

Transforming Our Justice System: Panel Composition in Tribunals

Context of submission

Rethink Mental Illness is a charity that believes a better life is possible for people affected by mental illness. For more than 40 years we have brought people together to support each other. We run services and support groups that change people's lives and we challenge attitudes about mental illness.

Rethink Mental Illness also engages with patients in secure mental health services who are detained under the Mental Health Act. Our 'Recovery and Outcomes' programme aims to increase the recovery focus of secure services and to support patients work towards more clearly defined outcomes. Alongside NHS England, we work towards improvements in care pathways and to achieve this, support the sharing of best practice across the country.

We are therefore uniquely well placed to comment on behalf of not only the thousands of people detained under the Mental Health Act each year, but also the 7,000 people currently placed in secure services, all of whom are detained under the Mental Health Act and could potentially engage with the Mental Health Tribunal system.

Overview

Under the current system, panels in First-Tier Mental Health Tribunals are made up three members in all cases: a judge, a medical expert and a lay member. The medical expert and lay members are known as non-legal members (NLMs).

The *Transforming Our Justice System: Panel Composition in Tribunals* consultation proposes to amend panel composition for a range of different tribunals. Specifically, it would remove the automatic requirement for NLMs to be present on First-Tier Mental Health Tribunal panels.

This would mean that unless the Senior President of Tribunals (STP) directed otherwise, a judge would sit alone in all First-Tier Mental Health Tribunals, without additional medical or lay expertise. We believe that the proposed reforms will significantly reduce the capacity of First-Tier Mental Health Tribunals to arrive at decisions that are just and fair.

We have also consulted with a range of medical and legal experts, as well as patients who have been involved in First-Tier Mental Health Tribunals. It is clear that our view is widely shared and that many affected stakeholders were not aware of the severity of what is being proposed.

Given the importance of the cases that First-Tier Mental Health Tribunals consider, it is imperative that NLM expertise on panels is retained in its current form in all cases. The proposals in this consultation should therefore not be applied to First-Tier Mental Health Tribunals and the current system should be maintained.

This consultation response sets out why we believe:

- First-Tier Mental Health Tribunals are unique in comparison to the other forms other tribunal that could be affected by the proposals to reform panel membership.
- NLM participation on First-Tier Mental Health Tribunal panels must be continued to ensure that the principles and responsibilities that underpin specialist tribunals are maintained.

- Panel evidence allows for greater scrutiny and understanding of cases before First-Tier Mental Health Tribunals than written evidence alone.
- Judicial expertise, as well as patient and public confidence in the justice system, is reinforced by a permanent NLM presence on First-Tier Mental Health Tribunal panels.
- Adjournments and appeals, alongside associated costs, are likely to increase if the consultation proposals are applied to First-Tier Mental Health Tribunals.

The unique case of First-Tier Mental Health Tribunals

We believe that the nature of the issues considered by First-Tier Mental Health Tribunals and the repercussions of their decisions mean that they should be considered separately from other tribunal settings. Without continued NLM presence on First-Tier Mental Health Tribunal panels, the principles of the legislation that created them and of the consultation as a whole are undermined.

