[redacted]
Mental Health Division
Scottish Executive
St Andrews House
Regent Road
Edinburgh
EH1 3DG

Dear [redacted]

Thank you for the opportunity to respond to the Draft Mental Health Tribunal Rules on behalf of Alzheimer Scotland – Action on Dementia.

The following comments come from members of Alzheimer Scotland's Rights and Legal Protection Committee.

We found the Rules clear, relevant and helpful. Our particular interest is to ensure that where anyone with dementia may come before the Tribunal the procedures will be as user-friendly as possible for the person with dementia and for their relatives. We are reassured that all efforts will be made to assist those with difficulties of communication or understanding during the proceedings.

We had the following specific questions and comments -

11 Is it wise to allow open amendment of applications etc? Will this not lead to half-formed applications etc, with the details to be filled in later?

18 The Rules for payment of *curators ad litem* need to be clear.

28 Who defines what constitutes an 'expert'?

29(2)(b) Does the word 'put' mean 'sent' or 'received'? If it is 'received' this may be a very short timescale.

35 Most applicants and patients will wish the Tribunal to be held in private. Presumably procedures will positively enable this, as encouraged by the Act Schedule 2(10)(2)(j)

35(2) Should the norm not be no photography etc, or are there some legal reasons for having this way round?

47 Is this sufficient to ensure authenticity of documents?

49(1)(a) Should it be 1st class, registered post?

Other points

i) Is there to be any Code of Practice or Guidelines for the Tribunal? Some of the procedural decisions to be taken are potentially quite subjective – e.g. in 2(a) who decides what is ‘proportionate’, in 4(b) how will acceptable forms be publicised, and in 6(3) what is to constitute a ‘copy of a disputed decision’?

ii) Does the doctor have the right to exclude the patient on health or safety grounds?

iii) Can the appellant or others object to any members of the Tribunal?

iv) What arrangements are to be made for expenses for witnesses?

Yours sincerely

[redacted]
Convener

MHO Forum – BASW
Response to the Mental Health Tribunal for Scotland (Practice and Proceedure) Rules 2005 Consultation

Introduction:
BASW is the professional association for social workers in the UK with over 1000 members in Scotland. Many of our members are at the frontline of services for people with mental health issues. The Mental Health Officers Forum is a special interest group of social workers hosted by BASW.

The Rules:
There are three major comments that the Forum would like brought to the attention of the drafters of the Rules:

1. Curator ad Litem (para 18)
   There is concern that this has not been cross referenced with the Adults with Incapacity Act. There are questions about *who* assesses capacity, etc and this needs to be clarified in the Rules.

2. Hearings in public or private:
   There is a question raised through ECHR Article 8 that the presumption should be that Hearings must be heard in *private* unless requested otherwise by the patient

3. The Register
   Following from the last point, ECHR Article 8, the Register should be anonymised to ensure privacy for the individual.

Concern has also been raised about the prevention of discrimination, particularly in relation to black and ethnic minorities, where research has shown a high degree of institutional racism in mental health services. It would be helpful to see something in the Rules and the procedures that will address these concerns.

[redacted]
Professional Officer
BASW
17 Waterloo Place
Edinburgh
EH1 3BG

14 January 2005

British Medical Association

14 Queen Street Edinburgh EH2 1LL
Telephone: 0131 247 3000 Fax: 0131 247 3001
BMA web site: www.bma.org.uk
Secretary: Tony Bourne
Scottish Secretary: Bill O'Neill, BSc FRCGP

Direct Line: [redacted]
Direct Fax: [redacted]
Email Address: [redacted]@bma.org.uk

Mental Health Division
Scottish Executive
St Andrew's House
Regent Road
Edinburgh
EH1 3DG

BMA SCOTLAND

14 January 2005

Dear Colleague

MENTAL HEALTH TRIBUNAL FOR SCOTLAND (PRACTICE AND PROCEDURE) RULES 2005 CONSULTATION

Thank you for this opportunity to respond to the above consultation. We are very supportive of consultation process being carried out with regard to the Mental Health (Care and Treatment) (Scotland) Act 2002 and in general support the provisions set out in this document. We do have a few points to raise as detailed below.

Firstly, in paragraph 16 (2) (b) we would suggest that the minimum notice period to all parties for changing time, date or place of hearings be increased to three days to allow staff to reschedule professional or clinical commitments. Similarly, three days should be the minimum notice period for alterations to hearings under paragraph 32 (1) rather than "as much notice as practicable". We believe that this will save time in the long-run as parties will not have to miss hearings due to other commitments.

Secondly, we would suggest adding the following point at the end of paragraph 18 for consistency with the Code of Practice:
(4) It shall be open to the AMP (usually the patient's consultant), the patient, or the patient's named person to contest a decision by the Tribunal that the patient lacks the capacity to take part in proceedings.

Paragraph 19 (2) refers to a "sworn or averred statement"; we would recommend that for consistency and clarity this be changed to "witness statement, as defined under paragraph (23)". Similarly, we would suggest that paragraph 25 (3) should use the same form of words as paragraph 24 (2) (b), for example; "Unless the Tribunal otherwise directs, a witness statement shall include the place of residence of the witness or, where the witness is making the statement in their professional capacity, the address at which the witness works."

Paragraph 42 (4) represents a shift from current practice by stating that a decision taken by the Tribunal is effective from the date on which a copy of the document recording the decision is sent to the parties. This may cause a problem where the Tribunal orders a patient's immediate discharge from detention in hospital, but does so by reserved decision (ie without all parties present). In this instance the discharge can take place only once the notification of the decision has been received by the hospital which may be some days after

the notification has been dated and sent effectively resulting in the patient being unlawfully detained. We would suggest that in this instance either the decision is effective from the date that the hospital receives notification by telephone with a paper copy being sent out the same day or that it is effective from the day that the letter is received by the hospital.

