Tribunal Rules

Implementing part 1 of the Tribunals, Courts and Enforcement Act 2007

Responses to the consultation on possible changes to the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 regarding proposed changes to the way that the First-tier Tribunal lists hearings in relation to applications by patients detained under section 2 of the Mental Health Act 1983

(Consultation period: 21 June to 16 August 2022)

Reply from the Tribunal Procedure Committee

October 2022

Introduction

1. The Tribunal Procedure Committee (the "TPC") is the body that makes Rules that govern practice and procedure in the First-tier Tribunal and in the Upper Tribunal. Both are independent tribunals, and the First-tier Tribunal is the first instance tribunal for most jurisdictions. Further information on Tribunals can be found on the HMCTS website at: https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about#our-tribunals

2. The TPC is established under section 22 of, and Schedule 5 to, the Tribunals, Courts and Enforcement Act 2007 ("the TCEA"), with the function of making Tribunal Procedure Rules for the First-tier Tribunal and the Upper Tribunal.

3. Under section 22(4) of the TCEA, power to make Tribunal Procedure Rules is to be exercised with a view to securing that:
   (a) in proceedings before the First–tier Tribunal and Upper Tribunal, justice is done;
   (b) the tribunal system is accessible and fair;
   (c) proceedings before the First–tier Tribunal or Upper Tribunal are handled quickly and efficiently;
   (d) the rules are both simple and simply expressed; and
   (e) the rules where appropriate confer on members of the First–tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.

4. In pursuing these aims the TPC seeks, among other things, to:
   (a) make the rules as simple and streamlined as possible;
   (b) avoid unnecessarily technical language;
   (c) enable tribunals to continue to operate tried and tested procedures which have been shown to work well; and
   (d) adopt common rules across tribunals wherever possible.

The Mental Health Tribunal

5. The Mental Health Tribunal ("MHT") is one of four jurisdictions within the Health, Education and Social Care Chamber ("HESC") of the First-tier Tribunal.

6. The Mental Health Act 1983 ("MHA") provides at section 66 for the circumstances in which applications may be made to the Tribunal and the time scales for doing so. Applications to the Tribunal may be made by or for a patient where that patient is detained under section 2 MHA (detention for up to 28 days for assessment or assessment followed by treatment) or section 3 MHA (detention for up to 6 months initially and then renewable for a further 6 months and then 12 months at a time) and where that patient has been discharged from hospital on a Community Treatment Order ("CTO") or has had his or her CTO revoked and is back in hospital, or is a restricted patient. The Tribunal also hears cases that have been referred because the patient has not made an application, although he or she had the right to do so.

7. The MHT consists of a panel of three: a Judge, a consultant Psychiatrist (the medical member ("MM")) and a Specialist Lay Member.

8. Prior to the hearing, the MHT panel members are provided with a report from the Responsible Clinician, a social circumstances report by a social worker, or Care Coordinator if there is one, and a nursing report. In section 2 cases, these are only made available on the day of the hearing.

9. All those detained under section 2 (section 2 cases) meet with the MM prior to the hearing for a mental state examination (unless they decide they do not want one). The MM then feeds back his or her findings to the panel and at the commencement of the MHT hearing those findings are fed back to the parties.

10. Cases in the MHT are dealt with under The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (the "HESC Rules"): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1099221/consolidated-ftt-hescc-rules-august-2022.pdf

The Consultation, and its background

11. The Consultation (the "2022 Consultation", to distinguish it from an earlier consultation – see below) ran between 21 June and 16 August 2022, and proposed changes to HESC Rule 37.

12. Rule 37(1) of the HESC Rules had (prior to the Tribunal Procedure (Coronavirus) (Amendment) Rules 2020)) provided that, in proceedings under section 66(1)(a) of the Mental Health Act 1983 (which concern section 2 cases), the hearing of the case must start within 7 days after the date on which the Tribunal received the application notice.

13. As a result of the coronavirus pandemic, emergency changes were made to the Procedure Rules on a temporary basis by the Tribunal Procedure (Coronavirus) (Amendment) Rules 2020, to allow cases to be dealt with across all jurisdictions during the pandemic. These amendments included, by paragraph 2(5) of those Rules, a change to rule 37 of the HESC Rules, extending the 7 day period to 10 days.