- First-Tier Mental Health Tribunals are of unique judicial importance because they consider the continual denial of an individual's liberty. This makes the appropriate panel composition and detailed exploration of each person's mental health condition a prerequisite to fully consider the various components of an individual's case.
- The current panel composition ensures that this detailed exploration takes place in all First-Tier Mental Health Tribunal cases, as it allows medical and broader considerations to inform decisions. This guarantee would be lost without continued NLM membership.
- Patients have infrequent opportunities to have their case heard at a Mental Health Tribunal, in some cases only once every two years.
- We believe that if the consultation's proposals are applied to First-Tier Mental Health Tribunals and NLM expertise is not present on panels in every case, there is a danger that some individuals will be inappropriately detained for longer than is absolutely necessary.
- This makes the impact of the removal of NLMs from First-Tier Mental Health Tribunals more severe than in the other tribunal settings affected by the consultation's proposals.
- The consultation notes that *'our system will continue to need and provide for the input of non-legal members with a wide range of skills to provide that necessary expertise where needed'*. We believe this additional expertise is always required in every case before a First-Tier Mental Health Tribunal and that it can only be provided through NLM panel membership.
- If NLMs are not available in every case, informed and robust decisions on whether a person's mental health condition justifies their continued detention cannot be guaranteed.
- First-Tier Mental Health Tribunals are often the first chance for an individual to contest their detention and were an essential safeguard included in the Mental Health Act when the legislation was passed.
- Given that the Mental Health Act placed judicial powers in the hands of medical professionals, it is vital that their contribution is considered by NLM panel members. Without this detailed scrutiny, we do not believe that the credibility of the appeals process, or the checks and balances in the Mental Health Act, can be appropriately maintained.
- The impact assessment accompanying the consultation makes no reference to Mental Health Tribunals. Nor does the Equalities Statement reference potential indirect discrimination against individuals involved in Mental Health Tribunals as a result NLM panel membership being removed.
- This gives the concerning impression that the unique characteristics and importance of Mental Health Tribunals were not included in the considerations that informed the consultations proposals.

The principles and responsibilities of specialist tribunals

First-Tier Mental Health Tribunals in their current form, including the permanent presence of NLMs on panels, embody the principles that led to specialist tribunals being introduced and ensure that current legal responsibilities are met. We therefore believe that First-Tier Mental Health Tribunals should be maintained as they stand.

- Alongside simplifying and expediting access to justice, specialist tribunals have also historically allowed for greater expertise to be considered when decisions on complex issues are made.
- First-Tier Mental Health Tribunals are the exemplar of this principle being applied and the continued availability of independent medical expertise and lay perspectives provided in all cases by NLMs is vital for it to be continued.
- The Legal responsibilities on the Senior President of Tribunals, defined in the consultation as maintaining *‘access to justice, to ensure that proceedings are fair and proportionate, and to provide the necessary expertise’*.
- These legal responsibilities can only be achieved by having NLMs present on all First-Tier Mental Health Tribunals panels. Without this, individuals before tribunals cannot be deemed to have had their continued detention considered in a fair or proportionate manner, or with the necessary expertise present.

Written Submissions Vs Panel Evidence

If the requirement for NLMs on panels in all First-Tier Mental Health Tribunals is removed, only written medical evidence prepared in advance could be considered when a hearing takes place. Written evidence is not currently submitted by lay members of the panel, who provide a valuable perspective for the Tribunal hearing. As well as bringing a non-medical and non-judicial viewpoint, people who have undergone the Tribunal process have told us that it is reassuring to have a lay member of the panel present at the hearing. This expertise would not be considered at all when hearings take place if NLMs were to be removed. We therefore believe that the loss of NLMs from panels would result in an irreplaceable lack of scrutiny and undermine the integrity of First-Tier Mental Health Tribunals.

- Given the fluctuating nature of many of the conditions that patients detained under the Mental Health Act have, the written medical submissions may have been based on a period when a patient was particularly struggling with their condition. This would deny individuals the opportunity for a contemporary assessment of their condition to be considered at their hearing.
- Medical NLMs on panels allow for the fluctuating nature of any condition and improvements in a patient’s condition to be heard and considered appropriately by a First-Tier Mental Health Tribunal. Their presence also allows for the full content of written submissions themselves to be properly explored.
- Removal of the presence of NLMs from First-Tier Mental Health Tribunals means that this important level of scrutiny, and the associated ability to properly justify the verdicts they reach, would be denied under the consultation’s proposals.
- Medical expert NLMs presenting the tribunals also provide an important opportunity for information that may have been omitted from the written report. Their removal from the process would mean that this additional safeguard is no longer in place. In a similar vein, a patient’s solicitor would no longer be able to question the medical expert on their evidence, or the evidence presented by other NLMs.

- The sum total of these considerations means that the level of scrutiny required to ensure access to justice for patients detained under the Mental Health Act will not be maintained under the measures outlined in the consultation.

