

Scottish Government Consultation

Amendment to Rule 58 of the Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005

Rule 58: Power to Decide Case Without a Hearing

March 2011

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PART 1 - INTRODUCTION

1.1 The Mental Health Tribunal for Scotland (“the Tribunal”) was established by the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”).

1.2 The Tribunal is the body in Scotland charged with making, approving and reviewing decisions imposing compulsory measures for the detention, care and treatment of people in Scotland who have a mental disorder. The Tribunal exercises a judicial function, and brings its specialist knowledge to bear on the cases before it. In exercising its judicial function it is an independent, impartial body making decisions on the facts and applying the relevant law.

The Tribunal Rules

1.3 The Tribunal is required to act in accordance with the 2003 Act and also with secondary legislation made under the 2003 Act, which includes [the Mental Health Tribunal for Scotland \(Practice and Procedure\) \(No. 2\) Rules 2005](#) (“the Tribunal Rules”).

1.4 The Tribunal Rules prescribe the practice and procedure to be followed in proceedings before the Tribunal. Any changes to the Tribunal Rules take the form of a statutory instrument which is laid before the Scottish Parliament.

Amending the Tribunal Rules

1.5 The Tribunal has approached the Scottish Government with a view to having the Tribunal Rules consolidated and amended to remove unnecessary duplication in order to make the Tribunal Rules more user friendly.

1.6 The Tribunal Rules have already been amended in 2006 and 2008, and so we have indicated to the Tribunal that we will be happy to look at consolidating the Tribunal Rules, and to take the opportunity at the same time to make them more user friendly.

1.7 We discussed the proposals to amend the Tribunal Rules with the Tribunal and concluded that we thought it would be better to leave any consolidation and amendment exercise on the Tribunal Rules until at least later in the year. This is because, by then, we will know whether and when we might get a Bill slot in the Scottish Parliament to take forward amendment of the 2003 Act itself, which we have agreed we will do in response to the Report of the McManus Review Group. We would then have a better idea of what further changes might be needed to the Tribunal Rules resulting from the changes to be made to the 2003 Act. As the aim of the bigger changes is to make the Tribunal Rules more user friendly, we would want to avoid a situation where we replace in total the current Tribunal Rules this year, only to amend them again just a year later.

1.8 However, in addition to the proposed technical amendments and consolidation of the Tribunal Rules the Tribunal identified and suggested two areas

for amendment which would have more of an impact beyond a mere consolidation exercise. These were in relation to the concept of “additional parties and relevant persons” in rule 48, and the power of the Tribunal to decide cases without a hearing under rule 58.

Consultation on amending rule 58

1.9 Whilst the issue of “additional parties and relevant persons” in rule 48 will also be left until the fuller consolidation and amendment of the Tribunal Rules, as that concept is more integral to the Tribunal Rules, we considered that rule 58 could be taken forward in advance of any bigger changes as it is a discrete issue.

1.10 The consultation at this time therefore seeks views only on the Tribunal’s proposal that its power to decide a case without a hearing under rule 58 be amended.

1.11 As this is a consultation on a single discrete issue, and we are aware that the Tribunal has helpfully already sought views on this topic amongst a number of bodies and service user groups in advance of approaching the Scottish Government, we are seeking consultees’ views over a shorter period than usual for a public consultation.

1.12 This consultation will therefore run for an 8 week period, from Monday 21st March until Monday 16th May 2011. Depending on the results of the consultation, we would then look at laying any amending statutory instrument to make a change to rule 58 in the Scottish Parliament in June, with the intention that it come into force in the autumn.

PART 2 - DISCUSSION OF RULE 58

What does rule 58 allow at present?

2.1 Rule 58 of the Tribunal Rules empowers the MHTS to decide cases without a hearing. It provides, in full, that:

“Power to decide case without a hearing

58.—*(1) Except as otherwise provided for in the Act, this rule applies where—*

(a) the relevant persons agree in writing;

(b) the Tribunal considers that having regard to the nature of the issues raised in the case, sufficient evidence is available to enable it come to a decision; and

(c) to do so will not, in the view of the Tribunal, be contrary to the interests of the patient.

