Amendment to Rule 58 of the Mental Health Tribunal for Scotland (Practice and Procedure) (No.2) Rules 2005

RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Howard League for Penal Reform in Scotland

Title **Mr** x **Ms** ☐ **Mrs** ☐ **Miss** ☐ **Dr** ☐ ***Please tick as appropriate***

Surname

Murray

Forename

Craig

2. Postal Address

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3. Permissions - I am responding as…

Individual ☐ / **Group/Organisation** x

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate ☐ **Yes** ☐ **No**

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available ☐

or

Yes, make my response available, but not my name and address ☐

or

Yes, make my response and name available, but not my address ☐

(c) The name and address of your organisation ***will be*** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your ***response*** to be made available?

Please tick as appropriate **X Yes** ☐ **No**

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate **X Yes** ☐ **No**

Date 3/5/11

CONSULTATION QUESTIONS

Question 1
Which of the following 4 options do you prefer? Please tick relevant box below.

Option 1: the Tribunal is given a power to deal with cases without a hearing on its own initiative, by writing out to the parties, stating that it has identified a particular case as being appropriate to be dealt with under rule 58 and that it intends to deal with the case under rule 58:

- any party (including the patient) may request an oral hearing on cause shown.

Option 2: the Tribunal is given a power to deal with cases without a hearing on its own initiative, by writing out to the parties, stating that it has identified a particular case as being appropriate to be dealt with under rule 58 and that it intends to deal with the case under rule 58:

- patient has an automatic right to an oral hearing that they can trigger if they wish a full oral hearing:
    - patient notifies the Tribunal that they want an oral hearing,
    - if patient does nothing, assumption that the patient is content for the Tribunal proceeds with a hearing under rule 58;
- the other parties may also still request an oral hearing on cause shown.

Option 3: the Tribunal is given the power to deal with cases without an oral hearing on its own initiative, by writing out to the parties, stating that it has identified a particular case as being appropriate to be dealt with by a hearing under rule 58 and that it intends to deal with the case under rule 58:

- if patient does not respond to the Tribunal (i.e. patient does nothing) then the Tribunal cannot proceed under rule 58 and an oral hearing must take place;
- if patient responds to the Tribunal agreeing that the Tribunal may proceed with a hearing under rule 58, then the Tribunal can do so (provided that no other party has requested an oral hearing);
- the other parties may also request an oral hearing on cause shown.

Option 4: rule 58 is left as it is.

Option 1 ☐	**Option 2** ☐	**Option 3** ☐	**Option 4 X**

Question 2
Do you have anything to add in support of your chosen option?

Comments

The Millan Report recommended that the principle of participation be central to decisions concerning those suffering from mental ill-health. That recommendation appears in section 1(3)(c) of the 2003 Act in requiring all those discharging a function under the Act to have regard to the participation of the patient as fully as possible in the discharge of that function. Secondary legislation seeking to reduce that participation must be compatible with section 1(3)(c). In addition, the daily practice of the Tribunal is to involve the patient as much as possible in proceedings. If, for example, a patient leaves a hearing unexpectedly, the Tribunal will usually take steps to enquire as to whether the hearing should continue or if an opportunity should be given to the patient to express further views (Auchie, D.P., & Carmichael, A., *The Scottish Mental Health Tribunal: Practice and Procedure*, 2010 Dundee University Press, para 4.87).

Option 1 allows the Tribunal to decide a case without a hearing where it decides it is an appropriate case and where any party wishing a hearing fails to meet the test of "cause shown". As patients do not routinely submit evidence or submissions in writing, it would seem that the decision of the Tribunal may in the first instance be made on the basis of submissions by the Mental Health Officer and reports of the Responsible Medical Officer. The test of "cause shown" is usually considered to be a relatively low threshold, but the application of that test to representations from the patient may lead to injustice in the individual case, particularly as the patient may be acutely unwell or draft the representation without advice or assistance. A decision of the Tribunal can have long-term consequences for a patient and there are limited rights of appeal for a patient who has not had an opportunity to fully present his or her case at first instance. It may be a considerable time before a patient is able to bring about a formal review of his or her compulsory treatment. It is the view of the HLS that the operation of Option 1 does not strike an appropriate balance between the fairness and expedition required by the overriding objective of the 2005 Rules.