Contributions to judicial expertise and confidence in verdicts

NLMs provide a valuable addition to the evidence presented to judges sitting in First-Tier Mental Health Tribunals. Their expertise is also an important component in the confidence in the verdicts reached by the Tribunal, both from the perspective of the person before the Tribunal and for the wider public trust in the judicial system. We believe that if NLMs are not present on panels in all cases, these important benefits will be irreplaceably lost.

- From the judge's perspective, removal of NLMs from Mental Health Tribunals means they no longer have the opportunity to get immediate medical and lay advice or steer on how a patient's condition would affect their ability to integrate into society.
- If the judge does not have all the information with them at a hearing, the opportunity for medical NLMs to help fill these gaps will no longer be present if their influence on proceedings and outcomes is reduced as the consultation proposes.
- Whilst judges sitting alone are likely to have some mental health training, or have practiced in mental health, this expertise will not replace the value provided by a medical expert with a more thorough understanding of the patient involved or the condition they have. Supplementary training for judge cannot replicate the expertise and experience provided by the presence of NLM members, as is suggested in the impact assessment.
- A patient's detention under the Mental Health Act is based primarily on their condition. Removing NLM expertise from panels risks decisions to continue an individual's detention being made without the fullest possible consideration of what should be the key determinant in that verdict. Potential restrictions on the ability of patients to access justice are unavoidable under the proposals contained in the consultation.
- A reduction to one member panels is also likely to reduce trust (both from the perspective of the patient and broader public confidence) in the Mental Health Tribunal system and the validity of the decisions that are reached because NLMs provide important reassurances to patients and reinforce judicial processes.

Adjournments and appeals

Although the consultation estimates that £21m overall could be saved from reducing NLM presence at the tribunals it covers, First-Tier Mental Health Tribunals cannot be categorised in the same manner. The high cost of detaining an individual in all mental health services and especially in high-cost secure services, coupled with the likely increase in appeals and adjournments if the consultation proposals are applied to First-Tier Mental Health Tribunals, means that we believe that any savings resulting from removing NLMs could be outweighed by an overall increase in costs.

- Due to the complex nature of mental health conditions, if NLM expertise is not present on the First-Tier Mental Health Tribunal panels, there is likely to be an increase in adjournments. This is because there are likely to be many cases where judges conclude that they have insufficient knowledge to come to an informed conclusion. This would delay access to justice and cause unnecessary anxiety for the patient involved.
- Removal of NLMs from First-Tier Tribunals is likely to lead to an increase in appeals to Upper-Tier tribunals, even though this countered in the impact assessment that does not refer to First-Tier Mental Health Tribunals specifically.

- This has the potential to add to the bureaucracy, the costs resulting from an additional appeal hearing, and the time it takes for final decisions to be reached. These outcomes would counter some of the central objectives of the changes proposed in the consultation.
- Practical realities may also contribute to an increase adjournments. Mental Health Tribunals are usually held within mental health units rather than in a court in a fixed location. This means that the pool of NLMs that may be attached to a particular fixed court, and can therefore be accessed by other forms of tribunals on an immediate basis, will not be as easily accessible for those held in mental health units. This is likely to lead an increase in adjournments and cause further distress for the patient concerned.
- Aside from the financial costs appeals and adjournments themselves, the delays will mean that patients spend additional time in mental health services in the interim period. For people in secure services, this would prove extremely expensive, with care in medium secure services costing almost £3,000 per week.
- Therefore we believe that the financial costs of keeping patients in mental health units after their case is avoidably adjourned, or between an initial hearing and an appeal, will far outweigh the costs of ensuring the NLMs are present on all panels in First-Tier Mental Health Tribunals.
- If the Government maintains that the number of appeals and adjournments will not rise, and that overall costs will not increase if the panel composition proposals are applied specifically First-Tier Mental Health Tribunals, we believe that detailed supporting evidence to support this view has to be put forward in its response to the consultation.