Proposal to amend the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 in relation to pre-hearing examinations, and decisions without a hearing in the case of references by the hospital or Department of Health.

Stakeholder Consultation

March 2018

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Introduction

1.1 The Tribunal Procedure Committee (TPC) is responsible for making Tribunal Procedure Rules for the First-tier Tribunal and the Upper Tribunal, each of which is divided into chambers. The First-tier Tribunal replaced a number of tribunals in 2008, including mental health review tribunals in England.
Further information on the Tribunals can be found on the HMCTS website:

www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about#our-tribunals

1.2 Specifically, s22(4) of the Tribunals, Courts and Enforcement Act 2007 requires that the TPC's rule-making powers be exercised with a view to securing:

(a) that, in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done,
(b) that the tribunal system is accessible and fair,
(c) that proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently,
(d) that the rules are both simple and simply expressed, and
(e) that 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.

Further information on the TPC can be found at our website:

www.gov.uk/government/organisations/tribunal-procedure-committee

1.3 This consultation seeks views on two key proposals to change the way that the First-Tier Tribunal operates in relation to mental health cases under the Mental Health Act 1983 (MHA), as dealt with in the Health, Education and Social Care Chamber (HESC).

- Firstly, there is a proposal to remove rule 34 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, which re-enacted rule 11 of the Mental Health Review Tribunal Rules 1983. Rule 34 generally requires that, in cases where a patient is detained under s.2 of the MHA (compulsory admission for assessment), there must be a medical examination of the patient (known as a pre-hearing examination, or PHE) by the medically-qualified member of the tribunal before the case is heard, unless the tribunal is satisfied that the patient does not want such an examination. In any other case a PHE must be carried out where one is requested by the patient or their representative, or where the tribunal directs that a PHE should take place.

- Secondly, there is a proposal to change the rules on when a decision can be taken by the tribunal without a hearing. The tribunal currently deals with two types of cases: applications, as requested by or on behalf of detained patients; and references to the tribunal by hospital managers or the Secretary of State for Health (including approvals under s.86(3) MHA). A change is proposed only in relation to the consideration of references to the tribunal. The current position is in rule 35, which requires a hearing to take place unless, in the case of a patient aged 18 or over and subject to a Community Treatment Order whose case has been referred to the tribunal under section 68 of the MHA, the patient or their representative has specifically opted not to have a hearing. It is proposed that this paper review procedure should be extended to most references to the tribunal by hospital managers or the Secretary of State. The default position would become that decisions, in such cases, are taken without a hearing, unless one is requested by a patient or their representative – with such a request being granted as of right – or where the patient is under 18, it is a discretionary reference under s.67 or s.71 of the MHA, or where the tribunal directs an oral hearing.

Proposed abolition of PHEs

2.1 PHEs are currently dealt with in rule 34:

Medical examination of the patient

(1) Where paragraph (2) applies, an appropriate member of the Tribunal must, so far as practicable, examine the patient in order to form an opinion of the patient's mental condition, and may do so in private.

(2) This paragraph applies—

(a) in proceedings under section 66(1)(a) of the Mental Health Act 1983 (application in respect of an admission for assessment), unless the Tribunal is satisfied that the patient does not want such an examination;

(b) in any other case, if the patient or the patient's representative has informed the Tribunal in writing, not less than 14 days before the hearing, that—

(i) the patient; or

(ii) if the patient lacks the capacity to make such a decision, the patient's representative, wishes there to be such an examination; or

(c) if the Tribunal has directed that there be such an examination.

Also relevant is rule 39(2):

Hearings in a party's absence

(1) Subject to paragraph (2), if a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—
(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(b) considers that it is in the interests of justice to proceed with the hearing.

(2) The Tribunal may not proceed with a hearing that the patient has failed to attend unless the Tribunal is satisfied that—

(a) the patient—

(i) has decided not to attend the hearing; or

(ii) is unable to attend the hearing for reasons of ill health; and

(b) an examination under rule 34 (medical examination of the patient)—

(i) has been carried out; or

(ii) is impractical or unnecessary

The complete Rules, as currently in force, can be found in the "Publications" section of our website at:

www.gov.uk/government/publications/health-education-and-social-care-chamber-tribunal-rules

2.2 PHEs were first introduced pursuant to the Mental Health Act 1959, and are undertaken by the medical member of the tribunal, who (so far as practicable) examines the patient before the hearing to form an opinion of the patient's mental condition. If the medical member's preliminary view of the patient's condition differs from that of the medical witnesses in the case (eg the responsible clinician or independent psychiatrist) then this is made known at the outset of the hearing, with the reasons for that preliminary view.

