EXPLANATORY MEMORANDUM TO

THE TRIBUNAL PROCEDURE (AMENDMENT NO. 2) RULES 2024

2024 No. 1283 (L. 20)

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of His Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Declaration

2.1 Minister Heidi Alexander MP, Minster of State for Courts and Legal Services at the Ministry of Justice confirms that this Explanatory Memorandum meets the required standard.

2.2 Dominic Lake, Deputy Director for the Civil, Tribunals, and Administration of Justice Directorate at the Ministry of Justice confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Vijay Parkash at the Ministry of Justice (email: Vijay.Parkash@justice.gov.uk) can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This instrument makes amendments to the rules of procedure that apply to certain chambers of the First-tier Tribunal and to the Upper Tribunal as follows:

- amends the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (S.I. 2008/2685) ("the SEC Rules") to remove the requirement for criminal injuries compensation cases to be held in private (paragraph 5.1), to specify the time limits that apply to bring an appeal concerning compensation decisions related to infected blood (paragraph 5.5) and to clarify certain rules including, clarifying the time limits that apply to bring an appeal concerning tax credits (paragraph 5.7),
- amends the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (S.I. 2008/2699) ("the HESC Rules") to allow the Tribunal greater freedom in certain circumstances, to dispose of proceedings relating to mental health without a hearing (paragraph 5.8),
- amends the Tribunal Procedure (Upper Tribunal) Rules 2008 (S.I. 2008/2698) ("the Upper Tribunal Rules") and the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (S.I. 2014/2604) ("the IAC Rules") to remove redundant drafting, improve clarity and update legislative references; and

- amends the Tribunal Procedure (Amendment) Rules 2022 (S.I. 2022/312) ("the 2022 Amendment Rules") to correct a drafting error.

Where does the legislation extend to, and apply?

4.2 The territorial extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales, Scotland and Northern Ireland.

4.3 The territorial application of the amendments made by this instrument (that is, where the instrument produces a practical effect) is the same as the application of the instruments to which the amendments relate.

5. Policy Context

What is being done and why?

Criminal injuries compensation cases

5.1 The Social Entitlement Chamber ("the SEC") of the First-tier Tribunal has jurisdiction to determine appeals relating to victims of crime, their eligibility for compensation and the amount of compensation under the Criminal Injuries Compensation Scheme[1] ("criminal injuries compensation cases").

5.2 Under rule 30 of the SEC Rules the Tribunal is required to hear criminal injuries compensation cases in private unless the appellant has consented to a public hearing.

5.3 The TPC received a request from the Judicial Office with the support of the Chamber President of the SEC for an amendment to rule 30 of the SEC Rules, to remove the requirement for criminal injuries compensation cases to be held in private, so that by default such cases are held in public. This amendment was sought on the basis that rule 30 is an unjustified departure from the principle of open justice, and when compared to other cases there was nothing about criminal injuries cases that justifies a presumption for cases to be heard in private.

5.4 Following the outcome of the TPC's consultation, the TPC determined that it was appropriate for rule 30 to be amended as proposed. This instrument amends rule 30 of the SEC Rules to remove the requirement for criminal injuries compensation cases to be held in private.

Infected Blood Compensation Scheme cases

5.5 Section 49(1) of the Victims and Prisoners Act 2024 placed a duty on the Secretary of State or the Minister for the Cabinet Office to establish by regulations, the Infected Blood Compensation Scheme ("the Scheme"), for the making of payments to eligible persons given infected blood or blood products[2] . The Scheme was established under the Infected Blood Compensation Regulations 2024, which came into force on 23 August 2024. Regulation 42 of those Regulations provides a right of appeal to the Tribunal, against a decision of the Infected Blood Compensation Authority following a review of its decision made under the Scheme.