(2) Subject to paragraph (3), the Tribunal may decide the case without a hearing.

(3) Before making a decision under paragraph (2), the Tribunal must consider any representations in writing submitted by relevant persons.”.

2.2 Rule 58 can therefore be utilised by the Tribunal, to allow it to consider cases without an oral hearing. There are no restrictions on the types of case that can be decided by a three-member tribunal panel at a hearing under rule 58.

2.3 However, at present, rule 58 can only be invoked if:

(a) all the parties agree in writing,

(b) the Tribunal considers that, having regard to the nature of the issues raised in the case, sufficient evidence is available to enable it to come to a decision; and

(c) to do so will not, in the view of the Tribunal, be contrary to the interests of the patient.

2.4 Further, if it uses rule 58, there is an additional control built in to the rule that, before deciding the case, the Tribunal is required to consider any representations in writing submitted by relevant persons. The Tribunal can also call for further evidence, whether oral or written, and decide the case at an oral hearing or on a further hearing under rule 58.

2.5 At a hearing under rule 58 cases are also still considered by a three member tribunal panel as normal, the difference being simply that the hearing takes place without the parties to the hearing and their representatives being present on the day.

Why change rule 58 at all?

2.6 The Tribunal would like to be able to make more use of rule 58, particularly in cases (of any type) where there is no real dispute between the parties as to the best way to progress a patient's case. The Tribunal has been aware of concerns raised by patients, named person and carers that it was unnecessary in certain circumstances for a patient to attend a particular hearing and to be put through the stress of a tribunal hearing.

2.8 The Tribunal is concerned that its use of rule 58 in appropriate cases is hampered due to the fact that the rule requires all the relevant persons to agree in writing, which can often not be achieved due to the timescales within which certain cases require to be heard.

Change rule 58 in what way?

2.9 The proposal is that rule 58 be amended to give the Tribunal power to decide cases without an oral hearing on its own initiative. The Tribunal would therefore write out to the parties, stating that it has identified a particular case as being appropriate to be decided by a hearing under rule 58 and that it intends to deal with the case under rule 58.

2.10 The question then is what additional balances are built in to rule 58, and we think there are 4 possible options on which your views are sought:

Option 1: the Tribunal is given the power to deal with cases without an oral hearing on its own initiative (as above), but any party (including the patient) may request an oral hearing on showing cause why an oral hearing is necessary.

Option 2: this is the same as option 1, with parties having the right to request an oral hearing on showing cause. In option 2 though, the patient would be treated differently from the other parties in terms of their request for an oral hearing, by having an automatic right to an oral hearing (i.e. no need for the patient to show "cause" as to why there should be an oral hearing). In option 2, the patient would need to notify the Tribunal that they wanted an oral hearing, otherwise the assumption would be that all parties were content that the Tribunal should proceed with a hearing under rule 58 (provided that no other party has requested a hearing).

Option 3: this is the same as option 1, with parties having the right to request an oral hearing on showing cause why an oral hearing is necessary. In option 3 though unless the patient *positively* responds to the Tribunal indicating that they are content for the hearing to proceed under rule 58 then the Tribunal cannot decide the case at a hearing under rule 58 but must proceed with an oral hearing.

Option 4: is simply that rule 58 is not changed at all.

Discussion of options

2.11 **Option 1** is the simplest option to operate and treats all parties, including the patient the same, still allowing them to request an oral hearing on cause shown. We have asked the Tribunal to produce a draft Guidance Note which would give an indication of how it would approach determining whether a case was appropriate to be decided at a hearing under rule 58, and it has agreed to do so.

2.12 **Option 2** recognises some concerns that the patient should be treated differently from other parties, by giving the patient an automatic right to an oral hearing. The patient would have the right to insist on an oral hearing and, unlike the other parties, would not require to show “cause” as to there should be an oral hearing. This gives an additional safeguard for the patient’s views to have central place, in accordance with the principles in section 1 of the 2003 Act, if they want an oral hearing. If the patient does not request an oral hearing but another party does, then it would be for the Tribunal to decide whether to proceed by way of an oral hearing or a hearing under rule 58.

