November 2026

Tribunal Procedure Committee

Consultation on possible amendments to the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 to remove provisions relating to pre-hearing medical examinations of mental health patients

Contents

Introduction 1

Proposal 2

Applications and references under the Mental Health Act 2

Pre-hearing examinations – current position 3

Proposed rule change 4

Context 4

Rationale for the changes 5

The TPC's view 7

Questions 7

Introduction

1. The Tribunal Procedure Committee ("TPC") is the body that makes rules to govern practice and procedure in the First-tier Tribunal and in the Upper Tribunal. It is an independent Non-Departmental Public Body, sponsored by the Ministry of Justice. Information on the TPC can be found at: www.gov.uk/government/organisations/tribunal-procedure-committee

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. Section 22(4) of the TCEA requires that the TPC's rule-making powers be exercised with a view to securing that:

   (a) in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done;

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

Proposal

6. The TPC has received a proposal from the Chamber President of the Health Education and Social Care Chamber of the First-tier Tribunal ("HESC") to consult on the removal of rule 34 of the Tribunal Procedure (First-tier Tribunal) (Health Education and Social Care Chamber) Rules 2008 (the "HESC Procedure Rules"). This would have the effect that HESC would no longer carry out medical examinations of mental health patients before their Tribunal hearing.

Applications and references under the Mental Health Act

7. Section 66 of the Mental Health Act 1983 allows patients detained in hospital or subject to a community treatment order to make an application to the Tribunal.

8. Section 68 requires hospital managers to refer a patient's case to the Tribunal where the patient has been detained for a period of time and has chosen not to apply to the Tribunal.

9. In addition, the Secretary of State refers patients who have been detained following criminal proceedings to the Tribunal under sections 67, 71 or 75.

10. In all cases, applications and references are heard by HESC. HESC mental health panels include a judge, a medical member (always a consultant psychiatrist) and a specialist lay member.

11. Prior to the hearing, the panel members are provided with a report from the Responsible Clinician, a social circumstances report by a social worker or care coordinator and a nursing report. Practice Direction: First-tier Tribunal Health Education and Social Care Chamber: Statements and Reports in Mental Health Cases made by the Senior President of Tribunals specifies the contents of these reports.

12. In some cases, a patient or their representative will commission an independent psychiatric report. These are most common in cases where a patient has been detained following criminal proceedings.

13. Legal representation is available through the Legal Aid scheme for all patients detained or subject to community treatment orders under the Mental Health Act.

Pre-hearing examinations – current position

14. Rule 34 of the HESC Procedure Rules states:

> **"Medical examination of the patient**
>
> 34.—(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."

15. In practice, this means that the medical member of the panel carries out a medical examination of the patient who has made the application to the Tribunal. This is usually by video, but it can be done in person, depending on whether the hearing is virtual or in person. If possible, the medical member also reviews the patient's electronic medical notes. This happens before the hearing and is known as the pre-hearing examination. The patient's legal representative may be present at the pre-hearing examination. HESC's internal guidance is that the patient must always be in a hospital setting if a pre-hearing examination is done in person, even if the patient is living in the community.

16. Following the pre-hearing examination, the medical member discusses the key points with the panel in the discussion before the hearing starts. The Tribunal's practice is for the judge (or occasionally the medical member) to give a summary of the pre-hearing examination to both parties at the start of the hearing.

17. Rule 34 requires that a pre-hearing examination take place:

    a. in all cases where the patient is detained under section 2 of the Mental Health Act (28 day detention for assessment) unless the patient does not want a pre-hearing examination;

    b. in other cases if the patient requests a pre-hearing examination in writing not less than 14 days before the hearing;

    c. if the Tribunal directs a pre-hearing examination.

18. Pre-hearing examinations are also relevant to the Tribunal's power to proceed in the absence of a patient. Rule 39 of the HESC Procedure Rules states:

> "**Hearings in a party's absence**
>
> 39.—(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."

19. Rule 39 has the effect that a hearing cannot proceed in the absence of a patient unless a pre-hearing examination has been carried out or is impractical or unnecessary. On the rare occasion that the panel considers that a pre-hearing examination is necessary, that will lead to an adjournment of the hearing.