[1] The current scheme established under section 1 of the Criminal Injuries Compensation Act 1995, is the Criminal Injuries Compensation Scheme 2012 and can be found: https://assets.publishing.service.gov.uk/media/5d00c89ee5274a3cfa8a4ffe/criminal-injuries-compensation-scheme-2012.pdf.

[2] The Infected Blood Inquiry examined the circumstances in which NHS patients were given infected blood and blood products and the impact of these infections. It also examined the response of the Government and other bodies to the use of infected blood or blood products by the NHS. The Inquiry published its final report on 20 May 2024 (https://www.infectedbloodinquiry.org.uk/reports/inquiry-report).

5.6 This instrument makes a technical amendment to rule 22(2) of the SEC Rules to specify the time limits by which an appeal under the Scheme must be brought.

Appeals under the Tax Credits Act 2002

5.7 The SEC also hears appeals relating to HM Revenue and Customs ("HMRC") decisions regarding tax credits. This instrument amends rule 22(9) of the SEC Rules to clarify the procedure that applies for sending a notice of appeal to the Tribunal when challenging a decision of HMRC relating to tax credits. This amendment is intended to ensure that the rules better reflect the recent Court of Appeal decision in *Commissioners for HMRC v Arrbab [2024]*. The Court of Appeal determined that mandatory review of decisions by HMRC in relation to tax credits was not a precondition of an appellant exercising their right of appeal before the Tribunal (as it is, for example, for those who wish to appeal a decision by the Department for Work and Pensions in relation to welfare benefits which are also heard in the SEC).

Mental health cases

5.8 The Health, Education and Social Care Chamber ("the HESC Chamber") of the First-tier Tribunal has jurisdiction to hear applications and references for people detained under the Mental Health Act 1983 ("the MHA").

5.9 References to the Tribunal may be made by hospital managers, or in certain cases, by the Secretary of State, for patients detained in hospital or for those living in the community but subject to conditions under the MHA. When determining an application or reference, the Tribunal has the power to discharge patients where they no longer meet the statutory criteria for detention under the MHA (with the exception of certain patients that are subject to special restrictions under Part 3 of the MHA).

5.10 Under rule 35 of the HESC Rules the Tribunal is required to determine all mental health cases at a hearing, with the exception of references under section 68 of the MHA for specified community patients, who do not wish to attend or be represented at a hearing of their reference.

5.11 In 2023, the TPC received a request from the Chamber President and the Deputy Chamber President of the HESC Chamber, for an amendment to rule 35(3) of the HESC Rules to allow the Tribunal greater flexibility to dispose of proceedings without a hearing, where they concern references in respect of patients detained in hospital. This proposal was sought in order to provide hospital-based patients the same rights as community patients, when their case has been referred to the Tribunal, to elect that it may be decided on the papers, where they do not wish to attend or be represented at a hearing.

5.12 Following the outcome of two consultations, the TPC determined that it was appropriate for rule 35(3) to be amended in the manner proposed (paragraph 7.12). This instrument amends rule 35(3) to allow the Tribunal to determine references made under section 68, 71(2) or 75(1) of the MHA, without a hearing where the patient is 18 or over, has capacity and has stated in writing (or the patient's representative has stated in writing) that they do not wish to attend or be represented at a hearing of their reference. The amendment also inserts a new paragraph (5) to rule 35 to provide that the exception in paragraph (3) (as amended by this instrument) does not apply to those patients whose detention under the MHA has not previously been considered by the Tribunal or if the Tribunal last considered their case without a hearing.

Other Amendments to the Tribunal Procedure Rules

5.13 This instrument makes minor drafting and technical improvements to the SEC Rules, the Upper Tribunal Rules and the IAC Rules to insert additional wording to improve clarity, remove repeated words and redundant drafting and to update legislative references where these have changed since the making of the procedure rules.

