

**Tribunal Procedure Committee (TPC) Meeting Minutes
Thursday 06 July 2023**

Meeting (Hybrid) at 7 Rolls Building, London

Mrs Justice Joanna Smith (JS)
Michael Reed - (MJR)
Christine Martin (CM)
Susan Humble (SH)
Gabriella Bettiga (GB)
Jeremy Rintoul (JKR)
Alasdair Wallace (AW)
Razana Begum (RB)
Shane O'Reilly (SOR)
Vijay Parkash (VP)
Hannah Polanszky (HP)

Guests

Julian Phillips (JP) (FtT IAC- Liaison Judge)
Kelly North (KN) – Ministry of Justice (MoJ) Victim and Witness Policy and Strategy Team)
Liz Eaton (LE) (MoJ Victim and Witness Policy and Strategy Team)

Apologies

Philip Brook Smith KC (PBS)
Donald Ferguson (DF)
Timothy Fagg (TF)
Mark Loveday (ML)
Stephen Smith (SS)
Mark Blundell (MB)

Minutes

1. Introductory matters

- 1.1 JS welcomed the attendees to the meeting. She stated that the agenda's line-up had been tweaked to allow KN and LE from the MoJ Victim and Witness Policy and Strategy team to join the meeting at 11.00am. The MoJ officials had been invited to the meeting to provide further details and to answer any questions from the TPC in connection with their request that the TPC consider making new rules to facilitate the use of 'Victims Personal Statements' in the Mental Health jurisdiction (following the topic being initially discussed at the TPC meeting on the 04 May 2023).
- 1.2 JS asked the attendees for their thoughts on adjusting the scheduled TPC meeting dates from November 2023 onwards. The TPC customarily meet on the first Thursday of each month, however JS will be unavailable on Thursdays as she will be hearing a long trial starting in October and currently listed for a period of 16-weeks. The attendees confirmed they had no objection to this proposal. TPC meetings will now take place on Fridays (when JS will not be sitting) as follows: 03 November 2023, 08 December and 02 February 2024.

AP/99/23- The TPC Secretariat to send revised meeting invitations to the TPC members- HP

TPC appointments/membership

- 1.3 The Lord Chief Justice (LCJ) has approved MJR's reappointment for a new term on the TPC. His three-year term commences on 22 May 2023 and will run to 21 May 2026. MJR has received formal notification of his reappointment from Judicial Office (JO). He will be relinquishing his role as the Chair of the Immigration and Asylum Chambers subgroup, and he will lead the newly created Employment Tribunals (ET) subgroup committee.
- 1.4 In respect of the LCJ's appointment recruitment exercise for the vacant non-legal member role, JS reported that the JO is in the process of finalising the contents of the 'expression of interest' (EOI) advertisement. She anticipated the EOI recruitment campaign will be launched by mid- July 2023. The selected member should commence in their post following the summer break.
- 1.5 In respect of the two TPC ET appointments, MoJ Ministers have approved the appointment of Mr Mathew Jackson as the new Lord Chancellor's (LC) appointment to the TPC.
- 1.6 The sift exercise for the ET LCJ's appointment post is complete, and a prospective candidate has been recommended by the recruitment panel. Should the recommendation be accepted, it is expected that the candidate could commence his post by October 2023. JS said she had wanted the ET TPC recruitment process to be completed sooner, in order to provide the new TPC members some settling in time and to enable them to familiarise themselves with the likely ET Rules work/ TPC workstreams ahead of the formal transfer of responsibility for the making of the ET Rules from the Department for Business and Trade to the TPC. Unfortunately, due to the delay to the recruitment process, this is now unlikely to happen.
- 1.7 The TPC Secretariat confirmed that the TPC membership segment on the TPC website page on GOV.UK has been updated with details of the latest appointments/membership changes.