2.13 In option 2, however, if no-one requests an oral hearing in response to the Tribunal’s notice then the Tribunal could proceed with holding the hearing under rule 58. We are aware of some concerns that putting the onus onto the patient to insist on an oral hearing may disadvantage some patients who might not understand what the Tribunal has proposed to do and so fails to insist on an oral hearing, or indeed lacks the ability to insist on an oral hearing. It is thought, however, that other safeguards could be built in around option 2, such as perhaps requiring the MHO to ensure that the patient has had assistance from independent advocacy to make any decision and to insist on an oral hearing if they wish.

2.14 **Option 3** further changes the balance of when rule 58 might be used, in terms of the patient’s role in deciding that. In option 3, the Tribunal could only proceed to use rule 58 if it received the patient’s agreement (as is the case under rule 58 at the moment). This contrasts with option 2, where the Tribunal will assume that the patient insists on an oral hearing; whereas, under option 3 if the patient does nothing in response to the Tribunal’s notice that it proposes to proceed with a hearing under rule 58 then a full oral hearing must take place.

2.15 Option 3 provides fuller protection for the patient by requiring the patient to respond positively to the Tribunal in writing that they are happy for the Tribunal to proceed under rule 58 (as is required under rule 58 at the moment), otherwise an oral hearing must still take place. A possible downside to option 3 is that the same issues may as arise as at present, namely around the Tribunal failing to receive the agreement of the patient in the given timescales. But with this change it would at least only be the agreement of one party - the patient - that the Tribunal would require to receive back, rather than the agreement of all the parties.

2.16 In **Option 4** no change is made, and the status quo is maintained with the Tribunal Rules for now.

PART 3 - CONSULTATION QUESTIONS

3.1 Your views are sought on the following questions:

Question 1

Which of the following 4 options do you prefer?

Option 1: the Tribunal is given a power to deal with cases without a hearing on its own initiative, by writing out to the parties, stating that it has identified a particular case as being appropriate to be dealt with under rule 58 and that it intends to deal with the case under rule 58:

- any party (including the patient) may request an oral hearing on cause shown.

Option 2: the Tribunal is given a power to deal with cases without a hearing on its own initiative, by writing out to the parties, stating that it has identified a particular case as being appropriate to be dealt with under rule 58 and that it intends to deal with the case under rule 58:

- patient has an automatic right to an oral hearing that they can trigger if they wish a full oral hearing:
 - patient notifies the Tribunal that they want an oral hearing,
 - if patient does nothing, assumption that the patient is content for the Tribunal proceeds with a hearing under rule 58;
- the other parties may also still request an oral hearing on cause shown.

Option 3: the Tribunal is given the power to deal with cases without an oral hearing on its own initiative, by writing out to the parties, stating that it has identified a particular case as being appropriate to be dealt with by a hearing under rule 58 and that it intends to deal with the case under rule 58:

- if patient does not respond to the Tribunal (i.e. patient does nothing) then the Tribunal cannot proceed under rule 58 and an oral hearing must take place;
- if patient responds to the Tribunal agreeing that the Tribunal may proceed with a hearing under rule 58, then the Tribunal can do so (provided that no other party has requested an oral hearing);
- the other parties may also request an oral hearing on cause shown.

Option 4: rule 58 is left as it is.

Question 2

Do you have anything to add in support of your chosen option?

Question 3

Are there any other changes to the Tribunal Rules more generally that you would like to raise at this stage for us to consider for any subsequent larger scale changes?

This will not be your only opportunity to tell us what you think, as we would go out to consultation on a draft of any new Tribunal Rules if we consolidate them at a later date. But it would be helpful for us if you told us in advance of any issues or points that you are aware of at the moment.

PART 4 - RESPONDING TO THE CONSULTATION PAPER

4.1 We are inviting written responses to this consultation paper by Monday 16th May 2011. Please send your response together with respondent information form (see “handling your response”) to:

mentalhealthlaw@scotland.gsi.gov.uk

or to:

Joanna Keating, Scottish Government Health Directorate
Mental Health Division
Head of Policy & Legislation Team (Branch 3)
3-ER St Andrews House
Regent Road
Edinburgh EH1 3DG

If you have any queries please contact Joanna Keating on 0131 244 2599. If you are aware of any individuals or organisations who have an interest but who are not on the consultation list in the Annex please also let me know.

