

September 2008

THE DRAFT MENTAL HEALTH REVIEW TRIBUNAL FOR WALES RULES 2008

The Administrative Justice and Tribunals Council and its Welsh Committee have considered the draft rules for the MHRT for Wales and have asked me to pass on their comments. Before turning to their comments I should explain that, whilst the AJTC was not formally consulted on this version of the rules they decided that it was sensible for them to submit views at this stage, bearing in mind the imminent deadline for their coming into force. This will also make the subsequent formal consultation process quicker and simpler.

In considering the draft rules the AJTC had particular regard to the developing rules for the Health, Education and Social Care (HESC) Chamber of the First-tier Tribunal under the Tribunals, Courts and Enforcement Act 2007 (TCE). Whilst the AJTC does not necessarily expect that the two sets of rules will be identical, they would envisage there being a high degree of consistency between them. The comments below highlight those areas where significant differences arise.

Turning first to the key consultation questions:

Appointment of the tribunal (Rule 11(1))

This broadly mirrors the provision in rule 8 of the existing MHRT rules, but is more comprehensive in respect of the conflict of interest/bias provision. Members wondered whether 11(1)(c) should say '*or has recently been involved with the medical or social care treatment of the patient in a professional capacity*', since it can occur that a lay member may in the past have provided care to the patient or their family in the past.

Withholding documents or information likely to cause harm (Rule 16)

The equivalent test in the draft HESC rules (r.14) is that the Tribunal is satisfied that '*such disclosure would be likely to cause that person or some other person serious harm*'. The AJTC prefers the '*serious harm*' test rather than the test of '*adversely affecting the health or welfare of the patient or others*'. The Tribunal has to balance the patient's ECHR Article 5 right to be heard and to challenge the lawfulness of detention with the need to protect the patient or others. The presumption, therefore, should be that all information is disclosed to the patient unless there are strong reasons for not doing so (i.e. the likelihood of causing serious harm).

Medical Examination (Rule 19)

For many years the Council on Tribunals, and now the AJTC, has expressed concern about the dual role of the MHRT medical member as both fact-finder and decision-maker, particularly from the perspective of patients – i.e. how a patient might be affected by an examination by the medical member prior to the tribunal hearing; and whether, and if so how, they understand the medical member's role. In our comments on the draft HESC rules we suggested that the rule should be drafted in such a way as to provide that, in order to 'form an opinion of the patient's mental condition' the medical member must examine the patient's medical records (especially the medical records), but that it may not be necessary for them to examine the patient in every case.

Application for appeal (Rule 19)

The title of the equivalent section in the draft HESC Rules is '*Application for permission to appeal*', which would seem to be a more accurate heading.

There is also provision in the HESC Rules (r. 47-49) for the Tribunal to review its own decision (under TCE s.9), but there is presumably no statutory authority for the MHRT for Wales to do so. There will therefore be a difference in practice in Wales, since all such matters will have to be referred up to the Upper Tribunal.

Detailed comments on the draft Rules

Rule 2 includes a detailed definition of '*final determination*' not included in the interpretation of the draft HESC Rules, but covered in the rules themselves. It is, however, quite helpful to have it spelt out here.

Rule 3(1) includes the words '*efficiently and expeditiously*' which are not in the HESC Rules. The AJTC has enquired why there needs to be a difference.

Part 3, Chapter 1 – The title is '*Before the final determination*' as compared with '*Before the hearing*' in the HESC Rules. The AJTC suggests that '*Before the hearing*' is clearer and more accurate, especially given the detailed definition of '*final determination*' in Rule 2.

Rule 14(1) requires the application or reference to be signed but does not specify by whom (e.g. the patient/applicant may not be able to sign). The equivalent provision in the HESC Rules is '*signed (in the case of an application, by the applicant or any person authorised by the applicant to do so*', which is preferred.

Rule 15(6) – The cross-reference in line 2 should be to paragraph (5) and not (4).

Chapter 2 – There is no equivalent provision to HESC Rule 36 concerning '*Entitlement to attend a hearing*', which provides helpful clarification. You may wish to consider including a similar provision.

Rule 23(1)-(2) – In commenting on the draft HESC Rules, the AJTC objected to the phrase '*be listed to start*', which was felt to be unclear and could potentially lead to delay. The drafting of the equivalent provisions in the HESC Rules was amended to '*the case must start ...*', which the AJTC suggests should also be used here.

Rule 26 – The equivalent HESC Rule 39 contains specific provision that hearings should not take place in the patient's absence unless specific conditions apply (e.g. the patient is too unwell to attend). The AJTC would welcome a similar provision here.

Power to pay expenses – Draft HESC Rule 40 makes provision for the payment of expenses to applicants, witnesses etc (which will be particularly important for community patients who may need to travel to the hearing). Although the MHRT for both England and Wales currently pay such expenses, it would make the position clearer to have the statutory authority for doing so set out in the Rules.

Rule 27(2) – The AJTC suggests that there should be an additional sub-section specifying that the decision should include notification of any right of appeal to the Upper-tier Tribunal, how to exercise it and any relevant time limits (see HESC Rule 41(2)(c)).

Rule 27(4)-(6) – There are no similar provisions in the HESC Rules. The AJTC has particular concerns about Rule 27(4) with regard to patients not being given full disclosure of the reasons for the decision – not least because of human rights considerations. If this provision is to remain, it is suggested that the appropriate test should be ‘*serious harm*’ (see comments on Rule 16 above). However, there would need to be really exceptional circumstances for this rule to apply. Rule 27(5) is considered helpful, particularly for conditional discharge cases.

Schedule – This is based on the existing Schedule 1 in the MHRT Rules and is thought to be much clearer than the draft Practice Direction for HESC mental health cases.

Schedule, Part A - The first sentence must be qualified in some way, e.g. ‘*shall, where possible, include...*’. The current MHRT Rule 6(1)(a) states ‘*in so far as it is within the knowledge of the responsible authority..*’. However, there is no equivalent qualification in draft Rule 15, without which endless delays could arise.

Para 9 – The word ‘*either*’ appears to be unnecessary.

After para 13 reference should also be made to the following, which is now relevant following implementation of the Mental Capacity Act 2005:

- details of any registered lasting power of attorney made by the patient that confers authority to make decisions about his personal welfare, and the donee(s) appointed by him;
- details of any registered enduring or lasting power of attorney made by the patient that confers authority to make decisions about his property and affairs, and the donee(s) appointed by him;
- details of any relevant advance decision to refuse treatment made by the patient.

Part B, para 2(a) – Although the word ‘*attitude*’ is used in the current MHRT Rules, it would perhaps be clearer to say ‘*the views of the patient’s nearest relative..*’.

The AJTC would in due course welcome a formal response to the matters they have raised.