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 (MHA)

(11 February to 7 April 2020)

Reply from the Tribunal Procedure Committee

June 2020

Contents

Introduction

1. The Tribunal Procedure Committee ("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.

2. 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.

3. 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 (MHT)

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

5. The Mental Health Act 1983 (MHA) provides at section 66 those persons who can apply for a Tribunal and the time scales for doing so. Tribunals are by or for persons detained under section. 2 (detention for up to 28 days for assessment or assessment followed by treatment), section 3 (detention for up to 6 months initially and then renewable for a further 6 months and then 12 months at a time), those discharged from hospital on a Community Treatment Order (CTO), those who have had their CTO revoked and are back in hospital, and restricted patients. 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.

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

7. Prior to the hearing the MHT panel members are provided with a report from the Responsible Clinician (RC), 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.

8. All those detained under section 2 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 their findings to the panel and at the commencement of the MHT hearing those findings are fed back to the parties.

Background to the Consultation

9. HESC (Mental Health) deals with around 30,000 applications and references a year from patients who are detained in hospital or subject to community orders. It is a very busy jurisdiction dealing with fundamental rights. The Tribunal is committed to ensuring easy access and the effective participation of the parties in the process.

10. For users of the Tribunal, particularly patients, the proceedings are often unavoidably distressing and stressful events. The proceedings are held in private and the written and oral evidence is personal and private. Most patients are legally represented, since there is non-means tested legal aid available for those subject to the MHA and the Tribunal has the power, in certain circumstances, to appoint a legal representative. It is important that patients' rights are protected and that there is no unnecessary distress caused by the administrative process. The Tribunal seeks to ensure that cases can be considered quickly and fairly.

Rule 37

11. Rule 37(1) of the HESC Rules provides 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.

12. Rule 37(4)(a), in combination with rule 37(3), provides that in such cases the period of notice given to the parties of the time and place of the hearing must be at least 3 working days.

13. The combined effect of these two rules is to limit the number of possible days for listing a hearing in section 2 proceedings to 1 or 2 days.

14. In 2018-2019, the Tribunal received nearly 11,000 section 2 applications (thus constituting around a third of the total number of applications received). The Tribunal sits at over 1,000 venues all over England. This significantly limits the Tribunal's ability to list these and other cases. The Tribunal can shorten the notice period or extend the listing period under rule 5(3)(a) of the HESC Rules, but such a decision must be taken by a Salaried Tribunal Judge or, in certain circumstances, by a Tribunal Case Worker.

15. The Tribunal frequently has to impose a hearing date on the parties because of the combined effect of these provisions: i.e. the requirement to hear the

case within 7 days after receipt of the application and to give the parties at least 3 working days' notice to prepare for the hearing. The Tribunal does manage to list approximately 70 percent of the cases within 7 days, but this does not take into account the number of cases postponed at the request of the parties due to their unavailability or because the Tribunal does not have three panel members to sit.

16. The Tribunal recognises that cancelling hearings for lack of availability of a panel causes distress to patients and inconvenience to the Responsible Authority (the hospital). If the hearing is listed and the patient is seen by the MM for a pre-hearing examination and then it is postponed, it may well require a second MM to examine the patient. This is an unnecessary intervention into the private life of a patient who has already lost a significant amount of privacy. Although the Tribunal is actively recruiting further members, it cannot recruit by area and has particular problems in some areas. It is also investigating video alternatives, but this may not be an ideal solution for all patients and may take some time to come to fruition.

17. If the Tribunal had more time to list these cases, it would have a much better chance of ensuring that a panel could be identified and that the hearing could proceed on the day it is listed.

The proposal

18. It is therefore proposed to substitute, for the 7-day time-limit for the holding of a hearing, a time-limit of 10 days. Since an application must be received by the 14th day of detention, this would mean that the latest the hearing would be held would be 24 days after the detention started. The Secretary of State can refer cases to the Tribunal if the date has passed for making an application and the Tribunal could prioritise listing these cases to ensure they are heard before the section expires. If the case needs to be listed earlier, the representative can make an application for this to be done. As noted above, nearly all patients are represented.

19. This short extension to the specified period should considerably assist in ensuring certainty for patients and the witnesses, thereby avoiding the additional distress and inconvenience caused by cancelled hearings.

20. The text of the proposed amended rule 37 is set out below, with the changes highlighted.

Rule 37.

1. *In proceedings under section 66(1)(a) of the Mental Health Act 1983 the hearing of the case must start within **10 days** after the date on which the Tribunal received the application notice.*

2. *In proceedings under section 75(1) of that Act, the hearing of the case must start at least 5 weeks but no more than 8 weeks after the date on which the Tribunal received the reference.*

3. *The Tribunal must give reasonable notice of the time and place of the hearing (including any adjourned or postponed hearing), and any changes to the time and place of the hearing, to—*

   (a) each party entitled to attend a hearing; and

   (b) any person who has been notified of the proceedings under rule 33 (notice of proceedings to interested persons).

