responsible Authorities will need to consider how they will represent or be represented if they become the respondent at the Upper Tribunal.**

30. As part of this consultation on Rules we would be interested in your views as to what guidance and support might be welcomed to ensure the efficient running of the proposed onward appeals process. Additionally, how might this be provided for in practice?

31. We would welcome your comments on all aspects on this paper and more widely the consultation on rules for The Health, Education and Social Care Chamber of the First–tier Tribunal and rules for the Administrative Appeals Chamber of the Upper Tribunal.

32. We would also be grateful for views on whether Rules or Practice Directions could helpfully deal with any other issues not included in the draft Rules and Practice Direction.

The consultation closes on Friday 11 July. Responses to the consultation should be sent to Michaela Strange at:

Tribunals Service
Fifth Floor
102 Petty France
London
SW1H 9AJ

Annex A

Medical reports
Draft Practice Direction on Reports for Mental Health Proceedings Statements by the Responsible Authority and the Secretary of State

Providing Statements

(1) Unless the patient is a conditionally discharged patient, the responsible authority shall provide the tribunal (and, in restricted cases, the Secretary of State) with a statement concerning the patient.

(2) This statement shall be provided to the tribunal as soon as practicable, and in all cases within 3 weeks of the responsible authority receiving notice of the application.

(3) This statement shall contain:

(a) the information required about the patient;
(b) the documents required concerning the patient;
(c) the clinician's report;
(d) the social circumstances reports;
(e) if the patient is an in-patient, the nursing report;
(f) if the patient is subject to supervised community treatment, the information set out below required in relation to that category of patient.

(4) In <u>restricted cases</u>, the Secretary of State shall provide the tribunal with the report within 3 weeks of receiving this statement.

(5) Where the patient is a conditionally discharged patient, the Secretary of State shall provide the tribunal with the statement required by paragraph (3) and the report required by paragraph (4), and shall do so within 3 weeks of receiving notice of the application.

(6) For the purposes of this rule, a patient is an in-patient if he is receiving in-patient treatment for mental disorder, even if it is being given informally or under an application, order or direction other than that to which the tribunal application or reference relates.

Information about the patient

(1) The statement provided to the tribunal shall include the following information:

(a) the patient's full name (and any alternative names used in his patient records).
(b) the patient's date of birth, age and usual place of residence;
(c) the patient's first language and, if it is not English, whether an interpreter is required;
(d) the application, order or direction made under the Act to which the tribunal proceedings relate, the date on which it commenced, and (where relevant in restricted cases) the dates on which the patient was conditionally discharged and recalled to hospital. In SCT cases where the patient's community treatment order has been revoked, this would include the date of the revocation;

(e) the hospital or hospital unit at which the patient is presently liable to be detained under the Act, and the ward or unit on which he is presently detained;
(f) if a condition or requirement has been imposed that requires the patient to reside at a particular place, details of the condition or requirement and the address at which he is required to reside;
(g) details of any transfers under section 19 or section 123 of the Act since the application, order or direction was made. This should include where appropriate, information about assignments of responsibility for SCT from one hospital to another under section 19A;
(h) where the patient is liable to be detained in an independent hospital, details of any NHS body that funds the placement;
(i) the name and address of the local social services authority and NHS body that are responsible for providing the patient with after-care under section 117, or will be when he leaves hospital;
(j) either the name of the patient's responsible clinician (detention and guardianship cases & SCT) and the length of time the patient has been under their care; or the medical practitioner who is responsible for his treatment and supervision (conditional discharge cases);
(k) the name of any care co-ordinator appointed for the patient;
(l) except in restricted cases, the name and address of the patient's nearest relative or of the person exercising that function, and whether the patient has requested that this person is not consulted or kept informed about their care or treatment;
(m) the name and address of any person who plays a substantial part in the care of the patient but who is not professionally concerned with it;
(n) details of any proceedings in the Court of Protection and of any deputy appointed for the patient, together with any relevant information under the Mental Capacity Act;
(o) details of any existing lasting power of attorney made by the patient that confers authority to make decisions about his personal welfare, and the donee(s) appointed by him;
(p) details of any existing enduring or lasting power of attorney made by the patient that confers authority to make decisions about his property and affairs, and the donee(s) appointed by him;
(q) details of any existing advance decisions to refuse treatment made by the patient, where known to the hospital;
(r) details of any other existing applications, orders or directions made under the Act to which the patient is presently subject, and the dates on which they commenced, including (where relevant in restricted cases) the date on which the patient was conditionally discharged;
(s) in cases where a patient has been transferred to hospital under section 47 or 48 of the Act, details of the order, direction or authority under which he was being held in custody before his transfer to hospital.