Employment Tribunal (ET) Subgroup

- 1.8 JS reported that she had met with the Senior President of Tribunals (SPT). One of the TPC topics discussed was the transfer of responsibility for the making of Procedure Rules in the ET and Employment Appeal Tribunal to the TPC (new powers under the Judicial Review and Courts Act 2022 measures). JS and the SPT had agreed the need carefully to manage this Rules exercise so as to avoid any detrimental impact on existing (weighty) TPC work streams, i.e. immigration and asylum and mental health.
- 1.9 JS reported that the SPT suggested that the TPC may wish to consider the use of a 'guest' resource to sit on the ET subgroup alongside appointed TPC members, to assist in dealing with the anticipated significant ET Rules workload. The TPC agreed in principle with this suggested approach for managing the future

ET work. MJR added that once the prioritisation of planned ET rule changes/amendments has been agreed, he expected the ET subgroup to have greater insight into the number of potential 'guest' members it requires (if any). The matter will be revisited at the October 2023 meeting.

- 1.10 The TPC agreed it was important to hold a preliminary introductory meeting in order to plan and prepare for the related forthcoming ET Rules work (following the formal transfer of responsibility of ET Rules planned in October 2023). JS asked VP to organise an online meeting with the relevant senior ET judiciary to discuss their views as to the proposed prioritisation of future ET rule changes to be included in a future TPC rules statutory instrument (SI) package. The attendees should include: the TPC Chair, the Employment Subgroup members, MoJ Policy officials and the Employment Tribunal Presidents (Judge Clarke- ET President for England and Wales & Judge Walker- ET President of the ET (Scotland)).
- 1.11 The intended meeting should be scheduled before the next TPC meeting on 05 October 2023 and ideally should be held during the week commencing 02 October 2023. VP said that he would contact Robin Rimmer, the MoJ policy official lead dealing with the ET rules transfer legislative exercise to ask that this meeting request be facilitated.
- 1.12 MJR is pleased to announce that JKR has volunteered to join the ET subgroup.

AP/100/23: To organise a meeting between JS, ET subgroup, ET judiciary and MoJ Policy- VP/RR

Update on the Civil Procedure Rule Committee sub-committee on the 'Cape v Dring' litigation

- 1.13 JS briefed the TPC on her involvement with a newly created Civil Procedure Rules Committee (CPRC) sub-committee tasked with considering potential changes to the current Civil Procedure Rules in relation to non-party access/disclosure of court documents (following the Supreme Court judgment circulated in 2019: *Cape Intermediate Holdings Ltd v Dring*).
- 1.14 JS had agreed to prepare a position paper for the sub-committee, setting out the approach taken to the issues of non-party access to documents and disclosure in all tribunal chambers. As the TPC has previously investigated the matter, JS reported that she had sought permission from the Tribunal Chamber Presidents who had previously contributed to the Confidentiality Subgroup' investigations, in order to seek their consent to share the material provided to the TPC with the sub-committee. JS added that there may be a possibility that once the sub-committee have concluded their endeavours and reported their thinking on potential rule changes to the CPRC, the TPC may need to revisit this matter. It will certainly need to discuss the sub-committee's observations and any recommendations and subsequently consider any implications for potential future tribunal rule changes.

Matters Arising

- 1.15 The draft minutes from the 8 June 2023 meeting were provisionally agreed by the TPC. The minutes from the 4 May 2023 meeting were published on GOV.UK.
- 1.16 There were no outstanding action points on the July 2023 TPC Action Log that required the TPC's further attention.

