

July 2023

Tribunal Procedure Committee

Consultation on possible amendments to the Tribunal Procedure (First-tier Tribunal) (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 regarding proposed changes to the way that the First-tier Tribunal decides cases referred to the Tribunal pursuant to S.68 Mental Health Act 1983 (MHA)

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, including the Health, Education and Social Care Chamber (HESC), replaced a number of tribunals in 2008. The Mental Health Tribunal falls within HESC. Further information on the Tribunals can be found on the HMCTS website:
<http://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 the proceedings before the tribunal are handled quickly and efficiently. Further information on the TPC can be found at our website:
<http://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 a proposal to change Rule 35 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 by amending the restriction on cases that can be decided without a hearing so that cases involving hospital-based patients who have been referred to the Tribunal and do not wish to attend can be decided on the papers.

5. A link to the relevant Rules is at:
<https://www.gov.uk/government/publications/health-education-and-social-care-chamber-tribunal-rules>

Background to the Proposed Changes

6. The TPC received the following request from the Chamber President and Deputy Chamber President of HESC.

“With regard to Rule 2 of the Tribunal Procedure (Coronavirus) (Amendment) Rules 2020 we understand the TPC is now considering whether to make permanent the rule changes in respect of paper-based decisions and the potential to order private remote hearings.

Rule 2 of the Coronavirus rules amended the current Rule 5 to include;

“Coronavirus temporary rule (decisions without a hearing)

5A.—(1) Notwithstanding anything in rule 22 (order that a school be regarded as not registered pending determination of an appeal), rule 23 (decision with or without a hearing), rule 35 (restrictions on disposal of proceedings without a hearing) or rule 37 (time and place of hearings), the Tribunal may make a decision which disposes of proceedings without a hearing if the Tribunal considers that the conditions in paragraph (2) are satisfied.

(2) The conditions are—

(a) the matter is urgent;

(b) it is not reasonably practicable for there to be a hearing (including a hearing where the proceedings would be conducted wholly or partly as video proceedings or audio proceedings); and

(c) it is in the interests of justice to do so.

(3) This rule does not prejudice any power of the Tribunal to make a decision which disposes of proceedings without a hearing otherwise than under this rule.”.

Apart from the exception for references under section 68 of the Mental Health Act for community patients, which can be dealt with without an oral hearing, all decisions which dispose of proceedings must have an oral hearing (Rule 35). What we are suggesting is that the same right given to those in the community to decide and state in writing that they do not wish to attend or be represented at a hearing is also given to those in hospital who are referred.

This change would not exactly replicate the Rule 2 in the Coronavirus Rules but it does give patients the right to determine how they want their case to be considered by the Tribunal and protects their right to privacy and dignity. The hearing would only be conducted on the papers if it was not reasonably practicable to hold the hearing because the patient did not want to attend or be represented and it was in the interests of justice to hold a hearing on the papers therefore replicating two of the conditions in rule 5A

The fact that a patient is referred to us is an important safeguard but does not affect their right to make an application to us. If they are unhappy about their situation, they can apply within the relevant periods in section 66, 69 and 70 of the Mental Health Act.

874 automatic references were heard on the papers between 20 March 2020 to 31 August 2021. A judge can typically dispose of between 4 and 8 automatic references in a single day. This is because these references are uncontested by the patient, who did not want to play any part in the proceedings. This change would respect the autonomy of those in hospital in the same way as community patients.

As the recent Government White Paper “Reforming the Mental Health Act” recognises, automatic referrals to the Tribunal are an important safeguard, ensuring that all detentions are reviewed independently from the detaining authority on a regular basis, rather than relying on the patient or their representative to request one. But the Tribunal’s experience is that there is a significant cohort of patients who do not welcome the intrusion into their lives that an automatic referral represents. They find the procedure distressing and will frequently “opt out”, refusing to appoint a representative (or meet one appointed for them) and/or refuse to attend the hearing.

In relation to community patients, this issue was recognised and then addressed with the introduction of Rule 35. But there is currently no equivalent provision for inpatients, and so all such referrals are listed for hearing, regardless of the views of the patient. This cannot be right. Patients may feel forced to participate in proceedings that they did not request and do not welcome, and it is an inefficient use of the Tribunal’s resources to have an oral hearing where the case could be determined on the written evidence. These cases, like those of community patients would be dealt with by District Tribunal Judges who are experienced in recognising situations where an oral hearing is required.