Lastly, we believe that paragraph 49 is unclear and confusing as (2) (a) and (b) appear to contradict each other.

We hope that these comments are helpful and if you have any further queries, please do not hesitate to contact us.

Yours sincerely

Sean Gallimore
Head of Scottish Council Secretariat

Mental Health Tribunal for Scotland (Practice and Procedure) Rules 2005

Response from the College of Occupational Therapists

Introduction

The College of Occupational Therapists (COT) is pleased to provide a response to this consultation document, which has been assisted by the Scottish sub-group of the Association of Occupational Therapists in Mental Health (AOTMH).

The COT represents over 26,000 occupational therapists that are working or studying across the United Kingdom of whom 2,600 are in Scotland. Occupational therapists work in the NHS, Local Authority Social Services and Housing Departments, schools, primary care settings, and a wide range of vocational and employment rehabilitation services. Occupational therapists are regulated by the Health Professions Council, and work with individuals of all ages with a wide range of occupational problems resulting from physical, mental, social or developmental difficulties.

General comments

The College welcomes the opportunity to respond to this consultation with its important implications for patients. The College stresses the importance of ensuring adequate training for staff including occupational therapists in both hospital and community settings who may be employed by either the NHS or in some instances, the Local Authority social work department.

Part 1 Introduction

The overriding objective

2. (1) The College endorses the overriding objectives as being more user-friendly and 'decriminalising'.

Part II Start of Proceedings

Intimating applications to the Tribunal

4. (1)(b) The format acceptable to the Tribunal in lieu of the approved form requires to be clarified and guidance made available to patients and staff.

Appeals to the Tribunal

6. (2)(a) It is suggested that forms be available through staff to aid accessibility for the patient, for example from medical records departments.

Acknowledgement and registration of applications, references and appeals

7. (2) A timeframe for notifying the Tribunal of a request for a private hearing should be specified.

Applicant or appellant is a minor or has a mental disorder or is physically impaired
9. (1) Clarification is required as to the criteria of mental disorder or physical impairment which would prevent a patient acting on his or her own behalf, and who would make this judgement. It is suggested that a senior occupational therapist acting as key worker for the patient would be in a position to make this judgement in which case the College would wish to ensure that guidance and training would be provided.

Part III Management Powers

Other Case Management Powers
16. (2)(E) This option is welcomed in instances where it would alleviate patient distress. It could also be considered where it would reduce travel time for staff attending the hearing and ensure best use of resources as long as this was acceptable to the patient.

Part V Hearings and Decisions

General comments
It is recommended that the effect on patient care of time off for staff to attend hearings be evaluated after a period of time and steps taken to address any negative impact.

Hearings in Public or Private
35. Due to the confidential nature of the evidence and potential for distress to patients of medical information entering the public domain, it is suggested that the norm should be for hearings to be held in private.

Decision of the Tribunal
42. The College commend the clear process of communicating the decision of the Tribunal to the patient.

Thank you for the opportunity to contribute to this consultation. The College and its specialist section, the Association of Occupational Therapist in Mental Health are keen to assist in shaping mental health services. Contact details for each are as follows:

[redacted]
Policy Officer - Scotland
College of Occupational Therapists
PO Box 19571
Johnstone
PA9 1YP
Tel: [redacted]
E-mail: [redacted]

[redacted]
(Contact for AOTMH)
Head Occupational Therapist
Adult Mental Health Service
Lothian Primary & Community Division
Royal Edinburgh Hospital
Morningside Terrace
Edinburgh
EH10 5HF
Tel: [redacted]
E-mail: [redacted]

14 January 2005

CAPS
independent
advocacy

The Consultation & Advocacy
Promotion Service

Submission on the Mental Health Tribunal for Scotland (Practice and Procedure) Rules 2005

The Consultation and Advocacy Promotion Service (CAPS)
CAPS is an independent advocacy organisation working in Edinburgh, Midlothian and East Lothian. CAPS provides collective and individual advocacy for people who use, or have used, mental health services. We support people who use mental health services by:

- supporting and developing service users groups, such as the Edinburgh Users Forum and Service Users Midlothian;
- ensuring that people who use mental health services have an opportunity to participate in planning, provision and evaluation of services;
- encouraging partnerships between service users and the people who plan, purchase and provide mental health services;
- advocating for service user involvement in the training of doctors, social workers and other health professionals;
- publishing the views and perspectives of service users;
- recruiting, training and supporting volunteer advocates; and
- promoting advocacy in its many forms.

Background to submission
CAPS was involved in the process that led to the enactment of the Mental Health (Care and Treatment) (Scotland) Act 2003, including giving evidence to the Health and Community Care Committee. The content of this submission is largely based on the views of service users, as expressed at meetings of the Edinburgh Users Forum (EUF) and Service Users Midlothian (SUM).

Comments on the Mental Health Tribunal for Scotland (Practice and Procedure) Rules 2005

Part II – Start of proceedings

Distribution of documents by the Clerk

1. Section 8(3) states that the Clerk should send copies of documents to the service user's named person where the Clerk has received advice from the medical member that the service user would be unable to understand or deal with the document.

2. Given that the Named Person has powers to act independently of the service user and has separate rights in relation to Tribunal hearings, and that in nominating a named person the service user has indicated that this is what he or she would want, we would expect that *all* documents relating to Tribunal hearings would be copied to the named person as a matter of course.

Part III – Management Powers

3. We are pleased at the broad powers of disclosure. We expect that in most cases it will be psychiatrists and Mental Health Officers holding information that service users, their advocates and their named persons do not have access to. We welcome the powers to compel people to disclose this information

Part V – Hearings and Decisions

4. We are greatly concerned at the proposal that Tribunal hearings be held in public. While noting that the draft rules allow for Tribunal hearings to be held in private in certain situations or at request of a party, we strongly recommend the default position be that Tribunal hearings are held in private except for where the Tribunal is satisfied that there are exceptional circumstances giving grounds for the hearing to be held in public.