14. The 2022 Consultation proposed that the extended period of 10 days be made a permanent change to Rule 37.

15. In 2020 the TPC had carried out a consultation (the "2020 Consultation") on the change now proposed, and its Reply is at: Ministry of Justice / Tribunals Service response to consultation paper (publishing.service.gov.uk) That Reply should be read in conjunction with this document.

16. Following the 2020 Consultation (see its Reply), the TPC decided:

> "*Since the commencement of this consultation process the country has entered a period of lock down due to the coronavirus pandemic. As a result, the TPC made emergency changes to the Tribunal Procedure Rules on a temporary basis by the Tribunal Procedure (Coronavirus)(Amendment) Rules 2020, to allow cases to be dealt with across all jurisdictions during the pandemic. These amendments included, by paragraph 2(5), the change to rule 37 of the HESC Rules proposed in this consultation.*
> *That obviously could not have been foreseen when this consultation was launched. However, in this situation, the TPC considers it appropriate to delay making a decision on a permanent change so that the effects of the temporary change can be monitored and the results*

assessed before it makes a final decision. Accordingly, the TPC will return to this matter in due course".

17. The TPC was asked to implement the proposed rule change by the Chamber President and Deputy Chamber President, following monitoring of the effects of the temporary change; the 2022 Consultation followed.

18. As set out in paragraph 7 of the 2022 Consultation, as an update from the Deputy Chamber President:

    (i) Before the Rules were amended temporarily, and hearings were in person, 73.1% of first listing of section 2 cases was achieved within 7 days. Listing outside of 10 days was very rare; there were only a few cases. There was listing of 99.9% of cases within 10 days.

    (ii) When the Tribunal Procedure (Coronavirus) (Amendment) Rules 2020 extended ability to list section 2 cases to 10 days, there was still listing of 99.9% of cases within 10 days.

    (iii) During 2020 to 2021, although only half of the cases were listed within 7 days this was due to the significant pressures of Covid, reverting to video hearings in all cases, and pressures on staff.

    (iv) During 2021 - 2022, despite being able to list within 10 days considerable efforts were made to list within 7 days, and such listing was achieved in 84.8% of cases that year. There were times when the percentage dipped, such as when PHEs were reintroduced as this had an effect on the listing of all cases. However, that was short-lived and 84.8 % of listing within 7 days was achieved, despite challenges. Again, listing section 2 cases within 10 days was 99.9%.

The 2022 Consultation Question

19. The Consultation Question was "*Do you agree with the proposed change to rule 37? If not, why not?*"

20. The TPC received a total of 11 responses to the 2022 Consultation (see Annex A for a list of respondents): 1 from a National Health Service provider, 5 from members of the legal profession and 1 from a Tribunal judge. It also received responses from 4 organisations:

- The Law Society
- The Mental Health Review Tribunal (Wales)
- The Mental Health Tribunal Members' Association
- The Mental Health Lawyers' Association

21. Of the 11 responses received, 3 were in favour of the proposal and 8 were against.

22. The concerns expressed by those respondents who were against the proposal were as follows:-

(i) The time limit within which the matter should be listed should revert to 7 days. The Tribunal is dealing with a decision (to section the patient) that takes away the liberty of the person; a most fundamental human right. Section 2 is often used for first admissions; to keep the extension of listing hearing to 10 days would be wholly wrong in principle and flies in the face of a person's right to a speedy determination/hearing. By returning to 7 days there is still always the option to extend if it cannot be avoided.

(ii) The Tribunal successfully listed the vast majority of cases within 7 days prior to the Covid pandemic. 7 days was the time thought be proportionate to the length of detention. The Tribunal made a change to the rules because of the Covid pandemic. The Covid 19 pandemic has now largely passed, the other factors in the reasoning for the previous seven-day listing window remain and there is now no proper reason for the change to be retained.

(iii) If a patient were to apply on the 14th day, they would have the hearing on the 24th day of a maximum detention of 28 days. Tribunal panels who were not a hundred percent sure about discharge would be more inclined, subjectively, to uphold detention to the end. If the patient is not detainable, contrary to the views of the Responsible Authority, why should they have to wait a further 3 days to be discharged?

(iv) The changes were made to assist the Tribunal service and all those involved during a time of national pandemic which is now past.

