

EXPLANATORY MEMORANDUM TO
THE TRIBUNAL PROCEDURE (AMENDMENT NO.2) RULES 2022

[Year] No. [XXXX]

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.

2. Purpose of the instrument

- 2.1 The Tribunal Procedure (Amendment No.2) Rules (“the Amendment Rules”) make amendments to the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, the Tribunal Procedure (First-tier Tribunal) Property Chamber Rules 2013, the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

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

6. Legislative Context

- 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 The 2007 Act provides for tribunal procedure rules to be made by the Tribunal Procedure Committee (“the TPC”), and deals with the process of making, and the content of, those rules.

7. Policy background

What is being done and why?

Amendments to Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 and the Tribunal Procedure (Upper Tribunal) Rules 2008

- 7.1 The Amendment Rules amend the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (“the GRC Rules”) and the Tribunal Procedure (Upper Tribunal) Rules 2008 (“the UT Rules”) resulting from legislative changes in relation to the repeal of the Charities Act 1993 and its replacement by the Charities Act 2011. These amendments have been made to reflect this change, providing correct referencing.
- 7.2 The Amendment Rules also amend the GRC Rules and the UT Rules to introduce provisions for the making of an application for an ‘authorised costs order’ (“ACO”). An ACO is akin to a Beddoe Order made in the High Court, in that it will authorise the incurring of costs from charity funds in conducting anticipated or current proceedings in the Tribunal.
- 7.3 Section 36 of the Charities Act 2022 has amended the Charities Act 2011 by including a new section 324A, providing for an ACO to be made by the Tribunal. Both the First-tier Tribunal and the Upper Tribunal have jurisdiction to make ACOs. Such an application may be made by a charity or by its charity trustees as regards proceedings within the charities jurisdictions of the First-tier Tribunal and Upper Tribunal (respectively).
- 7.4 An application for an ACO comprises separate proceedings to any current or anticipated proceedings. The amendments will enable the Tribunal to reflect the existing procedure adopted in the High Court in relation to an application for a Beddoe Order.
- 7.5 The Amendment Rules also amend the GRC Rules in relation to decisions with or without a hearing, to permit an application for an ACO to be disposed of without a hearing where appropriate. (There is no need to amend the UT Rules in this regard.)
- 7.6 The Amendment Rules further amend the GRC Rules to enable the First-tier Tribunal to direct that the 28-day time limit for making an application for permission to appeal against a decision in relation to an ACO be extended to accord with the time limit for making an application for permission to appeal against a decision which disposes of all issues in the proceedings to which the application for an ACO relates.

Amendments to Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008

- 7.7 The TPC initially consulted in February 2020 on extending the time limit imposed on the Tribunal by rule 37(1) of the Tribunal Procedure (First-tier Tribunal) (Health, Education, and Social Care Chamber Rules) 2008 (“HESC Rules”) which provides that proceedings under section 66(1)(a) of the Mental Health Act 1983 (which concerns patients detained under section 2 of that Act) must be heard within seven days after the date that the Tribunal receives the application notice.
- 7.8 The combined effect of rule 37(1) with the requirements to notify parties of the time and place of the hearing under rule 37(3) and (4)(a) is to limit the number of possible days for listing section 66(1)(a) applications to one or two days.

- 7.9 Due to the significant volume of such applications and the listing and notification requirements under the HESC Rules, the First-tier Tribunal frequently impose a hearing date on parties. This can result in more cancelled hearings due to postponements requested by parties due to their unavailability or because the Tribunal do not have three panel members to sit.
- 7.10 To address this issue the TPC proposed amending rule 37(1) to extend the time limit to list such cases from seven days to ten days. This would allow the First-tier Tribunal a better chance of ensuring that a panel could be identified and that the hearing could proceed on the day listed, thereby avoiding the distress and inconvenience caused by cancelled hearings.
- 7.11 Due to the coronavirus pandemic the rule 37(1) amendment was made on a temporary basis and the TPC considered it appropriate to delay any decision to make this change permanent. Following further consultation in June 2022 the TPC has decided to implement a permanent change to rule 37(1) of the HESC Rules to extend the time limit which the First-tier Tribunal must list cases under section 66(1)(a) of the Mental Health Act 1983 from seven days to ten days after the date the Tribunal receives an application notice.

