



TRIBUTUNALS
JUDICIARY

11th March 2014

**Amendments to the Tribunal Procedure (First-tier Tribunal)
(Health, Education and Social Care Chamber) Rules 2008**

The Tribunal Procedure Committee has announced the outcome of the consultation on proposed changes to the HESC Rules. I have decided to issue this guidance under Section 23(2) and Schedule 4, Paragraph 7 of the Tribunals, Courts and Enforcement Act 2007.

The amendments to the Rules continue the previous approach of the committee in relation to CTO paper reviews by putting ‘patient choice’ at the heart of the process, whilst also making arrangements where the interests of justice require specific provision to be made.

In summary, the tribunal doctor will continue to conduct a pre-hearing examination of the patient in all Section 2 cases unless the patient does not want such an examination, but the tribunal doctor will not conduct such an examination in any other case unless:

- the tribunal is informed in writing by or on behalf of the patient, not less than 14 days before the hearing, that a pre-hearing examination is wanted, or -
- the tribunal has directed that there must be such an examination. This will either be a direction by a salaried judge or Registrar in advance of the hearing, or a direction made by the panel because the patient has failed to attend the hearing.

The new Rule 34 will read –

“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.”

The new arrangements will only apply to cases received by the tribunal on or after 6th April 2014. As a transitional measure, general directions will be issued under Rule 34(2)(c) for a pre-hearing examination to be conducted in all cases where the application or reference was received on or before 5th April 2014.

The jurisdiction has drafted a leaflet, which the office will send at an early stage to all Section 2 and unrepresented patients, that advises patients of their rights to legal representation and/or to see the tribunal doctor in advance - and that provides a clear and easy method to promptly inform the tribunal of any wishes .

I expect legally represented patients to receive appropriate and timely advice from their lawyers, and the office will be vigilant in seeking capacity assessments for unrepresented patients to make sure that legal representatives are promptly appointed for patients who do not have the capacity to decide for themselves whether or not to appoint a representative.

Timely requests for a pre-hearing examination will be processed quickly so that tribunal doctors have time to make arrangements to see patients a day or two before the hearing.

In addition, there are two other situations when a pre-hearing examination may arise:

First, a salaried tribunal judge or Registrar can direct that an examination take place in advance of the hearing, as part of their case-management powers. Late requests from or on behalf of patients will be referred for case-management decision (although granting a late request may involve a postponement to give the tribunal doctor time to arrange a visit). Additionally, there may be other cases where, either upon the request of a party or the panel, or on their own initiative, a salaried tribunal judge or Registrar considers whether a pre-hearing examination is required. The test for all such decisions will be whether such an examination is necessary to enable the tribunal to deal with the case fairly and justly.

Second, if the patient completely fails to attend the hearing, the panel itself should direct the tribunal doctor to interview the patient on the ward before proceeding with the hearing unless such an interview is impractical or unnecessary - which it may be if, for example, the patient is too unwell, does not wish to see the tribunal doctor, has gone absent without leave, or lives in the community and has chosen not to attend a hearing. It may also be that the patient's representative agrees that a pre-hearing interview is unnecessary.

A new Rule 39(2) will read –

“39.—

(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.”

I do not expect that this interview will take too long and, in any event, it should shorten the hearing because the patient will not be giving evidence to the panel as a whole.

If the patient on the ward fails to attend the hearing then a pre-hearing interview provides an opportunity for the patient to be heard. However, all other evidence must be made available to the panel in the usual way. Thus, if the patient has decided not to attend or is unable to attend the hearing, it should not also be necessary to review the patient's records.

Apart from a patient failing to attend, I do not expect panels at the hearing to direct pre-hearing examinations. I recognise that the desirability of a pre-hearing examination may become clear only when the members of a panel read the reports. But it will then be possible for the panel to ask a salaried judge to consider whether or not to direct a pre-hearing examination. Moreover (except in Section 2 cases) if the patient is going to attend at the hearing, even if they have chosen to be unrepresented, there will rarely be time or necessity on the hearing day for a pre-hearing examination as well.

A new Rule 32(9) will read –

“32.—

(9) The responsible authority must make records relating to the detention or treatment of the patient and any after-care services available to the Tribunal on request and the Tribunal or an appropriate member of the Tribunal may, before or at the hearing, examine and take notes and copies of such records for use in connection with the proceedings.”

As in all other types of legal proceedings, it is for the parties to draw the panel's attention to any salient records or notes where there is sufficient time to do so. Therefore, if there are any aspects of the records or notes that any party considers the tribunal should consider, then they should prepare an extract and submit it to the tribunal, in advance.

It follows that, in all those cases where there is no pre-hearing examination or where the pre-hearing examination only arises because a patient fails to attend their hearing, tribunal doctors are not expected to routinely inspect the patient's records.

However, with a Section 2 pre-hearing examination or an examination properly requested or directed well in advance, the tribunal doctor should also inspect the patient's records – as has previously been the case. This Rule provides the authority for the tribunal doctor (or the panel as a whole) to have access to records upon request.

Finally, where a pre-hearing interview is not required, panels may consider giving patients an opportunity of speaking first and, again, at the end of the hearing. Many patients have things they want to say at the outset and, of course, much time will be saved by not having to feedback the tribunal doctor's preliminary opinion in such cases.

His Honour Judge Sycamore
Chamber President
(Health, Education and Social Care Chamber)
First-tier Tribunal