5. Tribunals will not be able to make decisions without access to, and discussion of, personal and sensitive information, including information about an individual's
   - mental health,
   - other health conditions,
   - care and treatment,
   - social care and needs
   - personal and home life.

6. In addition, in many cases the disclosure of this information will be compelled rather than volunteered. For example, when a Compulsory Treatment Order is being considered by the Tribunal, the service user will have no choice as

to whether this case is heard by a Tribunal or how much information is disclosed. They cannot decide to avoid the Tribunal in order to protect their privacy.

7. In other situations, for example a situation where a service user could appeal a Detention Certificate or a Compulsory Treatment Order in order to protect his/her interests, it could be an unfortunate consequence that people avoid the Tribunal so as to protect their privacy. This goes against the intention and spirit of the Act.

8. Public knowledge of an individual's personal health information fails to serve any useful purpose in the community. In addition, public access to Tribunal hearings and the possible publication and broadcast of information disclosed at Tribunal hearings is likely to add to the stress and anxiety of the service user involve, and may contribute to the further stigmatisation of people who use mental health services.

9. We understand the role that public hearings plays in the scrutiny of the Tribunal, to ensure the integrity of its processes and decisions. However, these functions can be carried out without making Tribunal hearings public. The Scottish Executive and members of the public should be able to access anonymised reports of decisions made by the Tribunal in order to scrutinize decisions made by the Tribunal and to determine whether the Tribunal is fulfilling the role the Scottish Parliament it to have.

Part VI – Miscellaneous and Definitions

10. We are also concerned at the proposal that a Register of Tribunal hearings and decisions will be available to the public. This would enable the media and members of the public to look up the case of a person they suspect has been required to accept treatment under the Mental Health (Care and Treatment) (Scotland) Act 2003. It is expected that a significant number of people will be the subject of Compulsory Treatment Orders in the Community, and providing members of the public with an ability to find out personal information about an individual's care and treatment for mental health breaches that individuals right to privacy, and right to feel safe and protected in their community.

11. The public's right to information needs to be balanced with the individual's right to privacy, taking into account that the vast majority of people being detained and required to accept treatment under the Act will be required to do so for health reasons.

Contact for further comment

12. Please contact Keith Maloney, Co-ordinator, or [redacted], Development Worker, if you would like to discuss the content of this submission.

13. We can be contacted by:
    - telephone at (0131) 538 7177,
    - fax at (0131) 538 7215,
    - email at contact@capsadvocacy.org
    - writing at:

      The Consultation and Advocacy Promotion Service (CAPS)
      5 Cadzow Place
      Edinburgh
      EH7 5SN.

THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND (PRACTICE AND PROCEDURE) RULES 2005

RESPONSE TO CONSULTATION

from

DR J A T DYER OBE, FRCPsych

General comment

The regulations appear to cover almost all the relevant issues. However in my view they read too much as a set of regulations for tribunals taken "off the shelf." They are insufficiently tailored to the specific circumstances of mental health tribunals. Many of the issues raised below will illustrate this point. Of particular note in this context are references to "the administration of justice" as a function of the tribunal and the presumption that tribunals will be held in public unless various exceptional conditions are met.

Paragraph 2 (2) (a)

It is not clear in what way fairness and justice are to be promoted by dealing with cases "in ways which are proportionate to ...the resources of the parties." This may be a reference to tribunals in general as a simpler and less expensive forum than the court. However it could be read literally as suggesting that the level of procedure used will vary according to the financial resources of the parties, which would of course be inappropriate. In any case, I understand that legal advice and representation will be available to patients without means testing in relation to relevant Mental Health Act proceedings, so that for patients financial resources are not an issue.

Paragraph 9 (1)

The reference in the regulations to applications and appeals being made by others on behalf of someone who is a minor or is incapable in respect of such an action is confusing in relation to the specific provisions of the Act. In most circumstances the Act narrowly specifies who can make an application or appeal. For example, appeals are made by the patient or named person, and an application for a compulsory treatment order can be made only by a mental health officer. The inclusion of the named person in the provisions in the Act generally deals with the issue of a person being a minor or being incapable in relation to the application or appeal. It should be remembered that the Act includes a provision for identifying the named person in relation to a person under 16 (Section 252). It would avoid confusion to identify those rare provisions in the Act to which this section of the rules is relevant.

Paragraph 12 (3)

I am confused by what is said here. If a direction as described in 12 (1) has been made, why would a hearing be subsequently arranged? If the hearing is needed to make the

direction, shouldn't the wording of 12 (3) refer to "proposed direction" rather than "direction"?

Paragraph 16 (2) (a)
I am concerned that this rule will permit the circumvention of the intended purpose of time limits and be used to accommodate various resource constraints and act against the interests of patients. It should be made clear that any relaxation of time limits should be only in exceptional circumstances and only when it is the interests of patients that are being served by the relaxation, rather than administrative convenience.

Paragraph 16 (2) (b)
The requirement to give at least one day's notice of adjournment is confusing. Clearly this cannot apply to the *decision to adjourn* when this occurs during a hearing. I assume what is intended is notice of the date to which the hearing has been adjourned.

Paragraph 16 (2) (e)
This section, and others, e.g. 38 (1) and 41 (2), refer to the "administration of justice" as a function of the Tribunal. This is not the correct way to describe the Mental Health Tribunal. It is not administering justice in the ordinarily understood meaning of the term. (Some people will even associate justice with the criminal rather than the civil variety.) It is adjudicating on the need for care and treatment in the absence of the patient's consent. Instead of reference being made to "interference with the administration of justice" there could be reference to "interfering with the fair and just process of the Tribunal"

Paragraph 18
This rightly requires the appointment of a curator *ad litem* when the patient is incapable of taking part in proceedings, but it fails to give guidance on how incapacity is to be established and on whose evidence.

