

December 2023

Tribunal Procedure Committee

Reply to Consultation and Further Consultation on possible amendments to the Tribunal Procedure (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. A consultation (the Consultation) took place this year seeking 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. A link to the consultation is at:

<https://www.gov.uk/government/consultations/possible-amendments-to-tribunal-procedure-first-tier-tribunal-health-education-and-social-care-chamber-rules-2008>

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. 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 68 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).

7. In the Consultation it was proposed to amend Rule 35 paragraph (3) to delete the words "a community patient". This would allow hospital - based patients, including restricted patients, with capacity, to consent to the reference being decided on the papers.

8. As stated in the Consultation, 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. At the time of the Consultation, 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).

9. As stated in the Consultation, the TPC considered 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.

10. The TPC therefore invited responses to the Consultation 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.

11. The Consultation questions were: -
 1. Do you agree with the proposed change to rule 35? If not, why not?

 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?

 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?

 4. Do you have any further comments?

The Responses

- 12.** There was a total of 22 responses (see Annex A hereto). Of those, seven respondents were in favour of the change and the remainder shared significant concerns.
- 13.** It is apparent that some of those concerns arose from a misunderstanding as to the proposal and it may be that the Consultation was insufficiently clear in its terms.
- 14.** The first concern expressed by several respondents was that patients without capacity or with learning disabilities would suffer as a result of the rule change. They would not understand the significance of their case being decided on the papers. To be clear, the TPC would stress that the proposed rule change would apply only to those patients with capacity. Persons without capacity would never be in a position to consent to the tribunal dealing with their reference on the papers.
- 15.** The second area where confusion may have arisen was concerned with panel composition. As the TPC had indicated in the Consultation, the SPT has made it clear that if the rule change is made, decisions must be made by a full panel, not by judge alone and that he will amend the Practice Direction accordingly.
- 16.** Several respondents expressed the view that to make such a rule change at this time was premature and any such change should await the passing of a new Mental Health Act. However, the TPC would point out that the Mental Health Bill is currently in draft form only and has not been put before Parliament. There is no way of knowing how long it will be before there is a new Mental Health Act. Furthermore, the draft Bill does not deal with procedure. The procedure rules are dealt with by the TPC and if any new legislation requires changes to the procedure rules, then that will be a task for the TPC as and when there is an Act.
- 17.** Several respondents expressed concern that if the rule change is made there are risks. There was concern that the reports upon which the Tribunal would make its decision may be inadequate. The patient's capacity could change between the date of any decision by the Responsible Clinician and the date the Tribunal decides the matter and there is no scrutiny by anyone other than the Responsible Clinician about the question of capacity.
- 18.** Several of the respondents also pointed out, correctly, that there is a significant difference between patients who are subject to Community Treatment Orders and are therefore living in the community and those patients detained in hospital and thus there need to be safeguards to ensure that they are not unjustifiably detained.
- 19.** The TPC understands those concerns but also recognises the right of an individual to choose not to have a hearing if they do not want one and they have the capacity to make that decision.

20. Accordingly, prior to the TPC reaching a decision on this rule change it would like to further consult on including safeguarding measures in the rules. In particular, that in addition to only those patients with capacity being able to request that the case be decided on the papers, it should also be only those patients who are also legally represented. In that way the TPC considers that the representative can challenge the issue of capacity if they deem the client to lack capacity. They can also raise questions concerning the adequacy of reports and the possible need for addenda thereto. It is of course always possible for a patient to change their mind prior to a decision and to request a hearing. However, if a legally represented patient with capacity decides that they do not want a hearing the TPC is of the view that such a decision should be respected.

21. It is therefore proposed that rule 35 is amended to allow the Tribunal to make a decision on a reference¹ hearing, in respect of a patient detained in hospital aged 18 or over, with capacity and is legally represented, and who has made a written request that they do not wish to attend or be represented at a hearing of their reference, and the Tribunal is satisfied that the patient has the capacity to make that decision.

The Consultation Questions

Question 1: Do you agree with the proposed change to rule 35? 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 **13 February 2024** 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>

¹ This includes mandatory references made under section 68 or 71(2) and discretionary references made under section 67(1) and 71(1) of the Mental Health Act 1983.

Annex A- List of respondents

1. Angela Wall- Butler & Co Solicitors
2. Carolle Burrell, Kaitlin Whelan and Angela MacFarlane- Law & Society Research Group
3. Daisy Fry and Bella Travis- The Challenging Behaviour Foundation and Mencap
4. Josanne Holloway- Medical Tribunal Member, Mental Health Review Tribunal for Wales
5. Pamela Charlwood - Mental Health Tribunal Members' Association
6. Mia Majid- Pennine Care National Health Service Foundation Trust, Mental Health Law Manager
7. Alison Cobb- Mind (Mental Health Charity)
8. Ms Austin- Tribunal Judge, - Health, Education and Social Care Chamber, First-tier Tribunal (Mental Health)
9. Ian Callaghan- Rethink Mental Illness
10. Simon John Rogerson- Member of the Public
11. Michael Sergeant- National Health Service Nottingham Healthcare- National Health Service Foundation Trust
12. Dr Anne Moynihan- Health, Education and Social Care Chamber, First-tier Tribunal
13. Christopher Marchment – Health, Education and Social Care Chamber, First-tier Tribunal
14. Kate Tyrell- Reeds Solicitors
15. The Mental Health Lawyers Association
16. The Law Society
17. Mark Osborne JP- Specialist Member - First-tier Tribunal (Mental Health)
18. Sophy Miles- Barrister and Fee-Paid Judge of the Health, Education and Social Care Chamber, First-tier Tribunal (Mental Health)
19. Judge Stephen Rogers- District Judge (sitting in retirement)
20. Si Hussain- Medical Tribunal Member, Health, Education and Social Care Chamber, First-tier Tribunal (Mental Health)

21. Dr Dasari Michael- Tribunal Doctor, Consultant Psychiatrist, Humber Teaching National Health Service

22. Dr Kiki O'Byrne- Tribunal Member- Health, Education and Social Care Chamber, First-tier Tribunal (Mental Health) - (Response Blank)