2. Immigration & Asylum Chambers Subgroup (IACSG)

New Plan for Immigration programme: Nationality and Borders Act 2022

- 2.1 JS provided the TPC with a position update regarding the Home Office (HO) plans for progressing the Nationality and Borders Act 2022 (NABA) 'tranche one' reforms. She had discussed this matter with the relevant senior MoJ policy official regarding NABA provisions relating to i) Accelerated Detained Appeals (ADA), ii) Priority Removal Notices & Expedited/Joined Expedited Appeals and iii) Credibility Statements.
- 2.2 JS reported that the Government still intends to progress the implementation of the 'tranche one' NABA reforms. MoJ and HO are working towards introducing these measures in October 2023 at the earliest, pending final ministerial decisions/approval. JS sought the TPC's views on how best this might be achieved.
- 2.3 The TPC discussed the indeterminate state of the SI: 'Tribunal Procedure (Immigration and Asylum Chamber) Amendment Rules 2023'. The TPC Amendment Rules SI (planned to be laid in April 2023) had been put on pause, following the Government's decision to suspend/delay the NABA 'tranche one' reforms.
- 2.4 RB confirmed that the existing SI could theoretically be signed off at the 05 October 2023 meeting, if the Government's intention is to proceed with the NABA legislation (or parts of it) in its existing form without amendment. Therefore, the anticipated date for laying the TPC Amendment SI in November 2023 is likely to be achievable. RB added that in sequencing terms, she understood that the planned Illegal Migration Bill 2023 Rules regulations would have to be prepared/laid before Parliament first before the NABA rules work was introduced/ came into force, to factor in the potential overlap between the two Acts of Parliament.
- 2.5 The TPC agreed that if the NABA legislation is amended in any substantive way (which affects the prepared TPC Amendment SI for the 'tranche one' reforms) it is likely that there will need to be a further public consultation exercise conducted by the TPC designed to meet the changed circumstances. In this situation a lead time and a much later laying date (conceivably October 2024) is likely to apply for introducing potential NABA 'tranche one' rule changes (to factor in the TPC resource/time needed and duration of another consultation exercise running its course to conclusion).

2.6MJR raised an important point in relation to the latest IACSG consultation exercise (completed in January 2023). He said that the accuracy of such a consultation is time sensitive, as content may cease to be accurate due to new policy developments altering the original policy objective (as consulted by the TPC) and there may be repercussions in respect of the TPC response that had been published in April 2023. The TPC agreed that the April 2023 consultation response in respect of the NABA 'tranche one' rules changes is likely to remain current for present purposes, however this is unlikely to be the case as time goes on in light of the political climate and ongoing developments in the United Kingdom's illegal migration policy stopping Channel crossings.

2.7JS said that she will contact the MOJ policy official to update her on the outcome of the meeting discussion and the TPC's agreed approach to managing this work. Also, to request further information and clarification on HO/MoJ NABA 'tranche one' implementation plans, in order to facilitate efficient planning and preparation for the recommencement of the NABA 'tranche one' rules work and future 'tranche two' NABA rules work.

AP/101/23 To email the MoJ New Plan for Immigration policy team to update them on the outcome of the meeting/ TPC approach. To request an update on government NABA implementation plans- JS

Illegal Migration Bill 2023

2.8In respect of the potential Illegal Migration Bill 2023 (IMB) immigration reforms, the Government consider it will be necessary for the new Tribunal Procedure Rules to be in place from the date of commencement for the provisions coming into force. To enable this to happen an amendment to the IMB has been made during the parliamentary passage/stages of the Bill to provide for the first set of Tribunal Procedure Rules to be made by the Lord Chancellor, rather than the TPC, after which the rule-making power for IMB rules will revert back from the Lord Chancellor to the TPC

2.9The TPC are aware that a cross government departmental consultation exercise is currently taking place in respect of the draft IMB Rules. The TPC remains of the view that it does not wish to see, or comment upon, the draft IMB Rules SI until the legislation receives royal assent/ comes into force.

Immigration (Citizens' Rights Appeals) (European Union Exit) Regulations 2020- Rule 22A

2.10 The TPC are preparing to consult in order to gain stakeholder views in relation to a HO proposal to amend rule 19(3D) of the Tribunal Procedure (First-tier Tribunal) (IAC) Rules 2014. HO is seeking a rule change to provide that where a person who has an outstanding administrative review of an European Union Settlement Scheme decision (but has not brought appeal proceedings against the original decision) decides to withdraw their administrative review, the time limit for appealing re-starts. This rule change appears to be required to address a significant backlog in the immigration system in respect of administrative reviews administered by the HO.

2.11 The latest version of the draft IACSG consultation paper amended by SS was circulated to the TPC ahead of the meeting. The TPC agreed in principle that it is ready to launch pending SS's validation. The consultation will run for a 6-week period.

AP/102/23: To send an amended version to SS to seek his thoughts/consent: - VP

3 GTCL Subgroup

Correspondence from a member of the public: how documents are provided by the Tribunal to parties who reside overseas

3.1 The TPC considered a document prepared by PBS containing observations from all Chamber Presidents in respect of the current use of email addresses to effect provision of materials overseas, the applicability of the Hague Service Convention and the interrelation between rule 16(7) and rule 16(1)(c) of the Property Chamber Procedure Rules.