Paragraph 27
This requires that any witness statement etc. should be open to inspection by any party involved in a hearing. This openness is to be supported, but also requires to be qualified by measures to allow evidence to be given in confidence where there are substantial reasons, e.g. where the giving of information could put the witness at risk from the patient or result in a breakdown in a relationship which is important to the patient's wellbeing; there may also be rare situations in which disclosure of certain information could be injurious to the patient's mental health.

Paragraph 31
The time period of not less that 7 days mentioned in subsection (1) appears incompatible with Section 69 of the Act where the Tribunal may have to act before the expiry of a period of 5 days. In subsection (2) the reference to the time period being reduced to not less than one day in relation to an application under Section 63 is puzzling. Is the reference to Section 63 correct, or should this reference be to Section 69, or perhaps Section 50?

Paragraph 32 (1)
This appears to ignore what is said in paragraph 16 (2) (b).

Paragraphs 35 and 44

These paragraphs provide that proceedings will be public other than in exceptional circumstances. This is wrong in relation to a mental health tribunal. Proceedings should be in private unless the patient requests otherwise.

It should be remembered that the patient is not initiating the process of compulsion, unlike the case with other tribunals where the individual person acts to bring the tribunal about. The patient is having his liberty restricted by others because of mental disorder and associated risks. The evidence to be heard by the tribunal will contain material that is sensitive personal information in relation to the patient. To have a presumption in favour of public hearings offends against the patient's right to privacy of his personal information – including the fact that the patient is considered mentally ill and is coming before a hearing at all. It was on the basis of such considerations that the Millan Committee (of which I was a member) recommended that hearings should take place in private unless the patient requested otherwise (Recommendation 9.6).

It may be held by those who have drafted the Rules that the presumption in favour of public proceeding is required because of general rules produced by the Council on Tribunals which rest upon the requirement for open justice in ECHR Article 6. I would argue that this is not so, and I support this argument by the following observations:

1. Most rights under ECHR are not absolute, and they may also conflict with other rights under the Convention. In this case there is a clear conflict with Article 8, the right to privacy.
2. I am informed that all hearings by the Parole Board in Scotland take place in private.
3. The corresponding rules for the Mental Health Review Tribunal in England and Wales read as follows (Rule 21): (1) the tribunal shall sit in private unless the patient requests a hearing in public and the tribunal is satisfied that a hearing in public would not be contrary to the interests of the patient. (2) Where the tribunal refuses a request for a public hearing or directs that a hearing which has begun in public shall continue in private the tribunal shall record its reasons in writing and shall inform the patient of those reasons. (3) When the tribunal sits in private it may admit to the hearing such persons on such terms and conditions as it considers appropriate.
4. The rule quoted above was challenged before a tribunal in 2003 on the grounds that that it was incompatible with ECHR Article 6 [this is referred to in the report of R (on the application of Mersey Care NHS Trust) v Mental Health Review Tribunal EWHC 1749 QBD (Admin) (Beatson J)]. I quote: "The tribunal rejected that argument as it was satisfied that rule 21 reflected what was intended by Section 78 (2) (e) of the 1983 Act and represented a proper and proportionate departure from the principle of open justice, and rule 21 did not

offend Article 6. An application for judicial review of that decision was dismissed."

I would strongly suggest that the correct position for the Mental Health Tribunal for Scotland would be to have a rule similar to that for England and Wales, providing that the tribunal shall sit in private unless the patient requests a hearing in public and the patient is competent to make and understand the implications of such a request.

Similarly, in relation to Paragraph 44, it should not be possible for a member of the public to find out who in the locality is so affected by mental disorder that they are considered to pose a risk to themselves or other people by consulting a public register! Patients are entitled to privacy accorded by ECHR Article 8 in relation to such matters.

It may be argued that a cost of the approach I am suggesting will be that the tribunal process is not open to public scrutiny. This disadvantage will have to be overcome by monitoring of the Tribunal internally and externally (Council on Tribunals) and through the publication of statistical information that does not identify patients.

Paragraph 42 (1) (a)
In the interests of patients, there should be a presumption that the decision of the Tribunal should be announced on the day. It should be reserved only in unusual circumstances, e.g. where complex issues of law are to be considered.

Paragraph 49 (2) (a) and (b)
It is not clear what is the difference between "sent" in (a) and "sent" in (b). Perhaps "sent" in (a) means "sent by post".

Omissions

1. The Rules do not appear to make any provision for matters referred to in Schedule 2 Part 3 Paragraph 10 (2) (b) of the Act (how it is to be decided which tribunal will deal with any particular case).

2. There is no mention in the Rules of Section 50 of the Act (patient's right to apply for revocation of short term detention certificate or extension certificate). It may not be possible to arrange a hearing if the patient applies relatively late in the 28 day (or 31 day) period. Given the short term nature of the detention, it will in any case be necessary to arrange hearings speedily. The period of notice referred to in Paragraph 31 (1) may well be too long.

J.A.T. Dyer.

Dr J A T Dyer
9 December 2004

-----Original Message-----
From: [redacted] <[redacted]@fife.gsx.gov.uk>
Sent: 14 January 2005 15:28
To: MentalHealthLaw <mentalhealthlaw@scotland.gsi.gov.uk>
Cc: [redacted]
Subject: Re: Consultation on Rules of Procedure for Mental Health Tribunal forScotland

FAO [redacted]

Dear [redacted],

Just a brief note to advise that I am content with the rules of procedure, as previously circulated for comment.

I am happy for this response to be made widely available, in the usual ways.

With best wishes.