2.3 PHEs were the subject of a consultation by the TPC in June 2013. At that time PHEs were compulsory in all cases. Having considered the responses to that consultation the TPC concluded, in March 2014, that PHEs should become optional for patients in all cases but for those where the patient was detained under s.2 MHA. In cases of patients not detained under s.2, patients must apply to the tribunal to request a PHE not less than 14 days before the hearing. A PHE is then held where requested, and in all s.2 cases, unless the patient or their representative withholds consent. The tribunal can direct that a PHE take place even if the patient does not want one. In proposing the change in 2014 the TPC stated, in its response to the consultation:

21. We are not persuaded that preliminary examinations should be abolished altogether. The superior courts have held the procedure not to be intrinsically unfair and the overwhelming view of respondents is that they assist the tribunal to reach the right conclusion in many cases and can be an important safeguard for patients.

22. There is also considerable force in the arguments that a preliminary examination enables at least some patients better to present their cases to the tribunal and that introducing an element of discretion that would require the tribunal to consider whether there should be an examination in a large number of individual cases would be expensive and give rise to appeals in contentious cases. However, we do not consider that it follows from these considerations that the rule that there should be a preliminary examination in all cases should be retained. At most, it follows that there should be a preliminary examination in all cases where the patient wants one.

2.4 It is now suggested by the MOJ, with support from the senior HESC judiciary, that in the light of experience since the rules were changed in 2014, PHEs should now be abolished entirely. The joint view is that PHEs appear to make little material difference to the outcome of cases, and, despite PHEs being requested in around 50% of non-s.2 cases, that they add little or nothing to the evidential basis on which tribunals make their decisions. It is suggested that that the proportion of patients discharged varies little, irrespective of whether a PHE was carried out. It is also suggested that a PHE may present a potentially misleading picture of the patient's condition where the patient is detained under s.2. The purpose of a detention under s.2 is to allow up to 28 days for a proper assessment, and a short 'snapshot' from a PHE may assume too great a role in the assessment process and influence the tribunal to a disproportionate degree.

2.5 The role in which medical members find themselves may be noted. They carry out a medical examination, and form a provisional view, based on a one to one conversation with one of the parties before the tribunal, in the absence of the other party and the other members of the tribunal which will decide the case. They then participate in the hearing of the case and the making of the decision. This was an issue addressed in the 2013 TPC consultation, and in the TPC's response to it. This "dual" role is also present in the Social Entitlement Chamber, where in appeals concerning Industrial Injuries Disablement Benefit the medical member of the tribunal carries out an examination in the absence of the judge. However, in those cases a contemporaneous 'snapshot' of e.g. physical functionality may be of value.

2.6 It could also be noted that the Mental Health Tribunal in Scotland does not, and never has had, a system of PHEs, and has no plans to introduce them.

2.7 The TPC notes that it is only three years since it accepted the case, in its reply to the 2013 consultation, that PHEs remained a desirable and valuable part of the tribunal process. Nevertheless, in the light of experience since the rules were changed in 2014, it is appropriate to re-visit some of those same issues in the context of the current proposal. The TPC is keen to receive the views of those with a stake in the mental health tribunal process. The specific questions on which views are sought are set out later in this consultation document.

Decisions without a hearing

3.1 At present rule 35 deals with this area:

> ***Restrictions on disposal of proceedings without a hearing***
> ***35.***
> *(1) Subject to the following paragraphs, the Tribunal must hold a hearing before making a decision which disposes of proceedings.*
> *(2) This rule does not apply to a decision under Part 5.*
> *(3) The Tribunal may make a decision on a reference under section 68 of the Mental Health Act 1983 (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—*
> *(a) the patient has stated in writing that the patient does not wish to attend or be represented at a hearing of the reference and the Tribunal is satisfied that the patient has the capacity to decide whether or not to make that decision; or*

(b) the patient's representative has stated in writing that the patient does not wish to attend or be represented at the hearing of the reference.
(4) The Tribunal may dispose of proceedings without a hearing under rule 8(3) (striking out a party's case).

Paragraphs (2) and (4) are not relevant to a substantive hearing of a case, being concerned with procedural and post-hearing matters.