5.14 In addition, this instrument amends rule 3(5)(c)(i) of the Tribunal Procedure (Amendment) Rules 2022 ("the 2022 Amendment Rules") to correct a drafting error. Rule 3(5)(c)(i) of the 2022 Amendment Rules, sought to amend rule 24(3)(e) of the Upper Tribunal Rules to make further provision as to what a respondent must include in a 'response' to a notice of appeal. The drafting of rule 3(5)(c)(i) was not sufficiently specific in identifying where the substituted provision was intended to be inserted. This instrument corrects this ambiguity by directing more clearly that the substitution is to occur from the second place that "on which the respondent" occurs in that rule.

6. Legislative and Legal Context

How has the law changed?

6.1 Part 1 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") created a two-tier tribunal system into which existing tribunals can be transferred, or new appeal rights directed. Section 3 of the 2007 Act establishes the First-tier Tribunal and the Upper Tribunal, which together make up this two-tier system. Both tribunals are divided into chambers which deal with different areas of jurisdiction e.g. health, immigration and asylum, and education. In addition to statutory appeals, the Upper Tribunal also deals with certain kinds of judicial reviews.

6.2 Section 22 of and Schedule 5 to the 2007 Act establishes the Tribunal Procedure Committee ("the TPC") and provides the TPC with the function for making procedure rules to govern the practice and procedure for the First-tier Tribunal and Upper Tribunal ("the Tribunal Procedure Rules"). By virtue of the Judicial, Review and Courts Act 2022 ("the JRCA"), the TPC's rule-making responsibility now extends to the Employment Tribunals (and the Employment Appeal Tribunal once the relevant provisions of the JRCA are in force).

6.3 This instrument makes the amendments to the various sets of Tribunal Procedure Rules as provided in paragraphs 5.1 to 5.14, and for the reasons set out in those paragraphs. In accordance with paragraph 28(3) of Schedule 5 to the 2007 Act, the Lord Chancellor has allowed the amendments to the Tribunal Procedure Rules made by this instrument.

Why was this approach taken to change the law?

6.4 This is the only possible approach to make the necessary changes.

7. Consultations

Summary of consultation outcomes

Consultation on possible amendments to rule 30 of the SEC Rules ("the SEC Rules Consultation")

7.1 Following the request from the Judicial Office for an amendment to rule 30(2) of the SEC Rules, the TPC launched a public consultation seeking views on whether hearings in criminal injuries compensation cases should be held in private or public. The SEC Rules Consultation ran from 17 October 2023 to 12 December 2023 and is

available on the gov.uk website[3]. The SEC Consultation sets out the intended objective for the proposed rule change, that is to bring such cases in line with the majority of other cases where hearings are held by default in public. This would remove the current requirement for such cases to be held in private, in order to further promote open justice. The principle of 'open justice' requires that judicial proceedings in tribunal hearings be conducted in a transparent manner, so as to safeguard the rights of those subject to the power of the tribunal and to allow for the scrutiny of the public in general.

7.2 There were two respondents to the SEC Rules Consultation.

7.3 The first respondent opposed the change and the second was in favour of it. The first respondent was concerned about the extreme trauma for victims having to go through another hearing, which trauma would be exacerbated by the proceedings being held in public. The second respondent was in favour of the changes in order to observe the principle of open justice.

7.4 Following consideration of the responses to the SEC Rules Consultation, the TPC determined that an amendment to rule 30 was appropriate. The TPC published its reply to the SEC Rules Consultation on 25 March 2024 and it is available at the gov.uk website[4]. In summary, the TPC considered that it was anomalous that criminal injuries cases were by default heard in private. The TPC acknowledged the concerns raised to the proposed rule change but considered that the SEC was accustomed to dealing with, and accommodating, vulnerable litigants. The TPC did not consider that there was any basis for concern that judges could not adequately address any additional reasonable adjustments necessary to reflect the needs of litigants in public hearings. The TPC also considered that the Tribunal's existing power to order proceedings to be held in private, either on its own initiative or on application, is sufficient as a safeguarding measure.

