



RESPONSE BY THE FACULTY OF ADVOCATES

TO THE SCOTTISH GOVERNMENT'S CONSULTATION ON DRAFT REGULATIONS REGARDING:

(1) THE TRANSFER OF FUNCTIONS AND MEMBERS OF THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND TO THE SCOTTISH TRIBUNALS;

(2) THE RULES OF PROCEDURE FOR THE FIRST-TIER TRIBUNAL FOR SCOTLAND MENTAL HEALTH CHAMBER;

(3) THE RULES OF PROCEDURE FOR THE UPPER TRIBUNAL FOR SCOTLAND WHEN HEARING CASES FROM THE FIRST-TIER TRIBUNAL MENTAL HEALTH CHAMBER;

(4) THE COMPOSITION OF THE FIRST-TIER TRIBUNAL AND UPPER TRIBUNAL FOR SCOTLAND WHEN HEARING MENTAL HEALTH CASES;

(5) THE ELIGIBILITY FOR MEMBERSHIP OF THE FIRST-TIER TRIBUNAL FOR SCOTLAND MENTAL HEALTH CHAMBER AND UPPER TRIBUNAL FOR SCOTLAND; AND

(6) TIME LIMITS FOR SEEKING PERMISSION TO APPEAL A DECISION OF THE FIRST-TIER TRIBUNAL MENTAL HEALTH CHAMBER

Introduction

1. The Faculty of Advocates fully supports the Scottish Government's proposals for the creation of a new, simplified, statutory framework for tribunals in Scotland. The transition of cases from the Mental Health Tribunal for Scotland ("MHTS") to the Scottish Tribunals will need to be handled with care and sensitivity. The Faculty considers that it is essential that the flexible procedure currently in place for the MHTS is replicated in the new procedural rules for the Mental Health Chamber. The Faculty

welcomes the Scottish Government's statement that the policy intent is for the MHTS to transfer into the Scottish Tribunals structure with its existing membership and functions insofar as practicable. The Faculty considers that this is critical to ensuring that cases are dealt with in a fair and just manner.

2. The Faculty broadly agrees with the proposals set out in the consultation document. In responding to the issues raised in the consultation document, we have adopted the headings and questions used in the consultation document.

QUESTIONS ON THE TRANSFER OF THE MHTS

Q1: Do you have any comments on the draft transfer of functions and members Regulations?

We have no comments to make on the draft regulations.

Q2: Are you content with the provisions relating to the transfer of members?

The Faculty is content with the provisions as drafted.

The Faculty notes with approbation that it is intended to replicate the effect of the Judicial Pensions and Retirement Act 1993, section 26 of which permits the reappointment of Tribunal members aged 70 for one year at a time until the age of 75, if their reappointment is in the public interest. The idiosyncratic nature of MHTS hearings requires Tribunal members to exercise their functions with an unusual degree of skill and sensitivity. In many cases, this skill has been honed over a significant period of time. In addition, some members are specially trained to handle more challenging cases, notably those involving children and adolescents, patients with learning disabilities and those suffering from age-related dementia. At a time when MHTS hearings are likely to be on the increase, the Faculty considers that it is appropriate to preserve the expertise and flexibility of this valuable resource.

Q3: Are you content with the proposal to align the eligibility requirement for MHTS legal

members with legal members of the First-tier Tribunal?

The Faculty is content with the proposal.

Q4: Are you content with the provisions regarding transitional arrangements?

The Faculty is content with the provisions as drafted.

Q5: Do you have any other comments you wish to make?

The Faculty has no additional comments.

QUESTIONS ON THE FIRST-TIER MENTAL HEALTH CHAMBER RULES OF PROCEDURE

Q1: Do you have any comments on rule 36, which provides that certain cases are able to be transferred to the Upper Tribunal, and, in particular, whether this should be restricted only to cases transferred on a point of law?

The Faculty has no comments on rule 36.

Q2: Do you have any comments on rule 37, which sets out the restricted grounds on which a case may be dismissed as being incompetent?

The Faculty considers that it is important for tribunals hearing a case to be able to take a view on competency.

With regard to the new Rule 37, the Faculty considers that it is unnecessary for there to be a provision for the Clerk to carry out a first sift. Reference to “Clerk” seems to have been carried forward from the existing Rule 44.

We would propose the following adjustment to Rule 37.

“Incompetent case

37. —(1) A case before the First-tier Tribunal is incompetent if it is—

(a) outwith the jurisdiction of the First-tier Tribunal; or

(b) made otherwise than in accordance with these Rules.

~~(2) Where a case appears to the Clerk to be incompetent the Clerk must refer the case to a Convener.~~

(2) A Convener may decide whether the case is incompetent either alone or with such other members as the Chamber President may direct.

(3) Before dismissing a case as incompetent a Convener may—

(a) send notice of the proposed dismissal to the parties inviting them to make written

representations within 28 days or such other period as may be specified by the Convener;

(b) afford the parties an opportunity to be heard.

(4) The First-tier Tribunal may also dismiss a case as incompetent under this rule during the course of a hearing.

(5) A Convener or the First-tier Tribunal may, where appropriate, on dismissing an incompetent case refer the matter to the Commission.

(6) Rules 67 and 68 apply to a decision made under this rule.”

Our final comment is in relation to whether parties should be provided with an opportunity to make representations in all cases before a determination is made on competency. The current drafting makes the consultation of parties discretionary. While there may be cases where the incompetence of the case is obvious, this may not always be the case. The Scottish Government may wish to reflect on whether overarching public law principles, such as the concept of natural justice, require a party to have an opportunity to make representations on such an important issue before a final determination is made.