Proposed rule change

20. The proposal under consideration is to delete rule 34 in its entirety and to amend rule 39.

21. The President also considered, as an alternative to the proposed amendment, whether the Tribunal should be given an express power to obtain the patient's wishes and feelings. However, he did not consider it appropriate for Tribunal members to visit a patient who chose not to attend, or was unable to attend a hearing. Further, he took the view that the Tribunal would already be able to take steps to ascertain the patient's wishes and feelings or facilitate the patient's participation without an express power in the HESC Procedure Rules. This could be achieved, for example, by obtaining the patient's views through their legal representative, or taking into account any written submissions made by, or on behalf of the patient.

Context

22. Pre-hearing examinations were first introduced under the Mental Health Act 1959. They were originally compulsory in all mental health cases. Following a TPC consultation in June 2013, the TPC changed the Procedure Rules so that pre-hearing examinations were only compulsory in the case of patients detained under section 2 of the Mental Health Act 1983.

23. The TPC consulted again in March 2018 on a proposal to abolish pre-hearing examinations - Proposal to amend the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 - GOV.UK. Having reviewed the consultation responses, the TPC decided not to make the changes requested by the HESC senior judiciary. This was because of an "overwhelming response against any change, supported by cogent reasons and evidence of direct experience." The TPC noted that large representative organisations including NHS Trusts and the Royal College of Psychiatrists believed that the pre-hearing examination added value.

24. By contrast with England, there is no system of pre-hearing examinations in Scotland. However, rule 20 of The Mental Health Review Tribunal for Wales Rules 2008 - currently provides for pre-hearing examinations before a hearing in all cases.

Rationale for the changes

25. The President has suggested the following reasons for wishing to make the change.

The original rationale has materially weakened

26. Pre-hearing examinations were introduced under the Mental Health Act 1959 and historically served a practical purpose in circumstances where medical evidence was inconsistent, incomplete, or presented by clinicians with limited tribunal experience.

27. That context has changed. Since 2013, the Senior President of Tribunal's Practice Direction on statements and reports in mental health cases has improved the focus and quality of reports by requiring evidence to address the statutory criteria.

28. The appointment of a Chief Medical Member in 2010 has enabled work with the Royal College of Psychiatrists to improve the quality of medical reports, and consistency over when trainees present medical evidence.

29. An agreement first made between the Mental Health jurisdiction in HESC and the Royal College of Psychiatrists (RCPsych) in 2018 specifies the steps and supervision of trainees before they present medical evidence independently. This is on the Royal College website https://www.rcpsych.ac.uk/training/curricula-and-guidance/specialty-guides?searchTerms=detaining%20authorities

30. Extensive training resources written by the Chief Medical Member and Postgraduate Tutor and trainees from South London and the Maudsley NHS Foundation Trust are now available free on the Royal College of Psychiatrists' website and include films and webinars – see the website Presenting evidence at mental health tribunals

31. The historic concern that the pre-hearing examination is needed to compensate for poor or inexperienced medical evidence is therefore substantially less compelling than it was.

The pandemic provided a practical test

32. During the pandemic, pre-hearing examinations were deemed not practicable in many cases because of infection risk and were approached on a case-by-case basis following EB v Dorset Healthcare NHS Trust and the Lord Chancellor: [2020] UKUT 362 (AAC) - GOV.UK. The HESC internal statistics are that in 2021–22 pre-

hearing examinations were requested in 22% of cases, compared with 60% of hearings prior to Covid-19.

33. The significance of this is that HESC continued to operate during a period in which pre-hearing examinations were substantially reduced. HESC submits annual data to the Care Quality Commission (CQC), published in the CQC annual publication Monitoring the Mental Health Act - Care Quality Commission. This data, analysed by the CQC, showed no difference in discharge rates when pre-hearing examinations were not practicable, and that discharge rates remained consistent with past years.

