Proposal to amend Rule 34 of the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (medical examination of the patient in mental health cases)

Stakeholder Consultation

June 2013

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Introduction

1.1 The Tribunal Procedure Committee 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 replaced a number of tribunals in 2008, including mental health review tribunals in England. Further information on the Tribunals can be found at: www.justice.gov.uk/tribunals.

1.2 This consultation seeks your views on a proposal to amend rule 34 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 which re-enacts rule 11 of the Mental Health Review Tribunal Rules 1983. It generally requires that, in cases under the Mental Health Act 1983, there must be a medical examination of the patient by the medically-qualified member of the tribunal before the case is heard.

1.3 Currently rule 34 provides:

> "**Medical examination of the patient**
>
> (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.
> (2) For the purposes of paragraph (1) that member may—
> (a) examine the patient in private;
> (b) examine records relating to the detention or treatment of the patient and any after-care services;
> (c) take notes and copies of records for use in connection with the proceedings."

1.4 The Senior President of Tribunals' practice statement on the *Composition of tribunals in relation to matters that fall to be decided by the Health, Education and Social Care Chamber on or after 18 January 2010* provides that the "appropriate member" is the medically-qualified member of the panel hearing the case,

1.5 Also relevant is rule 39(2)(a), which provides that the tribunal may not proceed with a hearing in the absence of the patient "unless the requirements of rule 34 have been satisfied".

1.6 The complete Rules, as currently in force, can be found at: www.justice.gov.uk/tribunals/rules

1.7 The proposal is that the requirement that there be a medical examination should be relaxed and made discretionary. However, it is proposed that there should normally be medical examinations in cases where a patient is detained for assessment under section 2 of the Mental Health Act 1983 and that there should be a duty placed on hospitals to make medical records available to the First-tier Tribunal in all cases.

Current practice

2.1 A medical examination under rule 34 is known as a “preliminary examination” or “PE”.

2.2 Although it may be concluded that it is not “practicable” to examine a patient who simply refuses to be examined or who has absconded, a PE takes place in nearly all of the 20,000 cases a year that proceed to a hearing.

2.3 A PE requires the presence of the patient and a medically-qualified member of the Tribunal at a suitable venue, before the hearing takes place. They usually meet in private but patients are told that they can choose to have someone such as a nurse or advocate present. The clinical team may advise that someone sits in if the patient is upset or agitated. The average time taken to conduct a PE is about an hour (which includes note writing) but this can vary considerably and the time taken can be very much longer in complex cases. Where the patient is detained, the venue is usually a room within the hospital where the patient is detained. The PE then provides an opportunity for the patient’s case notes to be considered. Even where the patient is subject to a community treatment order, the venue is often in the relevant hospital, because it tends to be easier to arrange a venue there and also because it can easily be combined with reading the case notes.

2.4 It is not generally considered to be good practice for the PE to take place on the day of the hearing. Both preliminary examinations and hearings can be distressing for patients and it is considered important to avoid any unnecessary stress just before the hearing. However, having the PE on the same day as the hearing is not always avoidable, particularly in the large number of cases concerned with detention for assessment under section 2 of the Mental Health Act 1983 where the timetable for hearing an appeal is very tight. Also, the PE often takes place on the day of the hearing in those cases where patients are living in the community under community treatment orders, because two trips to a hospital are likely to be inconvenient and potentially more distressing than one. Apart from creating additional stress, a PE on the day of the hearing can create timetable pressures for the tribunal and can interfere with the ability of the patient’s representative to take full instructions from the client, although efforts are made to arrange for the PE to be early enough to allow the patient to speak to his or her representative and to have a break before the hearing. On the other hand, conducting the PE on the day of the hearing does make more efficient use of medically-qualified members and reduces their travelling costs.

2.5 Following decisions of the superior courts, it is usual for the medically-qualified member to disclose his or her preliminary view and the reasons for it to the other members of the tribunal before the hearing and the presiding judge then discloses that information to the participants at the beginning of the hearing or during it. Thus, in one important study of the role of medically-qualified members of mental health review tribunals, many were observed “to make a conscious effort to encourage the patient to repeat the previous assessment interview” (Richardson and Machin, "*Doctors on Tribunals*", British Journal of Psychiatry 176 (2000), pages 110-115).

