

FACULTY OF ADVOCATES

**Response from the Faculty of Advocates**

**to**

**the Consultation on**

**MHTS Transfer – Onward Appeal Routes**

**Would you agree in principle with re-routing restricted patient appeals through the Upper Tribunal? If not, why not?**

There is an obvious administrative tidiness and consistency in rerouting Restricted Patient appeals via the Upper Tribunal (UT). It is correct to say that a Restricted Patient case which reaches the Court of Session requires to proceed on the basis set out in s.324 (2), and that this would not change were Appeals to emerge from the Upper Tribunal.

It is trite to say that Restricted Patient cases engage issues of high public sensitivity, as a result of release being based upon an evaluative Risk Assessment based on psychiatric assessment, as opposed to the exercise undertaken by the Parole Board for Scotland or the simple elapsing of time as occurs in the mainstream Prison Estate. This sensitivity appears to explain the current requirement for Restricted Patient cases being heard under the Convenorship of a member of the Shrievel Panel established for the MHTS (Mental Health (Care and Treatment (Scotland) Act 2003, Schedule 2, para.2).

It is not to decry the enhanced standing applying to the Mental Health Chamber of the First-tier Tribunal (FTT) to make replication of the Shrieval Panel requirement an essential part of the process at first instance. This addresses the need for a high order of scrutiny of cases which would address public safety concerns to some extent. If this condition is fulfilled, there is no objection in principle to a re- routing of Appeals along the lines envisaged. This also would remove an anomaly in the role of Sheriff Principal, which has changed significantly in the light of the Courts Reform (Scotland) Act 2014.

**What impact, if any, do you think this would have on access to justice for patients?**

By contrast to the comment regarding the anomalous position of the Sheriff Principal, one arguable advantage of Appeal from the FTT remaining there is that there may be less pressure to find space to hear an Appeal, and that it may accordingly be capable of being resolved more quickly. It is accepted, however, that incorporation of Appeals into the UT caseload may not add a particularly significant burden. What may be important is whether the UT would adopt a policy or practice of prioritising Restricted Patient Appeals once lodged.

The other apparent issue bearing on access to justice is the availability of legal aid to pursue an Appeal, wherever heard. The bulk of Restricted Patients may have little in the way of income or resources beyond state benefits, and it is essential that such patients are enabled to pursue properly-founded Appeals, if any positive impact on access to justice is to be achieved.

It is important that the use of Advocates or Solicitor Advocates is seen as an appropriate part – albeit not an essential prerequisite – of Restricted Patient Appeals coming before the UT. Some cases will demand a high level of skill and expertise given the possibly complex and sensitive nature of the key issues, and there is no obvious barrier to the Restricted Patients Division of the Scottish Government instructing Counsel or Solicitor Advocates as currently proposed. Placing a Restricted Patient into a situation where there is an inequality of arms for an Appeal is arguably more of a barrier to their accessing justice than the identity of who is suited to arguing their case.

**Do you think that re-routing appeals through the Upper Tribunal will ensure appeals are able to be considered at a high level and that any public protection issues can be appropriately addressed? If not, why not?**

This issue essentially was analysed in relation to the first issue. It seems that there is an established practice within the UT which ensures that a Senior Member would consider cases of the nature of Restricted Patient Appeals. It is submitted that this practice is best transposed into any subsequent legislation.

**What impact, if any, do you think this would have on providing equal opportunities for appeal for non-restricted and restricted patients?**

It is difficult to assess a possible impact on equality of opportunity to appeal, given the other practical issues which have been highlighted previously. While there is an argument for removing an anomaly created by the current system, simply seeking an administrative tidiness for the sake of it is not a particularly compelling reason. There is no proposal to alter any of the additional safeguards provided in relation to the release of Restricted Patients (e.g., effect of appeal by Scottish Ministers), and as a result, there will be a significant difference between how the two categories of detained patients are processed by the Tribunal system. In that regard, a strong justification can be made for any discriminatory or asymmetric impact on either group were the current arrangements to be retained.

**Are there any other comments or points you would like to raise?**

Article 5 of the European Convention on Human Rights requires decisions to deprive an individual of their liberty to be taken by an independent judicial body with powers to order release of an individual. As currently proposed, the identity of the decision maker in appeals does not have a particular significance, provided that the requirements of Article 5 can continue to be met.

3rd September 2021