3.2 Following the GTCL subgroup's analysis and subsequent discussion into the matter the TPC agreed that there is no need for a rule change to address the question of provision of materials overseas. The TPC's view was that the existing tribunal rules are adequate and that it will take no further action in respect of this query. JS will write to the member of the public to inform him of the TPC's decision in respect of the matter.

4. HSW Subgroup

Mental Health Tribunal- rule 35 proposed change

4.1 CM provided the attendees with an update in respect of the draft consultation paper she had prepared regarding the proposed change to rule 35 of the Health, Education and Social Care Chamber (Health, Education and Social Care Chamber (HESC)) Procedure Rules. The proposed rule change was requested by Judge Mark Sutherland Williams, the HESC Chamber President and Judge Sarah Johnston, the HESC Deputy President and principal judge for the Mental Health jurisdiction of HESC. Rule 35 is concerned with the management of these cases and, in particular, the types of cases which may be disposed of without a hearing.

4.2 CM circulated a final draft consultation paper on a Mental Health jurisdiction rule 35 proposed change ahead of the TPC meeting. Pending some minor amendments, the TPC confirmed that the consultation paper is ready for publication to gain stakeholder views. The consultation will run for a 6-week public period.

AP/103/23: To send final draft version to CM to seek her confirmation before publishing the consultation Mental Health jurisdiction Rule 35 proposed change -VP

'Open Justice' in Criminal Injuries Compensation cases

4.3 The TPC have received a paper from SOR setting out a proposed change to rule 30(2) of the Social Entitlement Chamber (SEC) (First-tier Tribunal) Rules for the 'Criminal Injuries Compensation (CIC)' jurisdiction of the (SEC) so that criminal injuries compensation cases are heard in public by default. The objective for the potential rule change is to further promote 'open justice' within this jurisdiction and remove the existing default position of private hearings in criminal injuries compensation cases.

4.4 Following a discussion, the TPC agreed to consult on the matter/potential rule change. CM will prepare the draft consultation paper in due course. The TPC will revisit the matter at the October 2023 meeting.

**AP/104/23 To prepare a draft consultation paper (Open justice in Criminal Injuries Compensation cases) and circulate ahead of the October 2023 meeting-
CM**

Victim Personal Statements in the (Mental Health jurisdiction- Health, Education and Social Care Chamber)

4.5 The Government is seeking to add an entitlement to the Victims' Code of Practice in England and Wales ("the Code") for victims to submit a Victim Personal Statement (VPS) to the Mental Health jurisdiction (HESC) of the First-tier Tribunal (the "MHT"), with an option to apply to the MHT to attend the hearing to read it.

4.6 KN and LE joined the meeting via MS Teams, to discuss the issue of VPS policy. JS thanked KN and LE for agreeing to attend the meeting and explained they had been invited to address a number of points on which the TPC require further information and clarity. These key points being:

- To gain further understanding of the need to make MHT Rules in relation to VPS/ the Code.
- To address the TPC's concern that there is no need for new rules given that a VPS will be inadmissible as evidence in tribunal proceedings.
- To seek clarity on why the TPC (in their statutory remit) have been asked to make new Rules in advance of the publication of a revised Code of Practice, without the opportunity to examine the final framework to enable them to draft new Rules (following a public consultation exercise).

4.7 KN briefed the TPC on the background and key objective to enable victims to submit a VPS to the MHT, when the appellant's discharge is being considered with an option to apply to the MHT to attend the hearing to read it. She added that the policy objective is seeking to align victims' entitlements procedures in the MHT more closely with those in the criminal courts.

4.8 KN explained that the current version of the Code gives victims in criminal proceedings a right to give a VPS in court, or have it read on their behalf, and if the defendant is found guilty, the judge or magistrate considers the VPS when deciding the defendant's verdict.