Theoretical criticisms and alternative models

3.1 For those used to traditional courts or even to other tribunals, PEs can seem anomalous. The very purpose of having a PE is to assist the medically-qualified member to form an opinion on a matter that is ultimately one on which the whole panel must form an opinion. It would also usually be regarded as unsatisfactory for one member of a panel to have received evidence that other members have not received and that the patient's representative (if any) and the other parties to the case have not seen or heard. It is even more unusual for a member of a tribunal to hold a lengthy conversation with one party to proceedings in the absence of other parties, particularly if the conversation is about the issues in dispute.

3.2 However, the superior courts have rejected suggestions that PEs are fundamentally unfair and have, instead, insisted on them being operated in a transparent manner that meets acceptable standards of fairness. In particular, it has been held to be necessary for the medically-qualified member to disclose to the patient's representative and other participants in proceedings any views formed as a result of the examination and the reasons for them and it has also been pointed out that, although the rule requires the medically-qualified member to take the steps necessary to form an opinion, "it is obvious that the medical member must not form a concluded opinion until the conclusion of the hearing, since otherwise the outcome of the hearing would be prejudged" (*R. v Mental Health Review Tribunal, ex parte Clatworthy* [1985] 3 All E.R. 699 (DC); *R.(S) v Mental Health Review Tribunal* [2002] EWHC 2522 (Admin)).

3.3 Moreover, perceptions of unfairness, as opposed to actual unfairness, may be less important where what might otherwise be seen as an advantage lies with the citizen in citizen v State cases than they would be in citizen v citizen cases or where the perceived advantage lay with the State. That is because the State, usually represented in mental health cases by the hospital managers and, in some cases, the Secretary of State for Justice, can well understand the purpose of PEs and is unlikely to perceive unfairness where none actually exists.

3.4 The model of having a three-person tribunal including a medically-qualified member for hearing cases in which medical issues arise pre-dates mental health review tribunals, which were first introduced only under the Mental Health Act 1959. From 1919, pensions appeal tribunals dealing with war pension claims used such a model and so did medical appeal tribunals dealing with medical questions in industrial injuries cases from 1948. The successors of those tribunals continue with the same model in the War Pensions and Armed Forces Compensation Chamber and the Social Entitlement Chamber of the First-tier Tribunal.

3.5 However, in each of those Chambers, the medically-qualified member *may* examine the claimant but is not bound to do so. Moreover, where there is such an examination in the War Pensions and Armed Forces Compensation Chamber, the member of the First-tier Tribunal who carries out the examination writes a report but does not then sit as a member of the panel hearing the appeal (although the rules do not prohibit him or her from doing so). It is also noteworthy that in industrial injuries cases, the power to conduct an examination is limited to "physical examinations", so that there is not the element of private conversation with a party that mental health

examinations entail. Furthermore, in both those types of case, and in other types of case in the Social Entitlement Chamber where there is a medically-qualified member of the tribunal, the First-tier Tribunal has a power to refer a claimant for examination by another doctor so that that doctor may provide a report to the First-tier Tribunal.

3.6 A similar approach is taken in the Mental Health Tribunal for Scotland, which has taken over functions similar to those of the First-tier Tribunal in mental health cases that were previously performed by sheriff courts. Whereas the rules for mental health review tribunals in Wales and Northern Ireland make provision for PEs that is similar to the provision in England, there is no provision for PEs in Scotland. Instead, the tribunal has the power to obtain a report from an independent expert and to require the expert to attend a hearing. However, this power is rarely exercised in practice because, insofar as the tribunal may require an independent report, it can generally rely either on a report obtained by the patient's representative – patients being eligible for non-means-tested legal aid – and, in any event, the tribunal is often able to elicit the information that might otherwise be obtained at a one-to-one medical examination at the hearing itself. The tribunal still has a medically-qualified member so that it has its own expertise for the purpose of both framing relevant questions and interpreting the answers.

3.7 Thus, in our view, there is no fundamental objection to PEs but there is a pragmatic question as to whether they are necessary or desirable in all cases.