23. The three respondents who agreed with the proposal did so on the basis that the current 7-day limit is very difficult to work within, especially regarding the submission of reports given that, of those 7 days, 2 are lost because of non-working days at the weekend and a further 2 are lost because reports have to be submitted at least 48 hours in advance of the hearing. That effectively leaves just 3 days to complete reports on a patient (a) who might only just have been detained; (b) of which little is known about; and (c) who may not have any identified secondary service allocated person to complete a Social Circumstances report and take part in the hearing.

24. One respondent who agreed also made an observation that representatives are often given no choice as to the date of the hearing, and should be offered alternatives.

25. These responses must be considered in the context of the responses to the 2020 Consultation. That Consultation is at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864791/mha-consultation-paper.pdf . The questions posed in that Consultation were:

(i) *Do you agree that the requirement should be that the First-tier Tribunal lists all section 2 hearings within 10 days from receipt of the application notice rather than 7 days?*

(ii) *Do you have any other comments on this proposal?*

26. The TPC received a total of 60 responses to the 2020 Consultation: 35 from National Health Service providers, 15 from members of the legal profession, 4 from members of the public and 3 from Tribunal members. It also received responses from 2 organisations: -

(i) The Law Society

(ii) Mental Health Tribunal Members' Association

27. The responses were overwhelmingly in favour of the proposal (51 for and 9 against). Some common concerns and comments emerged from a considerable number of responses, both from those in favour and those against.

(i) Given that the current 7-day limit is frequently extended already, there should be no slippage beyond 10 days.

(ii) Patients admitted under section 2 are very unwell on admission and the proposed change to listing allows more time for their condition to settle, resulting in some patients withdrawing the application and others being discharged, thus avoiding pointless listing.

(iii) The proposed change allows the NHS providers a little more time to produce meaningful reports. A slight delay makes it more likely that professionals will be able to attend.

(iv) The proposed change makes it more likely that the patient will get his or her advocate of choice.

(v) The proposed change will reduce the numbers of adjournments and postponements which are distressing for the patient.

28. For fuller details of responses to the 2020 Consultation, see extracts from the Reply to the 2020 Consultation, attached hereto as Annex B.

The TPC's Reply to the 2022 Consultation

29. The TPC has given careful consideration to the responses to the 2022 Consultation in conjunction with the responses it received to its 2020 Consultation.

30. As can be seen from paragraph 18 above, notwithstanding the ability to list within 10 days rather than 7 days during the pandemic, the Tribunal was still able to list the overwhelming majority of section 2 hearings within 7 days ((84.8%) and 99.9% within 10 days.

31. The TPC recognises that the majority of Respondents to the 2022 Consultation were against the proposed change (8 out of 11), but the TPC notes that in the 2020 Consultation 51 out of 60 Respondents were in favour of the change. The TPC considered it entirely appropriate to take account of the responses to the 2020 Consultation as it sought to address exactly the same rule point. That Consultation effectively fell into abeyance due to the pandemic and the introduction of the Tribunal Procedure (Coronavirus) (Amendment) Rules 2020). The TPC has assessed the impact of the temporary change during the Covid pandemic, as it indicated that it would, and has concluded that it is now appropriate to make the Rule change permanent.

32. In particular, its reasons are as follows.

    (i) Taking the responses to the two Consultations together, the great majority of Respondents were in favour of the rule change; the TPC considers this to be of significance. If the respondents to the 2020 Consultation had changed their views they might have been expected to respond to the 2022 Consultation.
    (ii) Experience during the period of the temporary change shows that a 10 day listing period has been useful in 15% of cases – i.e. a material number of cases.
    (iii) The observations of the Deputy Chamber President (see the 2022 Consultation) appear to the TPC to carry significant weight.
    (iv) A logical approach for the TPC to adopt is to consider whether anything concerning has emerged as a consequence of the temporary arrangements. Nothing concerning appears to have emerged, and the TPC has not been provided with any evidence from respondents of any emerged concern, in general or as regards any particular cases.

33. The TPC has had due regard to the public-sector equality duty in reaching its conclusion as set out above.

Keeping the Rules under review

34. The TPC wishes to thank those who contributed to the Consultation process (both in 2020 and in 2022). The TPC has benefited from the responses.

