

October 2023

## **Tribunal Procedure Committee**

### **Consultation on possible amendments to the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 in relation to whether hearings in criminal injuries compensation cases are held in public or private.**

#### **Introduction**

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

5. The TPC also has due regard to the public-sector equality duty contained in section 149 of the Equality Act 2010 when making rules.

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

<http://www.gov.uk/government/organisations/tribunal-procedure-committee>

### **The First-tier Tribunal**

7. The First-tier Tribunal is divided into chambers which group together jurisdictions dealing with like subjects or requiring similar skills. One of the Chambers of the First-tier Tribunal is the Social Entitlement Chamber (the “SEC”).

8. The SEC is responsible for deciding appeals against decisions concerning an individual’s entitlement to a range of disability, work related and other benefits, liability to make child support payments, appeals concerning whether and how much compensation can be paid to someone who has sustained injury as a victim of a crime of violence (“criminal injuries compensation cases”), and appeals against decisions refusing asylum support or cancelling an existing award.

9. The Rules which apply in the SEC are the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (the “SEC Rules”). These Rules can be found at: <https://www.gov.uk/government/publications/social-entitlement-chamber-tribunal-rules>

### **This Consultation**

10. This consultation seeks views on a proposal to amend rule 30 of the SEC Rules to remove the requirement for hearings in criminal injuries compensation cases to be held in private, so that by default such cases are held in public.

### **Background to the Proposed Changes**

11. The TPC received the following request from the Judicial office with the support of the Chamber President of SEC.

#### *Tribunal Procedure Rules – public and private hearings in criminal injuries compensation cases*

*1. In criminal injuries compensation (CIC) cases in the Social Entitlement Chamber of the First-tier Tribunal, the rules require hearings to be held in private unless the appellant consents to the hearing being held in public and the tribunal believes it is in the interests of justice to do so. This is an unjustified departure from the open justice principle. The Tribunal Procedure Committee should consult on a proposal to change the rules so that criminal injuries compensation cases are heard in public by default.*

## Background

2. *The 2001 Criminal Injuries Compensation Scheme was the Scheme in force immediately before the First-tier Tribunal was created. Paragraph 76 of the Scheme was as follows:*

*“Hearings will take place in private. The Panel may, however, subject to the consent of the appellant, give permission for the hearing to be attended by observers such as representatives of the press, radio and television. Any such permission will be subject to written undertakings being given:*

*(a) that the identity of the appellant and of any other persons appearing at the hearing or referred to during the appeal will be kept confidential and will not be disclosed in any account of the proceedings which is broadcast or in any way published without that person’s consent; and*

*(b) that no material will be disclosed or in any other way published from which those identities could be discovered without the consent of the subject.”*

3. *In the initial draft rules for the Social Entitlement Chamber published for consultation in May 2008, the relevant rule (29(2)) was that a hearing must be held in private unless the Tribunal considers that it is in the interests of justice for the hearing to be held in public. After the consultation, that draft was replaced by the current rule 30(2), which has not been amended since it was first made:*

*A hearing in a criminal injuries compensation case must be held in private unless—*

*(a) the appellant has consented to the hearing being held in public; and*

*(b) the Tribunal considers that it is in the interests of justice for the hearing to be held in public.*

4. *The TPC’s response to the consultation on the 2008 Rules does not discuss giving the appellant the right to insist on a private hearing. It seems likely that that change was made to more closely follow the existing practice under the 2001 Scheme.*

## Argument

5. *In Khuja v Times Newspapers [2017] UKSC 49, Lord Sumption said:*

*12. With limited exceptions, the English courts administer judgment in public, at hearings which anyone may attend within the limits of the court’s capacity and which the press may report. In the leading case, Scott v Scott [1913] AC 417, public hearings were described by Lord*

*Loreburn (p 445) as the "inveterate rule" and the historical record bears this out. In the common law courts the practice can be dated back to the origins of the court system. As Lord Atkinson observed in the same case at p 463, this may produce inconvenience and even injustice to individuals:*