   4. The period of notice under paragraph (3) must be at least 21 days, except that—

   (a) in proceedings under section 66(1)(a) of the Mental Health Act 1983 the period must be at least 3 working days; and

   (b) the Tribunal may give shorter notice—

      (i) with the parties' consent; or
      (ii) in urgent or exceptional circumstances

Purpose of the Consultation

21. The TPC formed no provisional view on the proposed change, but in light of the representations made by the Chamber President (HESC), the Deputy Chamber President (HESC) and the Chief Medical Member, supported by HMCTS, it felt it appropriate to go to consultation to seek the views of all interested parties before reaching a decision on whether to amend the Procedure rules in the way proposed.

22. The questions posed in the 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?

Summary of Responses

23. **The TPC received a total of 60 responses. 35 from National Health Service (NHS) 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: -**

    1. The Law Society

    2. Mental Health Tribunal Members Association

24. **It is fair to say that 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 their advocate of choice.

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

Some responses in favour of the proposed change

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 consultation who are in favour of the proposal.**

Some responses opposed to the proposed change

36. The Law Society suggested that the timing of the consultation was inappropriate given that it is before there has been 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 there is further information about what the Government is 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 their will. Patients should not be subject to further restrictions on their liberty 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 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 one which cannot be extended further.

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

The TPC's Reply

39. **The TPC has given careful consideration to the responses.**

40. **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.**

41. **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

42. **The TPC wishes to thank those who contributed to the Consultation process. The TPC has benefited from the responses.**

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

Contact details

Please send any suggestions for further amendments to Rules to:

TPC Secretariat
Post point 10.18
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:

http://www.justice.gov.uk/about/moj/advisory-groups/tribunal-procedure-committee.htm

Annex A

List of Respondents

Name	Organisation
Dr Arokia Antonysamy	Cygnet Hospital Beckton
George Platts	Head of Mental Health and Sutton & Cheam Locality
Chris Heery	Butler & Co.
Dr John Watts	N/A
Gary Spencer-Humphrey	Expert Social Worker Ltd
David R Pickup	Pickup & Scott Solicitors
Lee Sharp	Cygnet Healthcare
Adam Peyton	Cygnet Victoria House, Darlington
Alice Marshall	Lincolnshire Partnership NHS Foundation Trust
Carole Quin	Kent & Medway Partnership Trust - Little Brook Hospital
Ros Keenahan	BSMHFT
Olu Adeyemi	Edgware Community Hospital Mental Health Act Office
Mental Health Act Administrators (Chris Marks, Alison Williams, Karen Palmer)	Solent NHS Trust
Dr Kaleem Baig	The Priory Hospital Southampton
Bernadette Pickerell	SLAM/KCH
John Keech	East London NHS Foundation Trust
Karen Russell	Nottinghamshire Healthcare NHS Foundation Trust
James McAulay	ABR SOLICITORS
Hazel Montgomery	Cartwright King Solicitors
Leon Rodrigues	Associate Hospital Manager NELFT

Danielle Burgoine	Coventry & Warwickshire Partnership Trust
Carol Suthers	Norfolk & Suffolk NHS Foundation Trust
Adam Cox	Southern Health NHS Foundation Trust
Emma Gray	CYGNET CHURCHILL
Lyne Williams	Norfolk & Suffolk NHS Foundation Trust
Georga Godwin	Consultant Solicitor, Pickup & Scott
Matthew Fairclough	Cumbria, Northumberland, Tyne & Wear NHS Foundation Trust
Adam Marley	GT Stewart Solicitors
Jane Noble	Not stated
Polly Sturgess	Avon & Wiltshire NHS Partnership Trust
Dr Jay Amin	University of Southampton/Southern Health NHS Foundation Trust
Dr Nikolay Petrov	BSMHFT
Neil Cronin	Southerns Solicitors
Ashleigh Howard	Southerns Solicitors
Paige Newell	ABR Solicitors
Steve Moorhead	Cumbria Northumberland Tyne and Wear Trust
Nicola Eccles	Lincolnshire Partnership NHS Foundation Trust
Alison Cox	Mental Health Act Team, Lincoln
Christopher Marchment	Southerns Solicitors
Anthony David Wills	Avon & Wiltshire Mental Health Partnership
Elzbeth Claire Kenny	GHP LEGAL
Robert Gregory	Consultant Mental Health Solicitor
Dr N Boast	Medical Member Mental Health Tribunal
Alison Smith	Northamptonshire Healthcare NHS Foundation Trust

Denise Bound	First-tier Tribunal
Kerry Elliott	Early Intervention in Psychosis – Southern Health NHS Foundation Trust
Adam Black	Governor, South London and Maudsley NHS Foundation Trust
Jennifer Horne	Central and North-West London NHS Foundation Trust
Suzanne Rendall	Worcestershire Health & Care NHS Trust
Sandy O'Hare	Worcestershire Health and Care NHS Trust
Anne Bunting	Cumbria, Northumberland, Tyne and Wear NHS Trust
Lyndall Nicoll	Organisation Henry Hyams Solicitors
Anisha Patel & Janice Peters	MHA Administrators for Priory
Ranjit Thaliwal	Thaliwal & Veja Solicitors
Nicola Cho	RMNJ Solictors
Amanda Burke	Sussex Partnership NHS Foundation Trust
Leanne Maskell	The Law Society
Raj Dowlut	Reeds Solicitors
Margaret Houdmont	MH Legal
Rhian Williams-Flew	Specialist Member of the MHT
Pamela Charlwood	Chair Mental Health Tribunal Members' Association