34. This does not mean discharge rates are the only measure of fairness. The previous consultation cautioned against using outcomes alone as the measure of value. But it does mean that one of the principal empirical assumptions in favour of retention - that pre-hearing examinations materially affect results - is now considerably diluted.

Pre-hearing examinations create structural procedural difficulty

35. The 2018 TPC consultation noted at paragraph 2.5 the unusual position of medical members undertaking pre-hearing examinations: they examine the patient privately, form a provisional view in the absence of the other party and the other members of the panel, and then participate in the hearing and decision.

36. Those concerns remain. The pre-hearing examination is a unilateral fact-gathering exercise by one judicial member (the medical member), creating asymmetry of information between panel members and parties, and limiting the ability of the parties to test what was said or perceived. Pre-hearing examinations are generally short interviews, lasting between 20 and 30 minutes. Any 'findings' are generally relayed at the tribunal hearing by the medical member or the judge. This gives rise to jurisprudential questions, such as fairness and balance.

Pre-hearing examinations impose operational, listing and safety burdens

37. Late notice pre-hearing examination requests create practical listing difficulties, particularly where a request is made shortly before a hearing and arrangements must be made with the hospital, ward and staff. Particular safety concerns for medical members exist when conducting pre-hearing examinations alone, on wards, or in Community Treatment Order cases, where patients may be in the community, and may have disengaged from services, or may not have been recently assessed.

38. There are also confidentiality and data concerns, including examples of hospitals passing medical members' phone numbers or email addresses to patients to arrange pre-hearing examination meetings.

Future demand makes efficient use of medical member resource essential

39. If pre-hearing examinations do not materially improve decision-making or outcomes, their continuation is difficult to justify in a system facing increased pressure.

40. HESC is currently anticipating future pressure due to the implementation of the Mental Health Act 2025. Consultant psychiatrists are a limited resource. HESC wants to ensure that this resource is used only where necessary.

The TPC's view

41. The TPC's provisional conclusion is that rule 34 should be removed. The TPC is concerned about the retention of a procedure rule which allows an individual panel member to speak to a party to the proceedings without the other party present and this evidence to be relayed to the other party in a filtered format. The TPC has taken into account the importance of transparency and of treating the parties even handedly. The TPC is concerned that pre-hearing examinations may not be appropriate in a modern judicial system.

42. The TPC also wishes to consult on the option of retaining rule 34 but limiting its application to cases in which HESC has directed that there be a pre-hearing examination. This may give HESC flexibility in cases where the written medical evidence is not sufficient or in cases where the patient does not wish to attend a hearing or is too unwell to do so.

43. The TPC's provisional conclusion is that a consequential amendment should be made to remove rule 39(2)(b). The TPC's provisional conclusion is that it will be possible to decide whether to proceed in the absence of a patient without any panel member interacting with the patient in the absence of the other party to the proceedings, in the way identified by the HESC Chamber President.

Questions

Question 1

Do you agree with the proposal to remove rule 34 so that there is no longer any provision for pre-hearing examinations in England? If not why not?

Question 2

Do you consider that pre-hearing examinations should be retained in cases where the Tribunal directs a pre-hearing examination? If not, why not.

Question 3

Do you agree with the proposal to make a consequential amendment to rule 39 so that the pre-hearing examination is no longer a relevant factor in deciding whether to proceed in a patient's absence? If not why not?

Question 4

Do you have any other comments on the proposals?

Response

44. Please reply using the response questionnaire template.

45. Please send your response by **Thursday 4 February 2027** to one of the following:

a. Email: tpcsecretariat@justice.gov.uk

b. Post: Tribunal Procedure Committee
Administration of Justice Directorate

Policy, Communications and Analysis Group
Ministry of Justice
Post Point: Area 7.55
102, Petty France
London
SW1H 9AJ

Confidentiality and publication of responses

46. A summary of responses may be published. Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These include the Freedom of Information Act 2000, the Data Protection Act 2018 and the Environmental Information Regulations 2004.

47. If you want information that you provide to be treated as confidential, please explain why you regard the information as confidential. The TPC will take your explanation into account but cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by an IT system will not, by itself, be regarded as binding.

48. 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