Documents Concerning the Patient

(1) The statement provided to the tribunal shall include copies of the following documents:

(a) All records made under the Mental Health Act 1983 that relate to the application, order or direction that is being reviewed by the tribunal, including:
(i) the application, order or direction that constitutes the original authority for the patient's detention, guardianship or supervision under the Act,

together with all supporting recommendations, reports and records made in relation to it under the 1983 Regulations (as amended);the patient's consent documents.

[The intention here is to set out the documents required by the process of administration. In particular, the consent document referred to sets out the history of the patient's section].

(ii) every document prescribed by the 1983 Regulations (as amended) that has been completed since the application, order or direction was made, including renewal reports, transfers, certificates authorising treatment, reports reclassifying the form of mental disorder, [and modifications of the after-care services provided] and details of managers' hearings.

[These documents are intended to capture the documents that relate to the renewal of a section]

(iii) a copy of every tribunal decision, and the reasons given, since the application, order or direction being reviewed was made or accepted, where such information is in the hospital's possession.

(b) Where the patient is liable to be detained for treatment under section 3 of the Act, the statement shall also include a copy of any section 2 application that was in force immediately prior to the making of the section 3 application.

Clinician's Report

The statement provided to the tribunal shall include an up-to-date medical report prepared for the tribunal.

(1) Unless it is not reasonably practicable, the report shall be written or counter-signed by one of the following persons:

(a) the patient's responsible clinician;
(b) their appropriate medical officer;
(c) their community responsible clinician;

(2) This report shall include:

(a) full details of the patient's mental state, behaviour and treatment;
(b) the relevant medical history;
(c) a statement as to whether the patient has ever neglected or harmed himself, or has ever harmed other persons or threatened them with harm, at a time when he was mentally disordered, together with details of any neglect, harm or threats of harm;
(d) an assessment of the extent to which the patient or other persons would be likely to be at risk if the patient is discharged by the tribunal, and how any such risks could best be managed;
(e) an assessment of the patient's strengths and any other positive factors that the tribunal should be aware of in coming to a balanced view on whether he should be discharged;
(f) If appropriate, the reasons why the patient might be treated in the community without continued detention in hospital, but needs to remain subject to recall on SCT;

(g) Details of any specific conditions concerning where the patient shall reside, whether or where they must make themselves available for examination, whether they will continue to receive medical treatment and if so where they must make themselves available for such treatment, and whether they must agree to refrain from any particular conduct;

Social Circumstances Reports

(1) The statement provided to the tribunal shall include an up-to-date social circumstances report prepared for the tribunal.

(2) This report shall include the following information:

(a) the patient's home and family circumstances;
(b) A consideration of the views of the patient's nearest relative, or the person so acting. The patient's wishes must always be ascertained prior to a consideration of whether the nearest relative needs to be consulted;
(c) the views of any person who plays a substantial part in the care of the patient but is not professionally concerned with it;
(d) the views of the patient, including his concerns, hopes and beliefs in relation to the tribunal;
(e) the continuing opportunities for employment, or for occupation and the housing facilities available to the patient;
(f) the effectiveness of the community support that is currently available to the patient and would continue to be available to the patient is discharged from hospital;
(g) the patient's financial circumstances (including his entitlement to benefits);
(h) an assessment of the patient's strengths and any other positive factors that the tribunal should be aware of in coming to a balanced view on whether he should be discharged;
(i) a risk assessment.

