TRIBUNALS
JUDICIARY

JUDGE MARK HINCHLIFFE

DEPUTY CHAMBER PRESIDENT
FIRST TIER TRIBUNAL (HEALTH, EDUCATION AND SOCIAL CARE)
MENTAL HEALTH

IMPORTANT NOTICE

I am writing to advise you of some very important changes to our Procedure Rules and to our Practice Direction on the Contents of Reports, which come into effect after Easter 2012.

The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 will be amended as from 6th April 2012.

At the same time, a new Practice Direction from the Senior President of Tribunals will specify the contents of the statements and the reports that are to be sent or delivered to the tribunal in accordance with Rule 32. With effect from 6th April 2012, this new Practice Direction replaces the previous Practice Direction on mental health cases, dated 30th October 2008.

The changes to Rule 32 of the HESC rules, relating to mental health cases, make provision for the content of references to the tribunal (akin to the existing provisions for the content of applications), and amend the provisions requiring information to be provided to the tribunal.

The requirement to submit reports to the tribunal in relation to conditionally discharged patients is transferred from the Secretary of State directly to the Responsible Clinician and any named social supervisor, and the additional information to be supplied by the Secretary of State in such cases is specified. This will allow for effective enforcement.

The changes to Rule 35 of the HESC Rules will allow mental health cases to be struck out by a single judge without a hearing where the tribunal has no jurisdiction. The Upper Tribunal held in DP v Hywel DDA Health Board [2011] UKUT 381 (AAC) that neither an application nor, it appears, a referral by Hospital Managers can be made to the tribunal except in such cases and at such times as are expressly provided by the Mental Health Act 1983. There is no discretion to accept jurisdiction outside the parameters set by the Act.

It is hoped to provide more guidance on jurisdiction in the near future.

The changes also allow the tribunal to make a decision on a reference under section 68 of the Act (duty of managers of hospitals to refer cases to tribunal) without a hearing if the patient is a community patient aged 18 or over and either the patient has stated in writing that he or she does not wish to attend or be represented at a hearing (and the tribunal is satisfied that the patient has the capacity to make that decision) or the patient's legal representative has stated that the patient does not wish to attend or be represented at a hearing of the reference.

I understand that, in relation to these referrals, our administrative support centre in Leicester will be making arrangements to make it possible for community patients aged 18 or over, or legal representatives on their behalf, to complete and submit a form, postage free, stating whether or not the patient wishes to be attend or be represented at a hearing.

The tribunal will have to reach a view as to capacity based on all the evidence before it, but the new Practice Direction, in the section dealing with community patients, requires Responsible Clinicians to give an assessment of the community patient's capacity to decide whether or not to attend or be represented at a hearing of the reference.

We do not see that this should present a difficulty or a conflict of interest. The Responsible Clinician, as an expert witness, has no 'interest' one way or the other and, in any event, has a responsibility to assess capacity in many situations - such as consent to treatment, granting section 17 leave, and in cases where a patient refuses permission for a nearest relative to be contacted, or refuses blood tests or physical treatments. In fact, an assessment as to capacity has to be made whenever a Responsible Clinician decides whether to allow observers such as students at ward rounds etc. Consequently, if the Responsible Clinician's report in such cases does not cover this issue, a direction can be issued requiring that the matter be addressed, or other action can be taken under the Rules.

These changes flow from a lengthy consultation with the public and other stakeholders. The changes in relation to referrals for community patients do not prevent any community patient who wants a hearing of their reference from having one. This compares favourably with the Court of Protection or even the Parole Board where some hearings can take place on the papers even if the patient or prisoner wants a hearing. And this proportionate provision in our jurisdiction only applies to community patients, who are not deprived of their liberty.

Our experience has been that many community patients are content for the tribunal to review the evidence without the Responsible Clinician and other busy professionals having to take time out in order to attend an oral hearing, and community patients often do not want to attend or be represented at a referral hearing, are reluctant to go back to the hospital environment, and are not keen to be seen by the tribunal medical member.

We will still review all the evidence, of course, and we can still decide that there should be a hearing when appropriate, but co-operation from Responsible Clinicians and legal representatives will ensure that busy clinicians, doctors, nurses, social workers and legal representatives are not compelled to attend an oral hearing where there is no necessity, and no desire, to hold one.

So there is a new requirement on Responsible Clinicians to provide us with their expert view as to the community patient's capacity to decide whether or not to attend or be represented at a hearing of a reference, and there are changes consequent on the shift of responsibility to provide reports in relation to conditionally discharged patients. Apart from this, the new Practice Direction pretty much follows the booklet 'Reports for Mental Health Tribunals' which has already been widely distributed. The extra requirements for all patients under the age of 18 as set out in the booklet have, at last, been formally incorporated. We hope to put a link to the full text of the new Practice Direction on our website shortly.

The Tribunal Procedure (Amendment) Rules 2012 [2012 No. 500 (L. 1)] can be downloaded at: http://www.legislation.gov.uk/uksi/2012/500/pdfs/uksi_20120500_en.pdf

Mark Hinchliffe
Deputy Chamber President (HESC – Mental Health)
29 March 2012