Advantages and disadvantages from administrative and judicial perspectives

4.1 There seem to be two main advantages claimed for PEs. The first is that a PE effectively provides the First-tier Tribunal with an up-to-the-minute report, which is particularly valuable in those cases where there may otherwise not be a report by anyone independent of the hospital managers. It may be more difficult to elicit the relevant evidence at a hearing, where there are many people present and a patient may be under greater stress. Whether or not that is to the advantage of the patient in terms of being discharged, it may increase the chances of the tribunal reaching the "right" answer in a case where there is no independent report. The need for the First-tier Tribunal to carry out its own investigation may be particularly acute where the patient is detained under section 2, due to the tight timetable in such cases (which account for slightly over a quarter of all hearings).

4.2 The second claimed advantage of a PE is that it can lead to the hearing itself being more focussed because the members of the First-tier Tribunal can ask more pertinent questions and disclosing the medically-qualified member's preliminary views to all parties at the outset of the hearing can have the effect of narrowing the issues in the case.

4.3 A medically-qualified member commenting on the study mentioned above (paragraph 2.5) said that one advantage of the PE was that "it assists the medical member to ask the most appropriate questions at the hearing" (Gibson, "*Medical Roles in Mental Health Review Tribunals*", British Journal of Psychiatry 176 (2000), pages 496-497). He said that another advantage was simply that the PE gave the medically-qualified member an opportunity to read the hospital notes but, given how time-consuming PEs were and the limited number of medically-qualified members

available, he suggested that providing the notes to the whole tribunal in the half an hour before the hearing would allow the tribunals to dispense with PEs. That prompted a comment by a lay member that half an hour would not always be enough and that some notes required a degree of interpretation for the non-medically-qualified members (Prins, *Complex Medical Roles in Mental Health Review Tribunals*, British Journal of Psychiatry 177 (2000), page 182). However, even if longer than half an hour might be required, reading the notes could nearly always take place on the day of the hearing.

4.4 Cost is an important consideration. Medically-qualified members are paid a separate fee for attending for the purpose of carrying out a preliminary examination and this is paid in addition to the fee for the hearing even if the PE takes place on the same day as the hearing. The fee is currently £174 per case, so that the total cost of PEs is about £3.2m per year, not counting travel and subsistence payments and the cost of late cancellations when fees must still be paid. On the other hand, the cost of PEs is considerably less than the cost of independent medical reports obtained through legal aid.

4.5 PEs also have an impact on the recruitment and deployment of medically-qualified members of tribunals. There is a shortage of medically-qualified members of the First-tier Tribunal, especially those in full-time NHS practice as working consultant psychiatrists, and the requirement that they find extra time for the PEs – including the travelling time where the PE takes place on a day prior to the hearing date – makes it difficult for many younger, employed, psychiatrists to act as panel members.

Advantages and disadvantages from patients' perspectives

5.1 Potentially, PEs appear to have two important advantages for patients. The more obvious is that a PE can act as a substitute for an independent report. The second is that, together with rule 39(2), rule 34 has the practical effect of requiring detaining authorities to produce a detained patient to the First-tier Tribunal and to allow the patient to communicate privately with a member of the tribunal. Taken with the duty imposed by the Mental Health Act 1983 on detaining authorities to refer certain cases to the First-tier Tribunal, the requirement to produce the patient to the First-tier Tribunal is an important civil liberties safeguard.

5.2 However, the availability of non-means-tested and non-merits-tested legal aid, coupled with the First-tier Tribunal's power under rule 11(7) to appoint a legally-qualified representative to act on behalf of patient, may have reduced the importance of these potential advantages. If a patient has a legal representative who may instruct an independent consultant to prepare a report and who may demand to see a patient and is entitled to communicate privately with him or her, reliance on a PE may be unnecessary.

5.3 On the other hand, in cases where an independent report – or at least an opportunity to obtain one – might be a necessary alternative to a PE, a PE may be preferable if it can be arranged more quickly. A general duty to carry out a PE avoids any delay there might be if a PE were to be directed only when it was

discovered that there was no other report. This consideration is particularly relevant where patients are detained under section 2.