There is no injustice to a patient to have their case decided in circumstances where they had not themselves requested a hearing, did not want to attend a hearing and were not asking the Tribunal to discharge them from detention. The patient could of course change their mind at any point, and in those

circumstances the proceedings would be listed for an oral hearing. The judge sitting may also decide that the case needs to be listed for an oral hearing and would retain the ability to do this if it was in the interests of justice.

The ability to determine such cases on the papers will become increasingly important if the proposed Mental Health Bill is passed. The proposal to increase the frequency of Restricted Patient referrals under section 71 from once every three years to once a year poses a significant challenge to the Chamber given the limited pool of judges who are ticketed to hear such cases. HMCTS anticipate that this category of referral will increase from the current level of 830 per annum to 2,230 referrals per annum. Referrals under section 68 are projected to increase by 1,360 from the current level of 4,385 per annum.

The most important consideration is to ensure patients in hospital are afforded the same right to privacy and dignity as those in the community.”

7. Rule 2 states: -

(2) Dealing with a case fairly and justly includes—

- (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
- (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
- (d) using any special expertise of the Tribunal effectively; and
- (e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

- (a) exercises any power under these Rules; or
- (b) interprets any rule or practice direction.

8. Rule 35 states: -

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 67, 68, 71 and 75 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 a hearing of the reference.

(4) The Tribunal may dispose of proceedings without a hearing under rule 8(3) (striking out a party's case).

9. It is proposed to amend Rule 35 subparagraph (3) to delete the words "a community patient". This will allow hospital - based patients, including restricted patients, with capacity, to consent to the reference being decided on the papers.
10. The composition of the tribunal is determined by the Senior President of Tribunals (SPT) and is therefore not a matter to be decided by the TPC. The SPT recently decided, after a consultation, not to implement a proposal which would have allowed the cases affected by the proposed rule change to be heard by a judge alone. Because the effect of the proposed rule change would be to permit cases of this sort (references in respect of patients in hospital) to be decided by judge alone, the SPT has informed the TPC that if the rule change is implemented, he will amend the Practice Direction so as to ensure that the current requirement that these cases are heard by a panel is maintained (even though they would be decided on the papers).
11. The TPC considers that a safeguarding issue may arise in connection with the proposed rule change. The TPC is aware that patients detained in hospitals may often refuse to engage with the Tribunal process. The ability to deal with references on the papers would benefit such patients, but it may be thought that there is a limit to the number of occasions on which a reference should be dealt with on the papers without providing the opportunity for a hearing which would provide additional scrutiny. The TPC is aware that the Mental Health Bill is not yet law and it may be considered that the proposed changes may not be appropriate if the references occur only every three years as now as a patient in hospital may then have an oral hearing only every 6 years. The Mental health Bill, at the proposed section 28, provides for references to the Tribunal every 12 months rather than every 3 years as is currently the case.
12. The TPC therefore invites responses as to the desirability of putting in place safeguarding measures, and, if such measures are thought necessary, what they should involve. Without attempting to be a prescriptive list, there could, for example,

be a requirement that every second or third reference (depending on the statutory duration of each) must be considered at an oral hearing which would be able to hear the evidence of witnesses or call for additional information as required. And/or, there could be a requirement for an independent report from advocacy services or the like which would set out the views of the patient on all relevant issues. This would, at least in theory, allow for the patient's voice to be heard even in circumstances where that patient resolutely refuses to participate in a hearing. For the avoidance of doubt, the issue of safeguarding is at present intended to apply to patients detained in hospital only, given their detained status.

The Consultation Questions

Question 1: Do you agree with the proposed change to rule 35? If not, why not?

Question 2: Should there be some form of safeguarding in place in the event that rule 35 is changed as proposed above? If so, what form should that take? Would the proposals in section 34 and Schedule 3 of the Mental Health Bill provide adequate safeguards? If not, why not?

Question 3: Do you think the proposed rule change should go ahead if the timescale for references does not reduce from every 3 years to annually, as proposed by the Mental Health Bill?

Question 4: Do you have any further comments?

How to Respond

Contact Details

Please reply using the response questionnaire template.

Please send your response by **29 August 2023** by email to:

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>