Yours sincerely,

[redacted]

Senior Manager (Adults and Disabilities) Fife Council Social Work Service Fife House North Street Glenrothes
KY7 5LT
Tel. [redacted]
e-mail : [redacted]

CONSULTATION: THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND (PRACTICE AND PROCEDURES) RULES 2005

RESPONSE ON BEHALF OF INVECLYDE COUNCIL

PART I – INTRODUCTION

Para 2 – We are pleased to see that the introduction clearly highlights the overriding objective of the Tribunal operating in a manner that is fair, just, equitable, responsive, inclusive, expert and timeous. We feel particularly strongly about the need for proceedings to be conducted in as informal a manner as possible in order that all parties, and the service user in particular, do not feel intimidated or inhibited to a degree that would affect their participation.

PART II – START OF PROCEEDINGS

Para 4(1) – We feel it would be helpful to have the form numbers included in the Schedule as well as giving the description.

Para 7 – Acknowledgement and Registration of Applications, References and Appeals

1(a) We are not clear bout how the decision will be made as to whether there will be an oral or a paper Hearing. If an application is unopposed, will this be dealt with by written submissions without the parties having to appear, in particular the MHO as applicant? We feel that procedural guidance needs to be clearer regarding this matter.

2. We have major concerns that the procedural Rules state that Tribunal Hearings will be held in public and the onus will be on the applicant to request a private Hearing. We would struggle to identify cases where at any time we would consider it appropriate for a Hearing to be held in public, therefore we would feel that the converse rule should apply.

Para 8 (1) – Distribution of Documents by the Clerk – The Rules do not appear to state who is entitled to receive copies of the documentation. Does this need to be clarified?

Para 8(3) – Does the Named Person not get copies of all the documentation in any case? If so, we are unclear as to why this sub paragraph has been included.

It is unclear as to whether this means that certain documents would not go to a party, but only to their named person. Are parties going to get copies of the medical reports which are currently not served as part of a Section 18 Application?

Para 12 – Misconceived Initiating Applications, Reference or Appeal – It would be our view that the 28 day timescale is appropriate.

PART 111 – MANAGEMENT POWERS

Para 15 – Disclosure and Inspection of Documents – Does this recognise the Freedom of Information Act 2005?

Para 16

2(a) We feel the Tribunal's ability to extend time limits will be helpful but must be in keeping with dealing with matters timeously.

2(b) We feel that 3 days notice would be a better timescale to make changes to the date, time and venue of a Tribunal, with 1 day notice being the exception, the Rules requiring good cause for this.

2(e) We welcome the use of all modern technology to facilitate the Tribunal Hearings where the physical presence of a party is not possible. We feel however that the physical presence of all parties at the Hearing should be the general expectation. Where a party is unable to be physically present at Hearings, valid reasons should be given. We do not feel that 'pressure of work' falls within this category.

PART V – HEARINGS AND DECISIONS

Para 31 – Notice of Time, Date and Place – We feel that the Rules do not set out clear guidance about the timescales within which a Hearing must take place either in respect of a S63 Application where the party is in the community or is already subject to a short term detention certificate in hospital. In the latter case, is there an expectation that the Section 63 Application will be both lodged and heard by the Tribunal prior to the expiry of the short term detention certificate? If this is not the case the Rules do not appear to cover the extension of the party's detention in hospital until such times as a Hearing takes place. If this is the case, then the timescale is going to be very tight in terms of all of the work that has to be undertaken by the Mental Health Officer in terms of consultation and compiling the application for presentation to the Tribunal prior to the expiry of the short term detention certificate.

We feel that these timescales need to be clarified.

Para 35 – Hearings in Public or Private – Once again we would want to reiterate our concerns about the general rule that all Hearings by the Tribunal should be in public apart from the listed exceptions. We feel that this should be revised and that the general rule should be that Hearings will be held in private, with public Hearings being the exception.

We feel that there requires to be clarification of what constitutes a public Hearing.

Para 49 – Method of Delivery and Receipt of Documents

1(a) Will postal communications require to be sent by 'recorded delivery'?

1(b) Will faxed communications require to be sent via a 'Safe' fax.

This concludes our comments which we hope you will find helpful.

Primary Care Operating Division

(*Department Address)*

Telephone (01324) 570700
Fax (01324) 563552
www.show.scot nhs.uk/nhsfv

NHS Forth Valley

Mental Health Division
Scottish Executive
St Andrew's House
Regent Road
Edinburgh
EH1 3DG

Date: 20 January 2005
Your Ref:
Our Ref:
Enquiries to: [redacted]
Extension: [redacted]
Direct Line: [redacted]
Fax:
Email: [redacted]@fvpc.scot nhs.uk

Dear Colleague

Consultation: The Mental Health Tribunal for Scotland (Practice and Procedure) Rules 2005

Please find below the response to the above consultation from the Forth Valley JLIP area. These comments represent a composite response from statutory agencies and also the views of users and carers.

General comment

As a general comment it is felt that these rules of procedure occasionally employ vague terms for some very crucial matters. This apparent vagueness could lead to difficulties in interpretation and possibly wide variations in practice among Tribunals. A great deal of discretion is afforded to the Tribunal, and again this could lead to uncertainty and inconsistency.

It is common for regulations to be published, and along with them there might be an expectation that guidance or codes of practice would also be published. Again, as a general comment, some of the language used might suggest that these rules are trying to do two things at once – to be both the regulations and also the code of practice. It seems unusual to mix formal rules with on procedure with codes of practice or guidance.

Part I Introduction

Rule 2 This clearly states that the 'overriding objective' is 'to deal with cases fairly and justly.' This statement is welcomed. However, the definition of fair and just is open to interpretation and opinion. The examples given of what is intended by dealing with a case fairly and justly are themselves difficult to interpret and are imprecise.

Rule 2 (2) (a) This talks about 'dealing with the case in ways which are proportionate to the complexity of the issues and to the resources of the parties.' Clarification of this statement would be welcome.

Rule 2 (2) (c) This states that dealing with a case fairly and justly includes 'ensuring, so far as practicable, that the parties are on an equal footing procedurally and are able to participate fully in the proceedings, including assisting any party in the presentation of the party's case without advocating the course the party should take.' It might be difficult in practice for the Tribunal to assist a party in the presentation of the party's case without advocating the course the party should take.

