
SCOTTISH STATUTORY INSTRUMENTS

2008 No. 396

MENTAL HEALTH

**The Mental Health Tribunal for Scotland (Practice
and Procedure) (No. 2) Amendment Rules 2008**

Made - - - - 27th November 2008
*Laid before the Scottish
Parliament* - - - - 27th November 2008
Coming into force - - 20th December 2008

The Scottish Ministers make the following Rules in exercise of the powers conferred by sections 21(4) and 326(2) of, and paragraph 10 of schedule 2 to, the Mental Health (Care and Treatment) (Scotland) Act 2003⁽¹⁾ and all other powers enabling them to do so.

In accordance with section 44 of, and paragraph 24 of Schedule 7 to, the Tribunals, Courts and Enforcement Act 2007⁽²⁾ they have consulted with the Administrative Justice and Tribunals Council and its Scottish Committee⁽³⁾.

Citation and commencement

1. These Rules may be cited as the Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Amendment Rules 2008 and shall come into force on 20th December 2008.

Amendment of the Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005

2.—(1) The Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005⁽⁴⁾ are amended as follows.

(2) After rule 42(1) (disqualification) insert—

“(2) For the purposes of paragraph (1)(a), unless a person works wholly or mainly in a hospital or independent health care service, that person shall not be regarded as being employed by or contracted to provide services in or to that hospital or independent health care service.”.

(1) [2003 asp 13](#).

(2) [2007 c. 15](#).

(3) Consultation was previously with the Council on Tribunals and its Scottish Committee under sections 8(1) and (3) of the Tribunals and Inquiries Act 1992. Sections 8(1) and (3) of the Tribunals and Inquiries Act 1992 ([c. 53](#)) are now repealed. Section 45(1) of the Tribunals, Courts and Enforcement Act 2007 abolishes the Council on Tribunals and its Scottish Committee, with section 44 of and Schedule 7 to that Act establishing the Administrative Justice and Tribunals Council and its Scottish Committee in their place.

(4) [S.S.I.2005/519](#), as amended by [S.S.I. 2006/171](#).

(3) For rule 46 (distribution and disclosure of documents) and rule 47 (withholding documents or reports from disclosure in exceptional circumstances) substitute—

“Distribution of documents

46.—(1) Except as otherwise provided for in these Rules, the Clerk shall as soon as reasonably practicable send a copy of any document received in relation to the proceedings to the parties.

(2) At the request of any relevant person, or on its own initiative, the Tribunal or a Convener may determine whether a document should also be sent to any other person.

Requests to the Tribunal for non-disclosure of documents

46A.—(1) A request for non-disclosure of any document or part of it in connection with proceedings before the Tribunal shall be made in writing by the person sending the document when that document is sent to the Tribunal, indicating the words and passages for which non disclosure is claimed and giving reasons in each instance.

(2) If so directed by the Convener or the Tribunal, the person making the request under paragraph (1) shall, where practicable, supply a disclosable version of the relevant document.

(3) On receipt of a request under paragraph (1), the Convener or the Tribunal shall determine whether the request shall be intimated to any person and the Clerk shall intimate the request to such a person inviting that person—

- (a) to make written representations within such period as may be specified; or
- (b) to make representations at a hearing on such date as specified in the notice.

(4) On considering the request and accompanying reasons, and after taking into account any representations received in response to any intimation of that request under paragraph (3), the Convener or Tribunal may—

- (a) where the Convener or Tribunal is satisfied that all or any part of the document should not be disclosed, direct that the document or any part of the document should not be disclosed;
- (b) where a disclosable version has been provided under paragraph (2), direct that the version will be disclosed in place of the relevant document; or
- (c) reject the request.

(5) The Tribunal shall notify the person who made the request under paragraph (1) and any person to whom the request was intimated under paragraph (3) and who made representations that such a decision has been made and the reasons for that decision.

Withholding documents or reports from disclosure at initiative of the Tribunal in exceptional circumstances

47.—(1) This rule applies to documents or reports received by the Tribunal where the Convener or the Tribunal is concerned that disclosure of all or any part of the contents of a document or report—

- (a) may cause serious harm to the patient or any other person such that it would be wrong to disclose it to the patient or another person; but
- (b) that in all the circumstances it would nevertheless not be unfair if the document or report or that part of it is considered by the Tribunal.