35. The remit of the TPC is to keep rules under review.

Contact details

Post point 5.25
102 Petty France
London SW1H 9AJ

Email: **tpcsecretariat@justice.gsi.gov.uk**

Further copies of this Reply can be obtained from the Secretariat. The Consultation paper, this Reply and the Rules are available on the Secretariat's website:

ANNEX A

List of Respondents

Name	**Organisation**
Neil Cronin	Southerns Solicitors
Adam Marley	GT Stewart Solicitors & Advocates
Elizabeth Kenny	GHP Legal
David R Pickup	HMCTS
Benjamin Conroy	Conroys Solicitors LLP
David Pepper	The Priory Hospital Middleton St George
Angela Wall	Butler & Co Solicitors
Alice Dickinson	Mental Health Lawyers Association
David Stephenson	Law Society
Chris Butcher	Mental Health Review Tribunal (Wales)
Pamela Charlwood	Mental Health Tribunal Members' Association

ANNEX B

Extracts from the 2020 Consultation Reply (following its paragraph numbers)

25. *One Respondent (an NHS provider) said: -*

> *"Consideration could be given to increasing the minimum notice period of hearing to 4 or 5 working days.*
> *Many unnecessary Tribunal applications are made by patients who will be discharged from detention before a Tribunal could be held. This is because the patient appeals as soon as the section 132 rights are read, often immediately after admission to the ward. Within a few days, some patients recover and are discharged, and others recognise their mental state can be helped by an informal hospital stay and are also discharged from the MHA. If the Tribunal applications could not be made until the third or fourth day of detention there might be many fewer Tribunal's cancelled."*

26. *Another Respondent (an NHS provider) commented that: -*

> *"The current 7-day deadline, (which in practice amounts to only five working days) allowed the responsible authority to "scramble" to prepare for the hearing, it is a futile imposition, that causes undue hardship, to already hard pressed, and under resourced clinical teams, without necessarily conferring any benefit on the applicant, since the hearing dates, usually fixed without prior consultation, often only lead to the submission of an application to change the date."*

27. *Another Respondent (an NHS provider) said: -*

> *"I think the proposed extension from 7 to 10 days would greatly benefit everyone involved with the Tribunal process as it gives more time to be prepared. More especially for the individual admitted into mental health hospital services under section 2 of the Mental Health Act 1983 as it will give additional time for someone who is distressed enough to be admitted under section 2 to gain a bit more understanding of the process, especially*

if it is their first time being held under the Act. It will also give the Responsible Authority additional opportunity to ensure that all professionals involved prepare and are available for the set date as well as ensuring legal representation is arranged if requested. It will also ensure family/relatives/carers have that additional time to arrange to be present. It will also allow additional time for professionals to get to know the individual a little more and gather all relevant information."

28. *Another Respondent (an NHS consultant psychiatrist and Tribunal medical member) said: -*

"I do not think this small change will affect the delivery of justice, or the fairness of hearings. At present section 2 hearings are rushed and there is very limited time for reports to be written or witnesses to be found. This small change may allow some additional "breathing space" for witnesses and the Tribunal service."

29. *Another NHS provider said: -*

"The extension to 10 days will allow more time for the multidisciplinary team to meet with patients and provide a more reflective report. A common issue is lack/delay of allocation to care coordinator/care team-so again this would allow additional time for this process to take place and avoid someone attending who has no prior knowledge of the patient. Furthermore, this should lead to a decrease in postponement requests and provide patients with a more thorough and considered hearing."

30. *A legal representative states: -*

"It is appreciated that the short timescale does cause difficulties setting a mutually convenient date for all parties, but we would submit that the default position should be to hold the hearing within seven days and this should be the priority in relation to all matters. However, to allow flexibility moving to a ten-day time limit seems to be appropriate as long as it does not become the default position in all cases. In matters where a client is detained and the hearing is set for day 23 and a regrade to section 3 takes place, we presume the hearings will continue as it has been the practice in past times in any event."

31. *Another legal representative states: -*

"Allowing the listing window to be extended will enable further consultation time with the client, discussions of reports and instructions. It would also allow the inpatient team a longer period of assessment to enable more detailed reports, which are used in the Tribunal hearing. By allowing this extension of the listing window, may reduce the number of postponement requests the Tribunal receives when hearing dates are listed without consultation to the hospital and legal representative and allowing more availability for panels."