Continued

Rule 3 (2) 'In particular the Tribunal shall manage cases actively in accordance with the overriding objective.' Firstly, this statement would appear to be more suited to a code of practice. Secondly, does this rule add to anything already stated in Rule 2? Rule 2 talks about the Tribunal dealing with cases fairly and justly. Rule 3 (2) talks about the Tribunal managing cases actively in accordance with the overriding objective (which is to deal with cases fairly and justly). This would seem to be repetitive.

Part II Start of Proceedings

As a general comment to this part, it would be expected that each local area would want to establish effective communication arrangements with the Clerk to the Tribunal. As the Clerk may not have a permanent local office, this is likely to involve the exchange of information and documentation electronically. Local protocols covering this would therefore need to be developed.

Rule 4 (1) (b) states that 'where an approved form is not used, application may be on any form acceptable to the Tribunal.' This gives an extremely wide discretion to the Tribunal. In its attempts to be informal, just and fair, the Tribunal might be inclined to accept an application even where it widely differs from the approved format. There is a risk here that the subsequent procedure becomes difficult to follow and may be departed from. There is also a potential risk that the party following the formal procedures is unintentionally disadvantaged. Some formal guidance on the acceptable degree of variation from the approved format, or clarification that only approved formats will be acceptable, might be helpful to ensure consistency.

Rule 7 (1) If the application is received by the Clerk on or around the last day of, for example, a short term detention, is the fact that it is lodged with the Tribunal sufficient grounds to continue with the detention?

Rule 7 (1) (a) It would be helpful to give an indication of when the Clerk might send the acknowledgement, by stating some pre-determined timescale.

Rules 7 (1) (b), (c) and (d) Reference is made in (b) to informing the parties in writing, but in (c) and (d) there is no mention of parties being informed in writing. Should this be added for clarity?

Rule 7 (2) Again, it would be helpful to have a pre-determined timescale rather than the vague statement of 'as soon as possible.' Would the day before the hearing be acceptable?

Rule 7 (2) Given that part of the overriding objective is of avoiding delay, why is it necessary to wait until after an application has been lodged before requesting private hearings. Could the option of a private hearing not be included in the original request? It is expected that the request to have hearings in private would be the norm rather than the exception. This aspect is considered further under Rule 35 below, where it is stated that all hearings should be heard in private, and that public hearings would only be held by exception .

Rule 7 (2) If the applicant requests that they do not want an oral hearing, must all parties be in agreement with this request?

Rule 8 (1) Again the words 'as soon as possible' are employed. Perhaps a pre-determined timescale would be more helpful. Further thought on how the actual time limits will operate might be beneficial.

Rule 8 (1) The Clerk shall 'send a copy of any document…' Does this include medical forms, proposed care plan and social circumstances report?

Rule 8 (3) Should this information trigger a curator ad litem, as per Rule 18 (2)?

Rule 9 What is the definition of a 'minor'? This is not included in interpretation (Rule 50).

Rule 10 This states that 'Where the patient dies, all proceedings under these Rules shall cease immediately. Is this statement really necessary?

Rule 13 (1) (a) It would be helpful to state what form of withdrawal would be acceptable to theTribunal. Does the withdrawal have to be delivered by mail, fax, e-mail, or in person?

Part III Management Powers

Rule 15 (4) Clarification on the statement 'the Tribunal shall take into account the need to protect any matter…' How will the Tribunal decide this? What means of protection will the Tribunal take? Further guidance on what constitutes 'intimate personal or financial circumstances, is commercially sensitive, consists of information communicated or obtained in confidence or concerns national security' would be welcomed. This section also raises questions about third party information, the extent of medical confidentiality, and information likely to precipitate increased risk for vulnerable people.

Rules 16 (1) and (2) Rule 16 (1) is a clear general statement that the '…Tribunal may regulate its own procedure.' This is a clear general statement. However, Rule 16 (2) then goes on to list what the Tribunal may do. Does this mean that the extent to which the Tribunal may regulate its own procedure is given in Rule 16 (2), or does Rule 16 (1) mean that the Tribunal may regulate even beyond those matters listed?

Rule 16 (2) (a) This is generally welcomed as it allows for delays where, for example, there are difficulties in gathering information.

Rule 16 (2) (a) (ii) Clarity on the definition of 'substantial injustice' would be helpful.

Rule 16 (2) (b) If a hearing has formally convened, is it possible to give one day's notice of an adjournment? In the case of a postponement or adjournment, will there be time limits set? If a person were detained under a short term detention, would they still be liable to be detained pending a decision?

Rule 16 (2) (d) What happens where parties cannot agree on the facts? What might happen where one party, who wishes to conduct the case himself or herself, but is unable to fully understand what an agreed statement of facts is?

Rule 16 (4) 'Where the Tribunal proposes to exercise a power on its own initiative the Tribunal may give any person likely to be affected an opportunity to make representations.' If the Tribunal were to postpone a hearing under Rule 16 (2) (b) giving 1 day's notice, how in practical terms would persons likely to be affected have an opportunity to make representations?

Rule 17 (4) Perhaps greater clarification is required with this. Who decides that someone might require assistance? It would appear that the onus is on the relevant person to notify the Clerk of the need for assistance.

Rule 18 (2) Who decides that someone might lack capacity? When should this be done? What type of evidence would be required to make this judgement? Who meets the fees of the curator ad litem?

Rules 19 (1) (b) and (d) These appear to give the Tribunal an inquisitorial role in that the Tribunal might be able to determine on what issues they require evidence; the nature of the evidence; and the way in which the evidence is to be placed before the Tribunal. There is a possibility that this might take too much control from the parties. For example, what if the patient believes that their case may be better presented by using other evidence? Although the Tribunal is not a court situation, it would be unusual for courts to direct what evidence, in their view, would prove a case or determine how a case would be presented. On the other hand,

it would be useful for a Tribunal to have the power to note where there is insufficient evidence in order to reach a decision and to require, here possible, further information. As the directions currently stand, the discretion is so wide that there might be the possibility of a Tribunal virtually prejudging what evidence they might wish to see in order to reach a certain determination.