*The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect."*

*13. The justification for the principle of open justice was given by Lord Atkinson in this passage, and has been repeated by many judges since, namely the value of public scrutiny as a guarantor of the quality of justice. This is also the rationale of the right to a public hearing protected by the European Convention on Human Rights. It is a "means whereby confidence in the courts can be maintained": B and P v United Kingdom, (2001) 34 EHRR 19, at para 36. Its significance has if anything increased in an age which attaches growing importance to the public accountability of public officers and institutions and to the availability of information about the performance of their functions."*

*6. Exceptions to the open justice principle must be justified. It is difficult to see how rule 30(2) can be justified. In particular, the appellant's ability to veto a public hearing is highly unusual. In almost every other part of the justice system, an individual who wishes to displace the presumption of open justice is required to show why it is necessary to do so. Even in those areas of the tribunal system where privacy is the norm (e.g. mental health or special educational needs) the decision as to whether to proceed in private is for the tribunal to make in light of what the interests of justice require.*

*7. Even if the appellant's veto is removed, there is nothing about CIC cases as a category, when compared to other cases in the justice system, which justifies the presumption of them being heard in private. There may be many CIC cases where the appellant must be granted anonymity in order to comply with section 1 of the Sexual Offences (Amendment) Act 1992, but there are other jurisdictions in which anonymity is routinely granted (e.g. asylum) and hearings are nonetheless held in public by default. Criminal proceedings concerning the same offences would normally be heard in public. Civil proceedings seeking damages for the same criminal acts would normally be heard in public.*

8. *It's easy to envision scenarios where the tribunal might be justified in departing from open justice in a particular CIC case. Examples would include cases:*

- *where the appellant has a justified fear of reprisals from the offender;*
- *where an assessment of the award involved considering sensitive medical evidence;*
- *involving children; or*
- *where the alleged perpetrator has not been prosecuted or convicted.*

9. *Individually or taken together, those scenarios (and other similar scenarios) do not add up to a justification for a rule of holding hearings in private by default. In most cases any concerns would be better addressed by the tribunal issuing reporting restrictions while continuing to hold the hearing in public, which is a lesser intrusion on open justice.*

12. Rule 30 of the SEC Rules provides as follows:

### **Public and private hearings**

**30.**—(1) Subject to the following paragraphs, all hearings must be held in public.

(2) A hearing in a criminal injuries compensation case must be held in private unless—

(a) the appellant has consented to the hearing being held in public; and

(b) the Tribunal considers that it is in the interests of justice for the hearing to be held in public.

(3) The Tribunal may give a direction that a hearing, or part of it, is to be held in private.

(4) Where a hearing, or part of it, is to be held in private, the Tribunal may determine who is permitted to attend the hearing or part of it.

(5) The Tribunal may give a direction excluding from any hearing, or part of it—

(a) any person whose conduct the Tribunal considers is disrupting or is likely to disrupt the hearing;

(b) any person whose presence the Tribunal considers is likely to prevent another person from giving evidence or making submissions freely;

(c) any person who the Tribunal considers should be excluded in order to give effect to a direction under rule 14(2) (withholding information likely to cause harm); or

(d) any person where the purpose of the hearing would be defeated by the attendance of that person.

(6) The Tribunal may give a direction excluding a witness from a hearing until that witness gives evidence.

13. It is proposed that the change could be effected by deleting rule 30(2).
14. While the TPC recognises that a significant number of cases will still need to be heard in private, its preliminary view is that, in the interests of open justice, it is appropriate for the default position to be that all hearings are held in public and that any decision to hear the case in private should be that of the tribunal.
15. The TPC therefore invites responses as to the desirability of deleting Rule 30(2) thereby making the default position in criminal Injuries compensation cases that hearings are held in public. The tribunal would retain the power to order that all or part of the proceedings be heard in private and to make anonymity orders, either on application or of its own motion if it considers it in the interests of justice to do so.

### **The Consultation Questions**

Question 1: Do you agree with the proposed change to rule 30? If not, why not?

Question 2: Do you have any further comments?

### **How to Respond**

#### **Contact Details**

Please reply using the response questionnaire template.

Please send your response by **12 December 2023** by email to:

Email: [tpcsecretariat@justice.gov.uk](mailto: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>