

Tribunal Procedure Committee
Consultation on possible amendments to the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 on the timescale for listing Section 2 hearings.

Introduction

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#ourtribunals
2. Specifically, section 22(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
3. The TPC also has due regard to the public-sector equality duty contained in section 149 of the Equality Act 2010 when making rules.
4. This consultation seeks views on one proposal to change 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), dealt with in the Health, Education and Social Care Chamber (HESC). Proceedings in HESC are governed by the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (the HESC Rules), in particular by the specific rules concerning mental health cases set out in Part 4 of the HESC Rules. The complete HESC Rules, as currently in force, can be found in the "Publications" section of the Tribunal website:
www.gov.uk/government/publications/health-education-and-social-care-chambertribunal-rules

Background to the Proposed Changes

5. 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.
6. 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

7. 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 the 7 days after the date on which the Tribunal received the application notice.
8. 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.
9. 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.
10. 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.
11. 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.
12. 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 medical member for a pre-hearing examination and then it is postponed, it may well require a second medical member 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.

13. 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

14. 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 been 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.
15. 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.
16. 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

17. The TPC welcomes the views on this proposal of those with a stake in the mental health appeal process. Consultation questions are set out below.

The Consultation Questions

18. *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?*

19. *Do you have any other comments on this proposal?*

How to respond

Contact Details

Please reply using the response questionnaire template.

Please send your response by 7 April 2020 to:

Vijay Parkash
Secretary to the Tribunal Procedure Committee
Access to Justice Directorate
Policy, Communications and Analysis Group
Ministry of Justice
Post Point: 10.20
102 Petty France
London
SW1H 9AJ
United Kingdom

Email: tpcsecretariat@justice.gov.uk

Extra copies of this consultation document can be obtained using the above contact details or online at: <http://www.justice.gov.uk/about/moj/advisory-groups/tribunal-procedure-committee/ts-committee-open-consultations>