5.4 Moreover, for some patients, a PE may be a desirable precursor to a hearing, because they may find it easier to talk on a one-to-one basis rather than at a hearing where there are not only three members of the panel but also a number of other people present. Thus a patient may consider that a medically-qualified member may obtain a better view of his or her condition in a PE than at a hearing.

5.5 However, other patients may find a PE an additional stressful experience they would rather not endure, particularly if they are living in the community and the arrangements for attending a PE are inconvenient. If they are distrustful of doctors, they may feel that an adverse opinion formed by the medically-qualified member at a PE will unduly influence the other members of the tribunal and be very difficult to change at a hearing.

5.6 An examination for the purpose of an independent report commissioned by a representative might, of course, be equally stressful, but a patient can choose whether or not there should be such an examination and any such examination is also likely to be on a date further removed from that of the hearing than would be the case for a PE.

Conclusion and proposals

6.1 We consider that the current legislation has the effect of requiring there to be PEs in cases where at best they are unnecessary and where they may be positively undesirable. On the other hand, we consider that there can be advantages in there being PEs. Consequently, we propose that, in all cases, it should be open to the First-tier Tribunal to decide whether or not there should be a PE.

6.2 However, because of the likelihood of a PE being desirable in cases where patients are detained under section 2 and the lack of time for case-management directions in such cases, we propose that the default position in those cases should be that there will be a PE but that the First-tier Tribunal should have a broad power to decide that there should not be a PE in a particular case.

6.3 In other cases, we propose that there should be a simple power to direct a PE. The default position for these other cases would then be that there would not be a PE unless the First-tier Tribunal directed that there should be one in a particular case.

6.4 Although a PE may well be desirable where a patient is unrepresented, case-management difficulties militate against generally requiring a PE in such cases, The First-tier Tribunal has the power to appoint a representative and if a patient does not wish to be represented, he or she may also not want a PE. Moreover, a patient may without warning become represented, or cease to be represented, shortly before a hearing. Indeed, a need for a PE may become apparent only during a hearing, in which case it might well be possible for there to be a short adjournment to enable a PE to be carried out. Therefore, while the fact that a patient is unrepresented will be an important consideration when deciding whether or not there should be a PE, we

do not consider it necessary or desirable to make any specific provision in the Rules in respect of unrepresented patients.

6.5 Accordingly, we propose that rule 34 should be replaced by a new rule as follows:

> "**Medical examination of the patient**
>
> **34.**—(1) In proceedings under section 66(1)(a) of the Mental Health Act 1983 (application in respect of an admission for assessment), an appropriate member of the Tribunal must, so far as practicable and unless the Tribunal directs otherwise, examine the patient and may do so in private.
> (2) In any other case, an appropriate member of the Tribunal may examine the patient and may do so in private."

6.6 Currently, rule 34(2)(b) and (c) provides for the appropriate member to examine medical records for the purpose of a PE and to make notes. We suggest that the link with PEs be removed and that rule 34(2)(b) and (c) should be replaced by a new rule 32(9), requiring the responsible authority to make the records available to the tribunal and empowering all the members of the Tribunal to examine the records and make notes. We anticipate that the medically-qualified member of the panel will usually take the lead but we do not see why the other members should not also examine the records. We also anticipate that the medically-qualified member would usually wish to look at the records immediately before the hearing but, in a complex case, he or she might wish to do so earlier. It seems unnecessary to retain in the rule the specific reference to forming an opinion of the patient's mental condition, which formerly seems to have applied also to PEs.

6.7 We propose that the new rule 32(9) should be worded as follows:

> "(9) Records relating to the detention or treatment of a patient and any after care services must be made available to the Tribunal by the responsible authority and the Tribunal may examine such records and take notes and copies of them for use in connection with the proceedings."

6.8 If PEs are not required in all cases, it is necessary to amend rule 39(2)(a), dealing with hearings in the absence of the patient. We propose that the First-tier Tribunal should be able to proceed with a hearing in the absence of a patient only if there has been a PE or else the First-tier Tribunal has decided that a PE is either unnecessary or impracticable. We propose that rule 39 should read:

> **"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 in the absence of the patient unless—

(a) the patient has been examined under rule 34 (medical examination of the patient) or the Tribunal considers that such an examination is unnecessary or not practicable; 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."