Consultation on possible amendments to the HESC Rules - Rule 35

7.5 Following the request from the Chamber President and Deputy Chamber President of the HESC Chamber, the TPC published a consultation which sought views as to possible changes to rule 35 of the HESC Rules to allow the Tribunal greater opportunity to determine references made under the MHA without a hearing. This consultation ran from the 18 July 2023 to 29 August 2023 and is published on the gov.uk website[5] ("the First HESC Consultation").

The responses to the First HESC Consultation

7.6 There were a total of 22 respondents to the First HESC Consultation. Of those, 7 respondents were in favour of the change and the remainder shared significant concerns. A summary of those concerns are set out below:

- several respondents were concerned that patients without capacity or with learning disabilities would suffer as a result of the proposed rule change. They considered that such patients would not understand the significance of their case being decided on the papers.

[3] https://www.gov.uk/government/consultations/possible-amendments-to-the-tribunal-procedure-first-tier-tribunal-social-entitlement-chamber-rules-2008
[4] https://www.gov.uk/government/consultations/possible-amendments-to-the-tribunal-procedure-first-tier-tribunal-social-entitlement-chamber-rules-2008
[5] https://www.gov.uk/government/consultations/possible-amendments-to-tribunal-procedure-first-tier-tribunal-health-education-and-social-care-chamber-rules-2008

- several respondents expressed concern that if the proposed rule change was made, then these cases would be determined by a single judge alone, rather than by a full panel.
- several respondents expressed the view that the proposed rule change at this time was premature and that any such changes should be considered after the passing of a new Mental Health Act.
- several respondents expressed concern that the reports upon which the Tribunal may make its decision might be inadequate. The patient's capacity could change between the date of any decision by the Responsible Clinician and the date the Tribunal decides the matter, and there would be no scrutiny by anyone other than the RC about the question of capacity.
- several of the respondents also pointed out that there is a significant difference between patients who are subject to Community Treatment Orders and are therefore living in the community and those patients detained in hospital, and thus there needs to be safeguards to ensure that they are not unjustifiably detained.

7.7 It was apparent that some of the concerns raised by respondents arose from a misunderstanding as to the proposal. The TPC acknowledged that the First HESC Consultation was insufficiently clear in its terms, and therefore proposed a further consultation to address those issues ("the Second HESC Consultation"). The Second HESC Consultation ran between 19 December 2023 and 13 February 2024.

7.8 The Second HESC Consultation clarified that the proposed amendment to rule 35 would only apply to those patients with capacity. The TPC stressed that it did not consider that a patient without capacity would ever be in a position to consent to the Tribunal dealing with their reference without a hearing (i.e. on the papers).

7.9 Additionally, the TPC clarified that in respect to panel composition of the Tribunal when disposing of such cases, that the Senior President of Tribunals (who is responsible for determining the composition of the Tribunal), has made it clear that there would be no changes to panel compositions for such cases, and the relevant Practice Direction would be amended where necessary to preserve the current position.

The responses to the Second HSEC Consultation

7.10 There were a total of 16 respondents to the Second HESC Consultation. Of those 7 respondents were in favour of the change and 9 respondents against. In respect to the responses in favour 4 respondents made further observations:

- there was a need to limit the number of consecutive paper reviews.
- the legal representative ought to be an accredited member of the specialist mental health panel.
- more safeguards should be included such as: a case decided on the papers should trigger a further reference in one year; there should be an independent assessment of capacity preferably by medical member; and for a mechanism for the Tribunal to obtain further information.
- a full Tribunal panel dealing with such cases was not the best use of limited judicial resources.

7.11 In respect to those respondents who disagreed with the proposal a summary of the key objections are:

- a decision on the papers will result in less scrutiny.