(2) The Convener or the Tribunal may appoint a person having appropriate skills or experience to—

- (a) assess whether disclosure of the document or report to a patient or another person may cause serious harm; and
 - (b) report to the Convener or the Tribunal, as the case may be, on the matter.
- (3) The Tribunal shall pay to an expert appointed under paragraph (2) such an amount in respect of necessary expenses incurred in preparing and producing any report, as the President shall direct.
- (4) If the Convener or the Tribunal is satisfied, taking into account the report of any expert appointed under paragraph (2), as to the matters specified in paragraph (1), the Convener or the Tribunal, as the case may be, shall determine whether the document, report, or any part of it, is not to be disclosed and may direct that—
- (a) the document or report may be considered by the Tribunal; and
 - (b) all or any part of its contents must not be disclosed to such persons as specified by the Convener or the Tribunal.
- (5) The Tribunal shall notify the representative of the patient or other person to whom the document, report or any part of it is not to be disclosed, that such a decision has been made, and the reasons for that decision.
- (6) Where a decision is made under this rule not to disclose a document, report or any part of it to a patient and the patient does not have a representative to represent their interests, a curator *ad litem* may be appointed under rule 55(1).”.
- (4) In rule 59(7)(b) (production of documents) omit “rule 46(3)” and substitute “rule 46A(1)”.
- (5) In rule 66(6)(c) (hearings in public or private) omit “Council on Tribunals” and substitute “Administrative Justice and Tribunals Council”.
- (6) In rule 72(5) (decision of the tribunal) omit “as soon as reasonably practicable” and substitute “within 21 days of the date on which the decision is signed by the Convener”.
- (7) After rule 72(5) insert—
- “(5A) Paragraph 5B applies to decisions made by the Tribunal in relation to applications or references under sections 50(1), 63(1), 92, 95, 98(2), 99(1), 100(2), 120(2), 149, 158, 161, 162(2), 163(1), 164(2), 185(1), 187(2), 189(2), 191, 192(2), 210(3), 211(2), 213(2), 214(2), 255(4), (6) and (7), 256(1), 264(2), 267(2), 268(2), 271(2) and 291(2) of the Act but does not apply in relation to any such applications which are not granted by the Tribunal.
- (5B) Where a copy of a decision is sent to the Commission under paragraph (5) the Clerk shall at the same time send to the Commission a copy of:—
- (a) the application or reference (as the case may be); and
 - (b) in the case of an application, any mental health report that is required under the Act to accompany that application.”.

EXPLANATORY NOTE

(This note is not part of the Rules)

These Rules further amend the Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005 (“the principal Rules”), which make provision as to the practice and procedure of the Mental Health Tribunal for Scotland.

Rule 2(2) amends rule 42 of the principal Rules (disqualification), by inserting a new paragraph (2) to provide that a person shall not be regarded as employed by or contracted to provide services in or to a hospital or, independent healthcare service, and therefore disqualified from serving as a member of a tribunal for the purposes of rule 42(1)(a), unless that person works wholly or mainly in a hospital or independent healthcare service.

Rule 2(3) replaces rules 46 (distribution and disclosure of documents) and 47 (withholding documents or reports from disclosure in exceptional circumstances) of the principal Rules, to introduce three new separate rules on these matters: rules 46, 46A and 47. New rule 46 provides for the distribution of documents only. Rule 46A provides the procedure for resolving requests to the Tribunal for the non disclosure of documents. Rule 47, which provides for the withholding of documents by the Tribunal in exceptional circumstances, is replaced in amended form to eliminate the previous requirement for the Convener or Tribunal to afford the parties an opportunity to make representations on documents which they have not seen.

Rule 2(4) makes an amendment to rule 59(7)(b) of the principal Rules (production of documents), consequential on the amendments made at rule 2(3) as above.

Rule 2(5) substitutes the reference to the Council on Tribunals in rule 66(6)(c) (hearings in public or private) with a reference to the new Administrative Justice and Tribunals Council.

Rule 2(6) amends rule 72(5) of the principal Rules (decision of the tribunal) to provide that the Clerk of the Tribunal shall send a copy of the decision to the Mental Welfare Commission or, if appropriate, the court within 21 days of the date on which the decision is signed by the Convener.

Rule 2(7) introduces a new rule 72(5A) into the principal Rules, which provides in relation to applications or references under sections 50(1), 63(1), 92, 95, 98(2), 99(1), 100(2), 120(2), 149, 158, 161, 162(2), 163(1), 164(2), 185(1), 187(2), 189(2), 191, 192(2), 210(3), 211(2), 213(2), 214(2), 255(4), (6) and (7), 256(1), 264(2), 267(2), 268(2), 271(2) and 291(2) that where a copy of a decision is to be sent to the Mental Welfare Commission the Clerk shall at the same time send a copy of the application and accompanying medical reports and, in the case of a reference, send a copy of the reference to the Mental Welfare Commission along with the copy of the decision. It does not apply to any applications where the application is not granted by the Tribunal.