Rule 19 (1) (c) This aspect is considered further under Rule 35 below, where it is stated that all hearings should be heard in private, and that public hearings would only be held by exception.

Rule 19 (2) It is not clear how persons will be cited to attend as a witness. Schedule 2, Part 3 of the Mental Health (Care and Treatment) (Scotland) Act 2003 deals with 'Evidence.' It states that 'the Tribunal may by citation require any person to attend.' Does this put the onus of citing a witness on the actual Tribunal, as opposed to on the parties?

Rule 19 (2) It is not clear whether parties would have the right to object to this, but there may be difficulties where one or other parties wished to cross-examine the witness or put further questions to them.

Rules 19 (3) and (5) These rules allow for application for directions and objections to applications for directions. Parties would obviously require notice of such applications and objections, and time should therefore be factored into the proceedings to allow for representations to be made.

Rule 21 (1) Why should an application be dismissed if someone does not respond to a direction? It would appear more appropriate to compel them to respond, as their evidence/contribution may be a crucial aspect of the hearing. Section 317 (1) (e) of the Mental Health (Care and Treatment) (Scotland) Act 2003 states that 'a person who refuses to produce any document or record…shall be guilty of an offence.' Rule 21 (1) would appear to contravene this.

Part IV Evidence

Rule 22 (1) It would seem unusual for practice and procedure rules to make a statement such as 'the general rule…'

Rule 22 (1) What standard of proof is required here? In some instances we may not be dealing with absolutes. See also Rule 24 (3) below.

Rule 23 (1) Does a witness statement include application reports? It may be helpful to clarify what this means under Rule 50 – Interpretation.

Rule 23 (2) '…the party shall call the witness to give oral evidence…' Does this include the two medical reports?

Rule 23 (4) Is the permission of the Tribunal really required where a witness feels it is necessary to amplify their statement? Surely it would not be fair or just for the Tribunal to withhold such permission.

Rule 24 (3) As stated above, we may not be dealing with absolutes. If the level of proof were made clear in the rules then perhaps this might limit the need for appeals.
Rule 24 (4) This states that 'A document referred to in a witness statement shall be verified and identified by the witness.' What is the situation if the witness statement is accepted as evidence but the witness is excused from attending, perhaps by a direction?

Rule 25 deals with witness summaries. Does this mean that someone who is unable to file a witness statement and submits a witness summary must have the witness physically present at the time of the Hearing?

Rules 28 and 29 These rules deal with the form and content of expert reports and written questions to experts and seem rather restrictive. Also, the time factors should be noted in that a clear seven days are required for the putting of written questions. This could put a considerable burden on persons seeking to ask technical questions of experts in that the questions may themselves require the assistance of another expert in order to properly test the expert witness. Also, the answers to questions could of course raise further questions, but it would appear that written questions 'may be put only once.' Is this fair and just? Rule 29 does not indicate whether the Tribunal may put written questions to the expert.

Rule 28 (2) Who sends copies of this report to the parties – the Clerk or the party who instructed them? Who pays for this report?

Rule 30 states that 'Where a party has filed an expert's report, any party may use that expert's report as evidence at the hearing.' It is unclear whether that evidence requires to be spoken to (ie whether, if that evidence is used, the expert witness is required to attend personally to speak to the report). If, in the view of the Tribunal, it would be beneficial for the expert witness to attend, who would be responsible for meeting the costs of attendance?

Part V Hearings and Decisions

Rule 31 (1) The timetable dealing with notice of date, time and place is unclear in relation to the other timescales mentioned earlier in the rules. A flowchart showing detailed actions and timings would be helpful for clarification.

Rule 31 (4) '…the party shall inform the Tribunal whether it intends to be present or represented at the hearing.' Presumably the party can be both present and represented at the hearing. Again, a clear timescale as to when the party should inform the Tribunal of their intentions would be helpful.

Rule 32 (3) The same issue of power to continue a current detention applies here. Would there be fixed time limits?

Rule 32 (4) An indication of how a party would go about seeking an adjournment would be helpful here.

Rule 32 (5) '…the hearing will be adjourned by return.' Clarification is sought on this statement.

Rule 33 (1) Detailed guidance on proof and rules of evidence would be helpful.

Rule 33 (1) It is not clear whether the normal court 'burden and standard of proof and rules of evidence' actually strictly apply in that the discretions offered by these rules considerably weaken such. For example, the general rule is that documents do not speak for themselves and require to be spoken to. In addition, papers may be evidence of opinion but not necessarily of fact. Parties would generally lead their own evidence and present their own cases and witnesses would be subject to being led in evidence and being cross examined. In general, as stated previously, the rules do provide something of an inquisitorial role to the Tribunal.

Rules 33 (2) and (3) Rule 33 (2) reiterates the Tribunal's discretion while Rule 33 (3) highlights the rights of the parties to give evidence, call and question witnesses, and address the Tribunal. It is possible that at times it may be difficult to reconcile this almost inquisitorial role of the Tribunal and the more traditional adversarial style of the parties.

Rule 33 (5) 'The Tribunal may require any witness to give evidence on oath…' There is an implication that the Tribunal may not do this. Clear and consistent guidance is required on this.

Rule 35 (1) The issue of privacy should be assumed and should not be left to the parties concerned to request it as an exception. It is difficult to think of any situation where it would not be preferable to hold a

hearing in private. Under the current Act hearings are held in private, and this approach should continue. Holding hearings in public would be an intrusion into the confidentiality and privacy of the patient. On a lesser note, finding venues which could accommodate members of the public, in addition to those people who need to be present at hearings as participants, could be problematic.