Q3: Do you have any comments on the proposal to simplify proceedings for interested third parties and remove the requirement or ability to seek leave from the Tribunal to enter the proceedings as a party?

The Faculty considers that a First-tier tribunal should be able to consider a request to make representations, made on the day of the hearing, without the necessity of making such a request in writing. Rule 41 in its present form is unduly cumbersome. We would propose the following adjustment to Rule 41.

“Submissions and evidence from persons who are not a party to proceedings

41. —(1) Any person who has an interest in the case and wishes to make representations (whether orally or in writing) or to lead or produce evidence may make ~~send a written~~ request to the First-tier Tribunal stating—

(a) the person’s name and address;

(b) the nature of the person’s interest; and

(c) the person’s reasons for the request.

(2) A ~~written~~ request in paragraph (1) must be accompanied by a copy of any documents that the person intends to rely on.

~~(3) The First tier Tribunal may refer the request to a Convener to decide or decide the matter itself at a hearing.~~

~~(4) On receipt of a request and accompanying documents under paragraphs (1) and (2), the Clerk must send a copy of them to the parties, inviting the parties to make written representations within such period as may be specified by the First tier Tribunal or Convener.~~

~~(5) At the request of any party in writing within that period, the First tier Tribunal or a Convener, as the case may be, may afford the parties an opportunity to be heard either by a Convener alone or with such other members as the Chamber President may direct.~~

(3) The First-tier Tribunal must consider any request made under paragraph (1), and if satisfied that the person has an interest in the case, and that it is reasonable to do so, may grant that request.

~~(7) On granting a request made under paragraph (1), the First tier Tribunal or a Convener, as the case may be, must consider whether any decision already taken in the case requires to be reconsidered.”~~

Q4: Do you have any comments on the principle that the Tribunal must only assess documents received from persons who have sought leave to provide representations, to determine if those should be withheld from the patient and other parties?

The Faculty does not consider that the existing Rule 47 should be amended to provide that “*the Tribunal must only assess documents that it receives from people who have sought leave to provide representations*”. The Tribunal has the power to assess all documents under the existing Rule 47. There should be no restriction on this discretion. In the cases which the Mental Health Chamber deals with, it is critical that there is an inherent flexibility in the procedures to ensure that hearings are dealt with in a fair and just manner.

Q5: Do you have any comments on the proposal to clarify the terminology in rule 52 on the circumstances in which the Tribunal may decide a case at a hearing without oral evidence or oral representations? Include any comments that you have on the practical implications of such hearings.

The clarification of the terminology in the new Rule 52 is appropriate. The Faculty considers that the proposed rule, which will replace the existing Rule 58, is a useful provision.

Q6: Do you have any comments on the proposal that there should be no ability for the First-Tier Tribunal Mental Health Chamber to review its own decisions?

The Faculty considers that it is appropriate that the First-tier Tribunal Mental Health Chamber should not have the ability to review its own decisions.

Q7: Do you have any other comments on the draft regulations for the First-Tier Tribunal Mental Health Chamber Rules of Procedure?

The Faculty has no other comments on the proposed rules of procedure.

QUESTIONS ON THE UPPER TRIBUNAL RULES OF PROCEDURE

Q1: Do you have any comments on the proposal that the Upper Tribunal should be able to suspend a decision made by either itself or the First-Tier Tribunal, which is the subject of an appeal, in rule 7?

The Faculty is content with the proposal. The proposal fits with the overarching requirement for flexibility in such cases to ensure that they are disposed of in a fair and just manner.

Q2: Do you have any comments on the criteria for fresh evidence, in rule 19(4)?

The Faculty considers that the drafting is adequate.

Q3: Do you have any comments on hearings automatically being held in private in and the prohibition of public disclosure of documents and information?

The Faculty agrees that hearings should be held in private and that there should be a general prohibition on public disclosure of documents and information.

Q4: Do you have any comments on the proposals regarding time limits in the Upper Tribunal?

The Faculty is content with the proposals. It is desirable that cases are dealt with as expeditiously as possible.

Q5: Do you have any comments on the proposal that there should be no ability for the Upper Tribunal to review its own decisions in mental health cases?

The Faculty agrees that the Upper Tribunal should not be able to review its own decisions.

Q6: Do you have any other comments you wish to make on the draft regulations for the Upper Tribunal rules of procedure?

The Faculty has no other comments to make on the draft regulations.

QUESTIONS ON COMPOSITION REGULATIONS

Q1: Do you have any comments on the proposals regarding the composition of the First-tier Tribunal Mental Health Chamber?

The Faculty is content with the proposals.

Q2: Do you have any comments on the proposals regarding the composition of the Upper Tribunal when hearing cases appealed or transferred from the First-tier Tribunal Mental Health Chamber?

The Faculty is content with the proposals.

Q3: Do you have any other comments you wish to make?

The Faculty has no other comments.

QUESTIONS ON ELIGIBILITY REGULATIONS

Q1: Do you have any comments on the proposals regarding the eligibility criteria for ordinary members with medical or general mental health experience?

The Faculty is content with the proposals.

Q2: Are there any additional criteria you would wish to see prescribed?

No.

Q3: Are there any proposed criteria that you do not wish to see prescribed?

No.

Q4: Do you have any other comments you wish to make?

The Faculty has no other comments.

QUESTIONS ON REGULATIONS AMENDING THE TIME LIMITS FOR SEEKING PERMISSION TO APPEAL

Q1: Do you have any comments on the proposals regarding the amendments to time limits for seeking permission to appeal?

The Faculty is content with the proposals.

Q2: Do you have any other comments you wish to make?

The Faculty has no other comments.