6.9 We have considered whether it is necessary to make special provision for cases where a patient wanders in and out of a hearing, as not infrequently happens, but we do not currently propose to do so. In such a case, the new formulation would, we consider, provide the necessary flexibility because, ordinarily, if a PE was not necessary before the hearing, the First-tier Tribunal would be unlikely to consider one necessary merely because of a patient's short absence from a hearing. It would therefore be entitled to continue the hearing where a patient is absent having decided not to attend that part of the hearing. We envisage that the question whether a PE was necessary would be kept under review and the First-tier Tribunal would therefore finally come back to it immediately before the end of the hearing and consider whether a PE had become necessary because, for instance, it had not been possible to form an adequate view of the patient's condition due to his or her prolonged absences. Regard would have to be had to whether the patient was represented and to a representative's submissions and to all the other available evidence but it seems unnecessary to spell that out. The effect of the rule would merely be to require the First-tier Tribunal to consider whether a PE had become necessary as a result of a patient's absence; it would not require there to be a PE if one was not required by rule 34(1).

6.10 We welcome views on all these issues.

The consultation questions

1. ***Do you agree that the requirement that the First-tier Tribunal must conduct a PE in all cases save where it is impracticable to do so should be removed?***

2. ***Do you agree that the First-tier Tribunal should have some discretion as to whether to conduct a PE in <u>all</u> cases?***

2A. ***If not, please state in which classes of case you consider that the First-tier Tribunal should continue to be required to conduct a PE in all cases save where it is impracticable to do so.***

3. ***Do you agree that in cases where a patient is detained under section 2 of the Mental Health Act 1993, the First-tier Tribunal should conduct a PE unless a positive decision is made not to do so?***

4. ***Are there any other classes of case in which you consider that the First-tier Tribunal should conduct a PE unless a positive decision is made not to do so?***

5. ***Do you agree that, in any cases not covered in your answers to questions 2A, 3 and 4, the First-tier Tribunal should not conduct a PE unless it positively decides to do so?***

6. ***Do you have any other comments on the proposed drafting of a new rule 34?***

7. ***Do you agree that all members of a panel of the First-tier Tribunal should be entitled to examine the medical records of the patient?***

8. ***Do you have any other comments on the proposed drafting of a new rule 32(9)?***

9. ***Do you agree that the First-tier Tribunal should be permitted to proceed with a hearing in the absence of a patient only if there has been a PE or the First-tier Tribunal considers that a PE would be unnecessary or impracticable?***

10. ***Does any specific provision need to be made in rule 39(2)(a) to take account of the possibility that a patient might repeatedly leave a hearing?***

11. ***Do you have any other comments on the proposed drafting of a new rule 39(2)(a)?***

12. ***Do you have any other comments on the Rules?***

How to respond to this consultation

The consultation begins on Tuesday 18th June and ends on Tuesday 10th September. Please send your response so that it is received by the latter date.

Please send your consultation response to:

TPC SECRETARIAT
102 Petty France (Post point 4.38)
London SW1H 9AJ

Or you can email your response to: tpcsecretariat@justice.gsi.gov.uk

The consultation questions are available in a separate Word document on the Tribunal Procedure Committee's website at www.justice.gov.uk/about/tribunal-procedure-committee/ts-committee-open-consultations and that can be used for submitting your response.

When responding please state whether you are doing so as an individual or representing the views of an organisation – please make it clear who the organisation represents.

Confidentiality and data protection

In general, the Tribunal Procedure Committee regards consultation responses as public documents. They may be published by the Tribunal Procedure Committee and referred to in its Reply to the consultation.

If you would prefer your response to be kept confidential, you should be aware that information you provide, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA) and the Data Protection Act 1998. If you want information that you provide, including personal data, to be treated as confidential please be aware that under the FOIA there is a statutory Code of Practice with which public bodies must comply and which deals with, amongst other things, obligations of confidence.

In view of this, if you do not want your response or information to be made public it would be helpful if you could explain why you regard the information you have provided as confidential. If the Tribunal Procedure Committee receives a request for disclosure of the information it will take full account of your explanation, but cannot give an assurance that confidentiality can be maintained in all circumstances. Please note that an automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Tribunal Procedure Committee.