32. *Another legal representative commented: -*

"If the listing period is extended it should be strictly adhered to and also note should be taken of the expiry of the applicant's section when listing."

31. *Another legal representative states: -*

"Often an application is submitted and we are not made aware of it by a MHAO. The delay presents some difficulties in attendance and representation. The listing would give greater flexibility. In any event often the date listed runs into an extended period. It also gives a better clinical presentation. I would expect there to be a reduction in hearings as patients may well be discharged given the chance for professionals to make informed decisions about care and treatment."

32. *Another legal representative said: -*

"I believe that to extend the listing window would give greater potential for patients to be represented by their chosen representative which is so often not the case under the present system of imposed dates by the Tribunal service. Patients choose representatives on the basis often of previous experience or on recommendation. However, under the current system, representatives often are faced with the decision of whether to attend to give initial advice only to find that they have to inform patients later that they cannot represent them at the Tribunal due to a date having been fixed when they are not available, which means that the patient either has to agree to be represented by another person from the firm or even select a different firm altogether. The alternative is for the representative to wait until a date is imposed and then consider whether they can accept the case depending upon their availability. Neither of these scenarios is beneficial to the patient who needs some certainty in what is a very distressing time

for them. This process is supposed to be for the benefit of the patient, and I feel that it does not serve that purpose as well as it might under the current rules."

33. *Another legal representative states: -*

"I believe that it be more logical to list within 10 days because: -
(1) *The client is more likely to obtain the solicitor of choice. My diary is always busy one week in advance, but empty afterwards. I often have to reject section 2 applications due to lack of solicitors' availability.*
(2) *It avoids the need to adjourn because professional witnesses are unavailable. Adjournments cause distress to my clients generally.*
(3) *It may avoid other solicitor firms asking us to cover the Tribunal hearing, after first attending upon the client themselves. This leads to lack of continuity for the client and should be avoided if feasible."*

34. *The chair of the Mental Health Tribunal Members' Association commented that: -*

"The majority of our members (all of whom sit on Mental Health Tribunals) believe it is realistic to accept this extension and this is the position taken by MHTMA. The current situation, with a high proportion of cancellations is very distressing for patients.
Those of our members who disagree do so because they see it, in effect, as "Justice delayed" for patients and expect all parties to make it a priority to enable section 2 hearings to take place as speedily as possible. If the change goes ahead, it is essential that the number and proportion of the postponed/cancelled section 2 hearings is monitored, as this is a central rationale for the change. The effect of the extension must be assessed by comparing cancellation rates before and after the extension takes place."

35. ***The above quotes are an example of views shared by the vast majority of Respondents to the 2020 Consultation who were in favour of the proposal at that time.***

Some responses opposed to the proposed change

36. *The Law Society suggested that the timing of the consultation was inappropriate given that it preceded a response from the Government*

to the report of the Independent Review of the Mental Health Act 1983 and that changes in the area should be avoided until further information was available about what the Government was considering more broadly in relation to admission and treatment, along with the role of the First-tier Tribunal (Health, Education and Social Care Chamber).

They also stated that it was their view that extending the time limit for holding a section 2 Tribunal hearing from 7 to 10 days would unjustifiably lengthen the potential amount of time that a person is detained against his or her will. Patients should not be subject to further restrictions on their liberty in order merely to ease the administrative process of the Tribunal.

The Law Society went on to note that there was some confusion amongst professionals as to whether the time limit included working or consecutive days and that this should be clarified via guidance.

37. *Of the four responses from representatives opposing the proposal, two were from the same firm of solicitors. They argued that the present system makes complete sense to allow for 14 days for the application then 7 days for the hearing leaving at least 7 further days prior to the section expiry.*
Extending the timescales allowed would bring the hearing very much closer to the section expiry. This risks sections already being upgraded to section 3 by the time the hearing is held. In addition, as the 7 days is often "pushed" by hospitals and clinicians it is likely the 10-day limit would be "pushed" as well. So, while hearings may currently be held on day 8 or 9 of the application, we would soon see hearings being held on day 11 of 12. It was also stated that if the window is extended, then it should be an absolute that hearings take place within 10 days and that there can be no further extension.

38. *Another firm of solicitors commented that hearings are quite often listed outside of the 7-day period currently and expressed their belief that this would still happen if the hearings were listed within 10 days.*