4.2 We would be grateful if you would use the consultation questionnaire provided or could clearly indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received.

4.3 This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at <http://www.scotland.gov.uk/consultations>. You can telephone Freephone 0800 77 1234 to find out where your nearest public internet access point is.

4.4 The Scottish Government has an email alert system for consultations, <http://register.scotland.gov.uk> (SEconsult). This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations. SEconsult complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

4.5 We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please therefore also complete and return the respondent information form which forms part of the consultation questionnaire as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and will treat it accordingly, subject always to any legal requirements on the Scottish Government to disclose the information.

4.6 In that regard, all respondents should be aware that the Scottish Government are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and

would have to consider any request made to it under that Act for information relating to responses made to this consultation.

Next steps in the process

4.7 Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, responses will be made available to the public in the Scottish Government Library. (see the attached Respondent Information Form), these will be made available to the public in the Scottish Government Library by 14 June 2011 and on the Scottish Government consultation web pages by 21 June 2011. You can make arrangements to view responses by contacting the SG Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

4.6 Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision on the issues. We would then hope to lay any amending instrument to change rule 58 of the Tribunal Rules in June 2011, with the intention that it comes into force some time in the Autumn.

Comments and complaints

4.7 If you have any comments about how this consultation exercise has been conducted, please send them to Mental Health Division at the contact details shown above.

Annex - List of organisations being consulted

Organisations being consulted

Local Authority - Chief Executives ; MHOs; COSLA

NHS - Chief Executives

Police Boards and professional organisations

Association of Directors of Social Work (ADSW)

Scottish Parliament - Chairs of relevant cross-party groups, committees. All Scottish MEPs

Support Organisations

Academic Institutions

Equality and Human Rights Commission

Third Sector organisations (including victim support groups)

Relevant HM Inspectorates – HMIE, HMIP

A full listing of all consultees is available, upon request, from Mental Health Division

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RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Title Mr Ms Mrs Miss Dr *Please tick as appropriate*

Surname

Forename

2. Postal Address

Postcode

Phone

Email

3. Permissions - I am responding as...

Individual

/

Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate Yes No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate Yes No

Date .

CONSULTATION QUESTIONS

Question 1

Which of the following 4 options do you prefer? Please tick relevant box below.

Option 1: the Tribunal is given a power to deal with cases without a hearing on its own initiative, by writing out to the parties, stating that it has identified a particular case as being appropriate to be dealt with under rule 58 and that it intends to deal with the case under rule 58:

- any party (including the patient) may request an oral hearing on cause shown.

Option 2: the Tribunal is given a power to deal with cases without a hearing on its own initiative, by writing out to the parties, stating that it has identified a particular case as being appropriate to be dealt with under rule 58 and that it intends to deal with the case under rule 58:

- patient has an automatic right to an oral hearing that they can trigger if they wish a full oral hearing:
 - patient notifies the Tribunal that they want an oral hearing,
 - if patient does nothing, assumption that the patient is content for the Tribunal proceeds with a hearing under rule 58;
- the other parties may also still request an oral hearing on cause shown.

Option 3: the Tribunal is given the power to deal with cases without an oral hearing on its own initiative, by writing out to the parties, stating that it has identified a particular case as being appropriate to be dealt with by a hearing under rule 58 and that it intends to deal with the case under rule 58:

- if patient does not respond to the Tribunal (i.e. patient does nothing) then the Tribunal cannot proceed under rule 58 and an oral hearing must take place;
- if patient responds to the Tribunal agreeing that the Tribunal may proceed with a hearing under rule 58, then the Tribunal can do so (provided that no other party has requested an oral hearing);
- the other parties may also request an oral hearing on cause shown.

Option 4: rule 58 is left as it is.

Option 1 Option 2 Option 3 Option 4

Question 2

Do you have anything to add in support of your chosen option?

Comments

Question 3

Are there any other changes to the Tribunal Rules more generally that you would like to raise at this stage for us to consider for any subsequent larger scale changes?

Comments



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