

Consultation on proposed amendments to the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI 2008/2699)

The Tribunal Procedure Committee is established by section 22 of the Tribunals, Courts and Enforcement Act 2007 with the function of making Tribunal Procedure Rules governing the practice and procedure to be followed in the First-tier Tribunal and Upper Tribunal, which are established by section 3 of that Act. Before making Rules, the Committee must consult such persons as it considers appropriate.

The purpose of this consultation is to seek views on proposed changes to rule 35 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, which is concerned with hearings in mental health cases.

Information about how and when to respond will be found at the end of this document. The consultation questions are also in a separate Word document, which can be used for submitting your response.

Further information on the Tribunal Procedure Committee can be found at <http://www.justice.gov.uk/about/moj/advisory-groups/tribunal-procedure-committee.htm> and further information on the Health, Education and Social Care Chamber of the First-tier Tribunal can be found at <http://www.justice.gov.uk/about/hmcts/tribunals.htm> .

The proposals

Introduction

1.1 The First-tier Tribunal is divided into six chambers, each with its own set of Rules. The complete Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, as currently in force, may be found at <http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/rules.htm> . Part 4 of those Rules makes provision for proceedings in “mental health cases”, which are defined

in rule 1(3) as “proceedings brought under the Mental Health Act 1983 or paragraph 5(2) of the Schedule to the Repatriation of Prisoners Act 1984”.

1.2 Within Part 4, rule 35 provides –

“**35.**— (1) The Tribunal must not dispose of proceedings without a hearing.
(2) This rule does not apply to a decision under Part 5.”

1.3 Rule 39(2) provides –

“(2) The Tribunal may not proceed with a hearing in the absence of the patient unless –
(a) the requirements of rule 34 (medical examination of the patient) have been satisfied; and
(b) the Tribunal is satisfied that –
(i) the patient has decided not to attend the hearing; or
(ii) the patient is unable to attend the hearing for reasons of ill health.”

1.4 Paragraph (1) of rule 34, to which reference is made in rule 39(2)(a), provides –

“(1) Before a hearing to consider the disposal of a mental health case, an appropriate member of the Tribunal must, so far as practicable—
(a) examine the patient; and
(b) take such other steps as that member considers necessary to form an opinion of the patient’s mental condition.”

1.5 By rule 1(3), a “hearing” means an oral hearing, although it may include a hearing conducted in whole or in part by video link, telephone or other means of instantaneous two-way electronic communication.

1.6 These rules provide safeguards that are important in many cases. However, the Committee is considering limiting the effect of rule 35(1) by making it subject to two exceptions, one concerning references in respect of community patients and one concerning the striking out of proceedings.

Discussion – references in respect of community patients

2.1 Community treatment orders were introduced in 2008, through amendments to the Mental Health Act 1983 made by the Mental Health Act 2007. A patient made subject to such an order is known in the Act as a “community patient” and ceases to be detained in hospital. However he or she is liable to be recalled to hospital under section 17E and, if the community treatment order is revoked under section 17F, will be detained and treated in most respects as though never discharged from hospital under the order.

2.2 The provisions in the 1983 Act requiring a patient’s case to be referred to the Tribunal if the patient has not made an application to the Tribunal continue to apply notwithstanding that the patient has been discharged from detention in hospital under a community treatment order. Section 68(2) requires a patient’s case to be referred to the First-tier Tribunal within six months of the patient’s admission to hospital if the patient himself or herself has not made an application to the Tribunal. Section 68(6) then requires a case to be referred to the Tribunal if a period of more than three years (one year if the patient is under 18) has elapsed since a tribunal last considered the patient’s case.

2.3 Rule 35 requires a hearing in all these cases. This involves not just the judge and members meeting together but also the attendance of professional witnesses who have prepared reports for the hearing. Rules 34(1) and 39(2)(a) also require arrangements to be made for the patient to meet the medical member of the Tribunal.

2.4 However, patients in the community and not detained are often content with their position and decide not to attend a hearing of a reference or to see the medical member of the Tribunal. Although an examination under rule 34 may be dispensed with if it would not be practical, an effort to conduct a preliminary examination is required and this often involves at least one postponement or adjournment in the mere hope that the patient will at least be examined by the medical member, even if he or she still does not attend the adjourned hearing.