4.9 The current Code also entitles victims of sexual or violent offences, where the offender is sentenced to 12 months or more in prison or given a hospital order under the Mental Health Act 1983, to be referred to the Victim Contact Scheme (VCS). Victims are then entitled to submit a new VPS to the Parole Board, or use their original VPS, when the offender's release is being considered. However, victims opted into the VCS, where the offender is subject to a hospital order, are not able to submit a VPS to the MHT. KN added that there have been comparisons made between victims' entitlements in the parole process and the MHT. Key stakeholders had argued for parity of victims' entitlements in the criminal justice and tribunals systems.

4.10 The TPC questioned the merits of the VPS policy proposal regarding its functionality, usefulness, and effect in MHT hearings. The TPC sought clarification on the rationale behind the VPS policy proposal for the MHT to adopt an entitlement to permit victims giving a VPS in tribunal proceedings.

4.11 KN explained that the Government intend to make clear to victims that VPS cannot be taken into consideration in terms of the decision for the appellant's release. MOJ and HMCTS intend to manage expectations through developing a comprehensive communication strategy. LE said that in December 2021 the Government launched "Delivering Justice for Victims" – a public consultation setting out the intention to improve victims' experiences of the criminal justice system across England and Wales. The respondents' responses from the consultation that included Victim's sector stakeholders expressed support for including a VPS in the MHT.

4.12 The TPC raised the point that the Parole Board and the Tribunal have different functions/ special characteristics in respect to their role conferred by legislation/Parliament to achieve their statutory remit, i.e., the countervailing rights of the patient in a mental health setting.

4.13 CM cited recent caselaw: Judicial Review: (*R (Maher) v the First-tier Tribunal and others*) paragraph 155: -

- *"Starting with some general observations before addressing each specific ground, as explained above, the Parole Board has a different function and role to that of the FTT. They are each dealing with offenders, but the similarity ends there. The Parole Board is required to consider if it is satisfied that it is no longer necessary for the protection of the public that an offender be detained whereas the FTT is*

concerned with the treatment of a mental health patient, their clinical progress and assessment of risk”

- 4.14 KN acknowledged the different functions of the Parole Board process in the criminal justice system compared with the Tribunal’s process in respect of the procedure for ‘evidence and submissions’. She suggested that the use of VPS entitlement in the Parole Board process could provide alternative helpful context in relation to release conditions for Tribunal procedures when the appellant’s release is being considered by the MHT.
- 4.15 JS said that the current HESC Rules set out the procedure to permit evidence and submissions to be presented by parties and entitlement to attend a hearing, as the Tribunal deemed appropriate. Theoretically the Tribunal already had the power/ discretion to enable a VPS to be submitted by either party and a victim to apply to attend the MHT if the Tribunal deemed appropriate.
- 4.16 KN explained that the current HESC Rules do not meet their desired policy intention in terms of the expectation of mandating the tribunal panel to hear a VPS in the MHT if indeed one is received. She added that a potential rule change would facilitate their policy intention ahead of the new Code coming into force.
- 4.17 In relation to timetabling, KN stated that the MoJ are working toward implementing the revised Code by April 2024, at the earliest. The Government has committed to put this VPS entitlement into the revised Code and aim to “operationalise” before the revised Code comes into effect. A later public consultation will be launched to ask views on how policies are presented, rather than on the policies themselves.
- 4.18 JS explained that due to the TPC agreeing to the Government prioritisation of Immigration related rules work and the impending transfer of responsibility for the making of ET Rules to the TPC, it is most unlikely that this VPS matter will be dealt with speedily.
- 4.19 To assist KN and LE, JS explained the TPC rules process and likely timescales for making rule changes factoring in the consultation stages. JS added that it would not be feasible to conclude the necessary activities to meet the MoJ’s target for April 2024 (even if the TPC agreed that a rule change was appropriate following stakeholder engagement). The potential consultation exercise would likely be completed around October 2024.
- 4.20 In relation to the Victims and Prisoners Bill (VPB) that was presently at Committee Stage before Parliament, KN stated that the Government would consult on a revised Code after the Bill has received Royal Assent. She reiterated the request for the TPC to consider their proposal and consult for a potential rule change ahead of the revised Code coming into force in 2024.
- 4.21 JS stated that as a matter of principle, the TPC consulting on rules where the primary legislation has yet to gain Royal Assent is contrary to the TPC’s usual procedure. The TPC consider that to do so is premature and might be viewed as pre-empting what Parliament may decide.