In-patient Nursing Report

(1) This report shall include full details of:

(a) the patient's compliance with treatment;
(b) the level of observation to which the patient is subject;
(c) any occasions on which the patient has been secluded or restrained, including the reasons why seclusion or restraint was considered to be necessary;
(d) any occasions on which the patient has been absent without leave (including occasions when he failed to return when required after being granted leave of absence);
(e) any incidents where the patient has harmed himself or others, or has threatened other persons with violence;

(2) A copy of the patient's current nursing plan shall be appended to the report.

The Secretary of State's Report

(1) In restricted cases, the Secretary of State's report shall be up-to-date and include:

To Presidents and Legal representatives only

(a) copies of any periodic reports received by the Secretary of State under section 41(6) of the Act and of any periodic reports received by him during periods when the patient was a conditionally discharged patient;

(b) full details of the history of the patient's liability to detention under the Act since the restrictions were imposed, including details of any leave of absence, transfers between hospital, decisions to conditionally discharge the patient and recalls to hospital;

To all Parties and Panel

(c) full details of the offence or alleged offence that resulted in the patient being detained in hospital subject to a restriction order or, in the case of patients subject to a restriction or limitation direction, that resulted in him being remanded in custody, kept in custody or sentenced to imprisonment;
(d) a record of any other criminal convictions or findings recorded against the patient;
(e) the name and address of any medical practitioner responsible for the care and supervision of the patient in the community and the period which the patient has spent under the care of that practitioner;
(f) the name and address of any social worker, probation officer or other person responsible for the care and supervision of the patient in the community and the period which the patient has spent under the care of that person.

Medical Reports for Patients Receiving Supervised Community Treatment (SCT)

The statement provided to the tribunal under this category shall include an up-to-date medical report prepared for the tribunal.

(1) Unless it is not reasonably practicable, the report shall be written or counter-signed by one of the following persons:

(a) the patient's responsible clinician;
(b) their appropriate medical officer;
(c) their community responsible clinician.

(2) This report shall include:

(a) full details of the patient's mental state, behaviour and treatment;
(b) the relevant medical history;
(c) a statement as to whether the patient has ever neglected or harmed himself, or has ever harmed other persons or threatened them with harm, at a time when he was mentally disordered, together with details of any neglect, harm or threats of harm;

(d) an assessment of the extent to which the patient or other persons would be likely to be at risk if the patient is discharged by the tribunal, and how any such risks could best be managed;
(e) an assessment of the patient's strengths and any other positive factors that the tribunal should be aware of in coming to a balanced view on whether he should be discharged;
(f) The reasons why the patient can be treated in the community without continued detention in hospital, but needs to remain subject to recall on SCT;
(g) Details of any specific conditions concerning where the patient shall reside, whether or where they must make themselves available for examination, whether they will continue to receive medical treatment and if so where they must make themselves available for such treatment, and whether they must agree to refrain from any particular conduct;
(h) Where appropriate, the reasons for any conditions attached to the community treatment order other than those required for the order's renewal and the furnishing of a consent to treatment certificate.

Social Circumstances Report for Patients Receiving Supervised Community Treatment (SCT)

(1) The statement provided to the tribunal under this category shall include an up-to-date social circumstances report prepared for the tribunal.

(2) This report shall include the following information:

(a) the patient's home and family circumstances;
(b) A consideration of the views of the patient's nearest relative, or the person so acting. The patient's wishes must always be ascertained prior to a consideration of whether the nearest relative needs to be consulted;
(c) the views of any person who plays a substantial part in the care of the patient but is not professionally concerned with it;
(d) the views of the patient, including his concerns, hopes and beliefs in relation to the tribunal;
(e) the continuing opportunities for employment, or for occupation and the housing facilities available to the patient;
(f) the effectiveness of the community support that is available to the patient and would continue to be available to the patient if discharged from SCT;
(g) the patient's financial circumstances (including his entitlement to benefits);
(h) an assessment of the patient's strengths and any other positive factors that the tribunal should be aware of in coming to a balanced view on whether he should be discharged;
(i) the patient's progress in the community whilst subject to SCT including details of his compliance with treatment, care and any conditions or requirements to which he is subject under the community treatment order, and details of any behaviour that has put him or others at risk of harm;
(j) A risk assessment.