3.2 The present system, as can be seen, provides that an oral hearing is a requirement in all cases, unless, in the case of references for community patients over 18, the patient or representative has specifically stated they do not wish to attend or be represented at a hearing, and the tribunal is satisfied that it is able to decide the matter without a hearing. The proposal is, in essence, to reverse that situation, so that decisions on the papers become the default position in the case of references to the tribunal made by hospital managers or the Secretary of State. Under the proposal, either party would have an absolute right to request and be granted an oral hearing and, in addition, the tribunal would hold an oral hearing where the patient is under 18, it is a discretionary reference under s.67 or s.71 of the MHA, or where the tribunal directs an oral hearing. It is suggested by the MOJ and senior HESC judiciary that the proposed power on the part of the tribunal to direct an oral hearing on its own initiative (coupled with the right to Legal Aid without means-testing in these cases), provides a strong safeguard to capture those cases where an oral hearing is necessary for a fair and just disposal of the case, and to protect the interests of patients who lack capacity to decide whether or not to ask for an oral hearing if, in the absence of an application, their cases have been referred to the tribunal.

3.3 The change is proposed by the MOJ (with support from the senior HESC judiciary) since at present many oral hearings are required even though a patient has not made an application to the tribunal, does not wish to attend a hearing, or may have no interest or engagement with the proceedings. Even with the paper review procedure available for adult community patients, the requirement that such patients must positively ask for a paper disposal means that oral hearings must still be held for those adult community patients who are the least interested in engaging with the tribunal. It is suggested that having more cases dealt with on the papers alone would greatly speed up the work of the tribunal, enabling cases where the parties want a hearing to be heard more quickly. Currently a tribunal hears on average 1.33 cases per day, whereas it is suggested that with decisions on the papers alone this could be increased greatly.

3.4 The TPC notes that the procedure proposed is very similar to that which applies to the rules of the Social Entitlement Chamber, where rule 27 provides for a hearing, unless each party has consented to there being no hearing, *or has not objected to* a decision without a hearing. This has a very similar effect in enabling the tribunal to decide cases on the papers where someone has not expressed a preference, or has opted for a paper decision, leaving oral hearings for those who have actively requested one. This rule also requires the tribunal to be satisfied in all cases that it is able to decide the case – fairly and justly as required by rule 2 – without a hearing. The procedure in the Social Entitlement Chamber appears to work satisfactorily.

3.5 It is emphasised that the proposal concerns references only. There would be no change as regards applications in cases brought by or on behalf of detained patients, where an oral hearing would remain the default position.

3.6 The welcomes, as to this proposal, the views of those with a stake in the mental health appeal process. Consultation questions are set out below.

The consultation questions

1. ***Do you agree that the requirement that the First-tier Tribunal must conduct a PHE in all s.2 cases, and others where one has been requested, should be removed?***

2. ***If the requirement were removed, do you consider that the First-tier Tribunal should have some discretion as to whether to conduct a PHE if it considers it appropriate?***

3. ***Do you agree with the proposal that, with references to the tribunal, other than the exceptions set out in para. 3.2 above, (as opposed to applications from patients), a decision on the papers alone should become the default position, as outlined in the proposal above?***

4. ***Are there any classes of case in which you consider that the First-tier Tribunal should always conduct an oral hearing, irrespective of whether the parties have expressed a preference?***

5. ***Do you have any other comments on the proposals made, or on the operation of the rules generally?***

How to Respond

Contact Details

Any comments to the consultation should be sent to the Tribunal Procedure Committee Secretariat at:

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Secretary to the Tribunal Procedure Committee
Justice Policy Group
Ministry of Justice
1st Floor Piccadilly Exchange – 2 Piccadilly Plaza
Manchester
M1 4AH

Email: tpcsecretariat@justice.gsi.gov.uk

Copies of this report can be obtained from that address or on the website:
www.gov.uk/government/organisations/Tribunal-procedure-committee

The consultation questions are also in a separate Word document on our website, which can be used for submitting your response.

When responding please state whether you are doing so as an individual or representing the views of an organisation – please make it clear who the organisation represents.

Confidentiality and data protection

In general, the Tribunal Procedure Committee regards consultation responses as public documents. They may be published by the Tribunal Procedure Committee and referred to in its Reply to the consultation.

If you would prefer your response to be kept confidential, you should be aware that information you provide, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA) and the Data Protection Act 1998. If you want information that you provide, including personal data, to be treated as confidential please be aware that under the FOIA there is a statutory Code of Practice with which public bodies must comply and which deals with, amongst other things, obligations of confidence.

In view of this, if you do not want your response or information to be made public it would be helpful if you could explain why you regard the information you have provided as confidential. If the Tribunal Procedure Committee receives a request for disclosure of the information it will take full account of your explanation, but cannot give an assurance that confidentiality can be maintained in all circumstances. Please note that an automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Tribunal Procedure Committee.