2.5 If the patient has been examined but does not attend the hearing, the hearing can take place in the patient's absence provided the Tribunal is satisfied that the patient's absence is deliberate. However, if a patient does not attend, there is often little point in having a hearing at all because, as full written reports will have been provided to the Tribunal, there is frequently nothing that the Tribunal wishes to ask the professional witnesses. The witnesses' attendance will then have been for no purpose. Moreover, it is seldom possible to arrange two or more hearings in the same session when hearings are arranged for the convenience of patients and witnesses so that inefficient use will have been made of the judge and members as well.

2.6 We understand that the number of community treatment orders has exceeded expectations. Between April and November 2010, a total of 2,051 community treatment order cases were received by the First-tier Tribunal. During the same period, there were 461 adjournments or postponements in such cases. This suggests that there are adjournments or postponements in 22.5% of cases. The available statistics do not enable us to say exactly what proportion of the adjournments or postponements were due to the patient failing to attend a hearing or indicating that they would not attend, but it is thought to be a significant proportion and may even be a majority. The costs are substantial. Her Majesty's Courts and Tribunals Service estimates that it costs £1,557.79 to arrange a case in which it is necessary to reconvene after an adjournment. That sum covers only the fees, travel, subsistence and clerking of the Tribunal. It does not include the cost of attendance by witnesses, including clinicians, nurses and social workers, and sometimes also lawyers.

2.7 Although references are made for the protection of patients, it currently seems to us that rule 35(1) also places an unnecessary burden on community patients themselves, since they are expected to attend hearings they might rather not attend. They are likely to be quite capable of making decisions to accept the terms of a community treatment order and not to attend a hearing and they are entitled to independent mental health advocates and to non-means-tested legal aid to assist them in making informed choices on such matters.

2.8 It is therefore proposed that rule 35 be amended so that the Tribunal may make a decision that disposes of a reference under section 68 where the patient is a community patient and has consented to the matter being decided without a hearing.

2.9 The rule would be permissive so that the Tribunal could decide to hold a hearing where one would be appropriate because, for instance, it considered that the medical member should examine the patient or it had questions for the patient or other witnesses arising out of the written reports. Otherwise it would determine the reference on the papers. Since it would be unnecessary for the tribunal to meet at a place convenient to anyone else, it would be easier for a number of references to be listed for consideration on the papers on the same day, thus making far more productive use of judges and other members of the Tribunal and substantially reducing the unit cost of each case.

2.10 We emphasise that this proposal is limited to references. It would still be a requirement that there be a hearing of any application brought by the patient and, in references, there would still be a hearing unless the patient positively consented to the case being decided without one. It is anticipated that a form sent to the patient by the Tribunal would give the patient an opportunity to state that he or she was content with the community treatment order and consented to the reference being decided without a hearing. Consent could be withdrawn at any time before the case was determined.

Discussion – striking out

3. In all cases in the First-tier Tribunal other than mental health cases, the power of striking out may be exercised without a hearing, although the Tribunal may hold a hearing where it considers that one is necessary or desirable. It is not easy to see why mental health cases should be treated any differently, particularly as the only ground on which the Tribunal may strike out a mental health case is for lack of jurisdiction under rule 8(3). While jurisdictional issues can be contentious, in which case there should be a hearing, in other cases it may be obvious that a tribunal lacks jurisdiction. It is therefore proposed to enable the First-tier Tribunal to strike out a mental health case without a hearing.

The proposed amendment

4. It is proposed that the whole of rule 35 be substituted so that it is the same style as rule 23 (dealing with cases in the Health, Education and Social Care Chamber other than mental health cases) and equivalent rules applying in other chambers.

“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 and has consented to the reference being decided without a hearing.

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

Consultation Questions

Q.1 Do you agree that the Tribunal ought to be able to determine a reference in respect of a community patient without a hearing, provided the patient has given valid consent?

Q.2 Do you agree that the Tribunal ought to be able to strike out a case for lack of jurisdiction without a hearing?

Q.3 Do you have any other comments on the draft rule 35?

When answering the consultation questions, please do keep in mind that the rules should be simple and easy to follow and should not include provisions that contain unnecessary requirements or repeat requirements that are set out elsewhere. The Committee must aim to meet the objectives set out in section 22(4) of the Tribunals, Courts and Enforcement Act 2007, which include securing “that the rules are both simple and simply expressed”, and it aims to do so in a consistent manner across all jurisdictions.

This consultation will run for a period of **12 weeks** commencing from **1st June 2011** and closing on **23rd August 2011**.

How to Respond

Please send your response by **Tuesday 23rd August 2011** to:

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or

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Extra copies of this consultation can be obtained using the above contact details or online at: <http://www.justice.gov.uk/about/moj/advisory-groups/ts-committee-open-consultations.htm>