- three years between references was already far too long, and that the Tribunal may differ in its opinion on the patient's capacity, and that some representatives may see paper reviews as an attractive option given the pressure of work.
- there should be an upper age limit.
- patients should not be denied a hearing because they are not engaging with the Tribunal process.
- the legal aid implications had not been considered;
- there was a risk that this proposed change would undermine the proposals of the draft Mental Health Bill.
- there needed to be documentary confirmation of the patient's capacity, and the patient's representative should confirm in writing that they are satisfied as to the capacity of the patient and that the patient understands the repercussions.
- there needs to be safeguards in place in proceedings where there are missing reports or relevant information.
- the concern that hospital-based patients may face a greater risk of adverse influence by the treatment team in making the decision to request a paper review.
- it would be unsuitable for complex cases to be dealt with without a hearing;
- the proposed rule change risked references becoming more of a 'rubberstamping exercise' than an 'inquisitorial exercise'.
- oral evidence is crucial in providing the latest information.
- the changes would result in 'justice behind closed doors' and that justice therefore 'cannot be seen to be done'.
- an oral hearing, even in the absence of the patient, allowed oral submissions and a scrutiny of the evidence which may not be the case if decided on the papers.
- paper hearings would make it less likely that the Tribunal would make recommendations to facilitate a patient's discharge.
- the proposed rule change was aimed at making more efficient use of resources rather than being in the patient's best interests.

7.12 The TPC having regard to the responses to both consultations considered that on balance it was appropriate to make the changes to rule 35 of the HESC Rules. The TPC's reply is available on the gov.uk website[6].

7.13 In summary, the TPC observed that a number of objections to the proposal related to matters beyond the scope of the TPC's rule making powers, and this included the frequency of references, which is set by the MHA. The TPC did not share the concerns raised by respondents; in particular, the TPC considered that the rule change provided patients with greater choice as to whether a hearing takes place, that the proposed rule would only apply to capacitous patients who are legally represented, and in the case of missing or inadequate reports, the Tribunal had ample powers to require further information, and if appropriate could decide that a hearing was nevertheless necessary. The TPC considered that the requirements for capacity and

[6] https://www.gov.uk/government/consultations/reply-to-consultation-and-further-consultation-on-possible-amendments-to-the-tribunal-procedure-first-tier-tribunal-health-education-and-social-ca

legal representation were sufficient safeguards to reduce the risk of patients making an unwise decision.

Other amendments to Tribunal Procedure Rules

7.14 The TPC did not conduct a public consultation in respect to the minor and technical amendments to the instruments referred to in paragraphs 5.5 and 5.7, or in respect to the drafting correction made to the 2022 Amendment Rules.

7.15 Given the nature of the changes proposed and in accordance with paragraph 28(1)(a) of Schedule 5 to the 2007 Act, the TPC consulted such persons as it considered appropriate. For these changes, this included consultation with the relevant Chamber Presidents and His Majesty's Courts and Tribunals Service, who agreed with the changes made by this instrument.

8. Applicable Guidance

8.1 His Majesty's Courts and Tribunals Service produces guidance for each Tribunal jurisdiction which is issued to parties at key stages of the appeals process and is available on the gov.uk website[7].

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 An Impact Assessment has not been prepared for this instrument as its impact is expected to be minimal and well below the threshold of £5 million per annum at which an assessment must be prepared.

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on business, charities or voluntary bodies.

9.3 There is no, or no significant, impact on the public sector.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The approach to monitoring of this legislation in respect to the impact of any changes to the Tribunal Procedure Rules is monitored by the TPC by way of feedback from the Tribunal, His Majesty's Courts and Tribunals Service and users.

10.2 This instrument does not include a statutory review clause. The legislation does not apply to activities that are undertaken by small businesses.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 The instrument corrects a drafting error made in the Tribunal Procedure (Amendment) Rules 2022 [8].

[7] About us - HM Courts & Tribunals Service - GOV.UK
[8] S.I.2022/312

12. European Convention on Human Rights

12.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation no statement is required.

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").