Option 2 provides for a greater degree of participation by the patient, but it has to be recognised that many patients will lack the organisational skills to notify the Tribunal that they wish to have an oral hearing. Patients often derive benefit from seeing the process of decision-making in their case and hearing the reasons for their compulsory treatment. It is not always possible to determine in advance what benefit a patient will gain from attending at a hearing. It is the view of the HLS that Option 2 does not sufficiently recognise the particular difficulties patients experience in corresponding whilst suffering from mental ill-health.

Option 3 strikes a fairer balance between the patient's own circumstances and the purpose of amending Rule 58. It seems unlikely that any particular saving in time would result from the proposed procedure under Option 3.

The HLS would support amendment of Rule 58 to Option 3 as an appropriate measure to increase the expedition with which cases can be decided and allow for hearings to be avoided if patients so wish.

HLS prefer Option 4 as all relevant persons have an interest in hearings taking place; they form a central part of the scheme of the 2003 Act and Option 4 acknowledges the importance of decisions made by the Tribunal. The reasons advanced in the consultation for Rule 58 not operating effectively do not support the case for amendment of the rule. If agreement (that a hearing is not necessary) is not obtained from relevant persons in a small number of applicable cases, it is disproportionate to remove the central requirement that a hearing takes place. A failure to obtain agreement may be the result of lack of resources, rather than a failure in the operation of the present rule.

Question 3

Are there any other changes to the Tribunal Rules more generally that you would like to raise at this stage for us to consider for any subsequent larger scale changes?

Comments

The current rules on cross-border transfers of patients to the State Hospital in Scotland limit the practical steps a patient may take to challenge their detention in a high security facility. In particular, the decision to move a patient from a medium or low security hospital to a high security hospital can be made in another jurisdiction (England and Wales or Northern Ireland) by the Secretary of State (or Northern Ireland Department of Health, Social Services and Public Safety). On arrival in Scotland, the patient will become subject to a Scottish order equivalent to the order extant in the other jurisdiction. The decision to transfer the patient is made outside Scotland and the patient is unlikely to have access to appropriate legal advice and representation to challenge that decision by judicial review (itself a time-consuming and expensive remedy). The only remedy available to the patient in Scotland is to apply to the Tribunal under section 264 of the 2003 Act on the basis that he is held in conditions of excessive security (S v. Mental Health Tribunal for Scotland 2010 SLT 991). The test for such applications to be granted is a high one.

When removed to Scotland, the patient may be taken away from family members and friends. That is likely to affect the patient's treatment and deprives him of support. HLS are aware of at least one case in which a patient was transferred to Scotland from Northern Ireland because of a lack of high security hospital facilities there. There is a danger of a dehumanising effect on patients when such transfers take place against the wishes of the patient.

The HLS respectfully submit that there is a lacuna in the law, whereby a patient is unable to effectively challenge his removal to Scotland and detention in a high security hospital. A specific right of appeal to the

Tribunal should be introduced so that such patients can seek prompt return to their 'home' institution without having to overcome the high test of proving detention in conditions of excess security. The lack of participation of the patient in such circumstances is inconsistent with the Millan principles.

Aims of the Howard League for Penal Reform in Scotland

The League maintains an interest in reforms, not only in the penal system itself but in the wider criminal justice system in Scotland. It is particularly interested in:

- rehabilitation of offenders and the effectiveness of interventions
- improving prison regimes
- relationships between drug and alcohol abuse and crime
- treatment of young people in the criminal justice system
- early intervention and prevention
- reducing the unnecessary use of imprisonment
- links between poverty and crime.

The Howard League Scotland believes that it is time for criminal justice policy and systems to take a different direction, a direction with much more reliance on effective community approaches to reducing crime and dealing with criminality. A direction with much greater chance of success in reducing crime. A direction that has already been successfully taken by many of our Northern European colleagues.