Rule 35 (2) '…the Tribunal may prohibit photography or filming at any hearing if satisfied that such a prohibition is desirable in order to ensure a fair hearing.' As this is currently worded, if a party felt that they did not want photography or filming during a hearing because it was a breach of their privacy and confidentiality, the Tribunal would not be able to prohibit photography or filming on this basis alone, as there may be no evidence that the hearing would be unfair. Prohibitions to photography and filming should be assumed unless the parties concerned have no objections to this.

Rule 36 Will patients receive free legal representation if they so wish? Will legal aid be available for all patients without a means test? It is likely that patients may require medical opinions and reports to make their case in a fair and just way.

Rule 39 (1) It is not clear who would notify the Tribunal, or provide it with such evidence to satisfy it, that a party is unable to attend the hearing ie is the failure to attend due to an inability or an unwillingness to attend? This would have an impact upon Rule 40.

Rule 40 (c) This seems to suggest that the evidence is taken by an inquisitorial method and not by the more usual method of leading of evidence or cross examination.

Rule 40 (d) This gives the Tribunal the ability to hold a hearing in the absence of a witness who may be too ill to attend. This raises questions of how fair and just this approach might be.

Rule 41 (1) (b) Who takes the decision to have a paper hearing? What is the definition of a routine matter?

Rule 42 (1) (a) 'A decision of the Tribunal may be reserved.' Does this mean that a person can still be detained under a Short Term Detention order pending this decision?

Rule 44 (1) Why should the public be allowed to inspect this register? Issues of confidentiality and privacy would be undermined if this were the case.

Rule 47 Would the Tribunal expect a hard copy of any document sent electronically?

Rule 49 Again, would the Tribunal expect a hard copy to follow?

Rule 49 (2) (b) '…the day on which the document was sent or delivered…' may not be the same day.

Rule 50 'Convenor' is noted as meaning 'the convenor of the Tribunal.' A clearer definition would be helpful.

Rule 50 'Patient' is defined as someone who 'has, or appears to have, a mental disorder.' In this instance, it might be more helpful to state that the patient is the subject of the application, review etc.

Rule 50 (2) (b) The clarification of working days, weekends and public holidays and the resultant timescales is welcomed.

A final general comment relates to the payment of travelling expenses for patients or named persons. Perhaps some guidance could be issued on this aspect.

I trust that you find these comments helpful.

Please do not hesitate to contact me if you require any further information.

Yours sincerely

[redacted]
Project Manager, Mental Health Act

RCP CO2

NHS Grampian

Psychiatric Medical Advisory Committee
Block A
Clerkseat Building
Royal Cornhill Hospital
ABERDEEN AB25 2ZH
Tel : (01224) 557621
Fax: (01224) 557433

IN CONFIDENCE

Date 14 December 2004
Your Ref
Our Ref

Mental Health Division
Scottish Executive
St. Andrews House
Regent Road
Edinburgh
EH1 3DG

Dear Sir

Re: Consultation - The Mental Health Tribunal for Scotland (Practice and Procedure) Rules 2005

We are writing with a response to the consultation on behalf of the Psychiatric Medical Advisory Committee representing all psychiatrists working in Grampian.

We are very concerned by paragraph 35 "Hearings in Public or Private". We believe strongly that all hearings should be held in private. Tribunals will discuss sensitive matters including detailed confidential clinical information and it is therefore inappropriate for hearings to be held in public.

There are similar concerns about paragraph 44 "The Register". Information held on such a register should be regarded as confidential and not open to inspection by any person.

Yours faithfully

Dr Jane Lolley
Chair

Dr Andrew Robinson
Vice Chair

[redacted]
[redacted]
Secretary

-----Original Message-----
From: [redacted] <[redacted]@tpct.scot.nhs.uk>
Sent: 23 December 2004 16:34
To: MentalHealthLaw <mentalhealthlaw@scotland.gsi.gov.uk>
Subject: The Mental Health Tribunal for Scotland Rules 2005

Thank you for the opportunity to comment on this document.

Much of the document seems to reflect the running of a “generic” type of tribunal such as an Employment Tribunal. By contrast, terms such as “expert” are not defined in paragraph 50. Indeed, it is not clear that the role of “expert” will be filled in relation to mainstream tribunal hearings.

It would be very important for this document to link clearly with the Code of Practice of the 2003 Act. A clear guide is required for the role of the medical, legal and lay members of the tribunal. It is important that this guide can be accessed by professionals and others who will be present at tribunals.

Overall I think that the document needs to be written in more specific terms to recognise that there are differences between the nature and purpose of a Mental Health Tribunal than other forms of tribunals such as Employment Tribunals.

Kind regards.

Yours sincerely

PETER J CONNELLY
Associate Medical Director for Mental Health

[redacted]
Secretary to Dr P Connelly
Associate Medical Director for Mental Health Murray Royal Hospital Perth Tel [redacted] Fax [redacted] Emial [redacted]@tpct.scot.nhs.uk

SCOTTISH COURT SERVICE
Headquarters
Hayweight House
23 Lauriston Street
Edinburgh
EH3 9DQ

Mental Health Division,
Scottish Executive,
St Andrews House,
Regent Road,
EDINBURGH
EH1 3DG

Your Reference:

Our Reference:

Date: 14 December 2004

Dear Sir / Madam,

CONSULTATION ON THE MENTAL HEALTH TRIBUNAL FOR SCOTLAND (PRACTICE AND PROCEDURE) RULES 2005

Thank you for inviting us to comment on the above consultation paper.

I confirm that we are content with the Rules as drafted.

Yours sincerely

[redacted]

Head of Organisation Branch
Operations and Policy Unit

INVESTOR IN PEOPLE

Telephone: 0131 229 9200 E-mail: [redacted]@scotcourts.gov.uk DX: [redacted]

Direct Dial: [redacted] Fax: [redacted] [redacted]