4.22 KN referred to the draft Code published on the 19 June 2023. She explained that the draft Code is primarily to inform the Bill's passage through Parliament and contains place holder text for policy areas requiring further policy consideration/development and ministerial approval before the MoJ include the policy areas in the final document.

4.23 The TPC reaffirmed their practical apprehensions that they cannot draft rules without knowing what the ultimate updated Code will say. The Draft Code has been published but as KN has confirmed there are placeholders where it concerns the MHT that are still in the process of policy development to be settled and subject to change/ exclusion.

4.24 The TPC also expressed unease with the proposal to permit the introduction of inadmissible material which could place the Tribunal in a problematic position. The Tribunal will have to state that the VPS is irrelevant and has not/will not be taken into account (which could be detrimental to the victim and contradictory to the desired policy intention of entitling the victim to have the impact of the criminal act taken into account). Equally, the fact that the tribunal panel will be required to examine /listen to the VPS, might give rise to further litigation on the basis that the tribunal panel's decision was possibly influenced by the contents of the VPS.

4.25 The TPC remarked that this policy potentially erodes the legislative purpose of the MHT in respect of the operation of the Mental Health Act 1983. There is a conceivable risk that allowing the introduction of irrelevant material now may result in future related 'entitlement' policies following the same precedent.

4.26 To assist the TPC in their rule making process, JS requested additional information from KN and LE: a copy of the consultation document, the latest version of the draft Code of Practice, and the current Parole Board Rules (The Parole Board Rules 2019) to be sent to the secretariat. The TPC would also welcome a new policy paper being prepared (to address their comments) and an indicative draft of a suggested rule change in order to assist the TPC in understanding how this might be formulated in a draft consultation.

4.27 The TPC agreed that upon receipt of a further policy paper, the VPS topic will be added as an agenda topic for the October 2023 meeting.

5 Overview Subgroup **TPC Work Programme**

5.1 The TPC work programme has been updated and circulated as of 28 June 2023. It was agreed that the TPC work programme should be updated to amend/remove:

Section 1 of the TPC Work Programme

- Update entries 3 and 4 to update the progress for the consultation on 'possible changes to the First-tier Tribunal (Immigration and Asylum Chamber) Rules and the Upper Tribunal Rules'.

- Update entry 6 to update the progress status for the consultation on ‘possible amendments to the HESC Rules regarding proposed changes to the way that the Tribunal decides cases referred to the Tribunal pursuant to S.68 Mental Health Act 1983’.
- Add new entry: Open Justice in criminal injuries compensation cases.

6.EU Law (Revocation and Reform) Bill

6.1 The Department of Business and Trade (DBT) have submitted a policy paper for the TPC’s consideration in relation to the commencement of a provision in the Retained European Union Law (Revocation and Reform) (REUL) Act 2023. DBT have advised that the provision will impact the current tribunal procedure in every tribunal chamber and may therefore necessitate some amendments to the current tribunal rules, tribunal practice directions, or guidance ideally before they are brought into effect in 2024. DBT have confirmed that the REUL Act received Royal Assent on 29 June 2023, and while most of the Acts provisions come into effect automatically, the two clauses with an impact on tribunal procedure have to be proactively commenced.

6.2 The TPC discussed the matter and confirmed that they will consider proposals for potential rule changes once further information is received (which will be considered at the October 2023 meeting).

AP/105/23- VP to report back to the DBT to share the TPC’s view/observations and approach in respect to their policy proposal. Add the topic ‘REUL Bill’ as an agenda item for the October 2023 TPC meeting.

7. A.O.B

Online Procedure Rules Committee

7.1 The Online Procedure Rules Committee (OPCR) held its inaugural meeting on 26 June 2023 and will hold subsequent meetings in July and October 2023. At their next meeting on 10 July the OPRC expect to make some decisions on the formation and scope for initial sub-committees, with a view to working towards an autumn 2023 completion date. One of the related sub-committees will be liaising with the TPC in relation to tribunal rule matters.

Next Meeting: Thursday 5 October 2023