Amendments to Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

- 7.12 The Amendment Rules make amendments to the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 to accommodate the ability to achieve early disposals on paper of Part 4A Electronic Communications Code cases involving ‘unresponsive grantors’. These are cases in which a lessee in occupation in a multi-dwelling building has requested a telecommunications service from an operator, and to connect the property the operator requires an access agreement with another person (such as the landlord) granting permission to gain access and install equipment. However, after a series of required steps to contact such person, the intended grantor of permission remains unresponsive.
- 7.13 The Tribunal will have the power to dispose of applications made under paragraph 27D of Part 4A (code rights in respect of land connected to leased premises: unresponsive occupiers) of Schedule 3A to the Communications Act 2003 without a hearing, after giving not less than 14 days’ notice.
- 7.14 The TPC has also decided to amend the structure of rule 13 (Orders for costs, reimbursement of fees and interest on costs) to bring greater clarity for the present and in anticipation of further jurisdictions being placed in the Property Chamber. The existing ‘default’ costs provision is that there are no costs shifting powers other than for cases of unreasonable conduct. Jurisdictions where there are costs shifting powers, or no power to order costs for unreasonable conduct, are then expressly stated.

Amendments to Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010

- 7.15 The Environment Act 2021 (“EA 2021”) introduces a legislative framework for conservation covenants. A conservation covenant is an agreement between a landowner and a ‘responsible body’, such as a conservation charity, public body or not-for-profit body, to do or not do something on their land for a conservation purpose. It is intended to conserve (protect, restore or enhance) the natural or heritage features of the land for the public good. These agreements are long lasting and can

continue after the landowner has parted with the land, ensuring that its conservation value is protected for the public benefit.

- 7.16 A local authority or other organisation with conservation among its core purposes or activities can apply to become a responsible body. The Secretary of State for Environment, Food and Rural Affairs will assess applications against published criteria to decide if an applicant may be so designated.
- 7.17 A party to a conservation covenant can apply under section 130 of the EA 2021 to the Upper Tribunal to discharge or modify the covenant. The Upper Tribunal must make the other party to the covenant a party to the application. In disposing of the application, the Upper Tribunal must have regard to, or must disregard, various specified matters when deciding whether to exercise its power to discharge or modify. The Upper Tribunal has supplementary power to award compensation and, in a decision to discharge or modify, to impose a condition of entry into a new conservation covenant.
- 7.18 The Upper Tribunal may also receive an application under section 135 of the EA 2021, from any person interested, for a declaration in respect of a conservation covenant: as to its validity, whether any land or any person is bound by the conservation covenant, or how the conservation covenant should be interpreted.
- 7.19 The Amendment Rules amend the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 to introduce a new Part 6A which makes provisions for applications to be made to the Lands Chamber of the Upper Tribunal under sections 130 and 135 of the Environment Act 2021 for the discharge or modification of conservation covenants, or for declarations. Part 6A also sets out that copies of the application materials must be provided to relevant persons named in the application, and that a notice of objection from such a person may subsequently be provided to the Upper Tribunal, following which directions, as appropriate, will be given by the Upper Tribunal.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

- 9.1 Informally consolidated versions of these rules will be updated onto the Justice website when the instruments come into force. They will be found at: [https://www.gov.uk/government/publications?departments\[\]=tribunal-procedure-committee](https://www.gov.uk/government/publications?departments[]=tribunal-procedure-committee)

10. Consultation outcome

- 10.1 On the 11 February 2020, the TPC published its consultation: [Consultation on possible amendments to the Tribunal Procedure \(First-tier Tribunal\) \(First-tier Tribunal\) \(Health, Education and Social Care Chamber\) Rules 2008 on the timescale for listing Section 2 hearings \(“the 2020 Consultation”\)](#), which sought views on the proposed change to rule 37(1) of the HESC Rules, to extend the timescale that the First-tier Tribunal must list hearings in relation to applications by patients detained under section 2 of the Mental Health Act 1983, from seven days to ten days.
- 10.2 During the consultation period the country entered a period of lock down due to the coronavirus pandemic. As a result, the TPC made emergency rule changes on a

temporary basis through the Tribunal Procedure (Coronavirus)(Amendment) Rules 2020 (S.I. 2020/416), to protect public health and to ensure the continued administration of justice during the pandemic. The temporary rule amendments included a change to rule 37(1) of the HESC Rules as proposed by the consultation, this expired at midnight on 24 September 2022.

- 10.3 These events led to the TPC publishing its consultation response to say that it would delay making a final decision as to making a permanent rule change to rule 37(1) as it wished to assess the effects of the temporary change before making a final decision.
- 10.4 As the temporary rule approached its expiry the TPC considered it appropriate to run a further consultation on making this rule change permanent (“the 2022 Consultation”). The 2022 Consultation ran between the 21 June 2022 and 16 August 2022. There were 11 responses to that Consultation and of those 3 were in favour of the proposal and 8 were against. The TPC considered these responses in the context of the 2020 Consultation, where 60 responses were received, and of those responses the overwhelming majority were in favour of the proposal (51 for and 9 against). The TPC also assessed the effects of the temporary rule change and noted that notwithstanding the ability to list within 10 days rather than 7 days, the overwhelming majority of section 2 hearings were listed within 7 days (84.8%) and 99.9% within 10 days. The TPC having considered the 2022 Consultation responses in conjunction with the 2020 Consultation responses, and having assessed the impact of the temporary rule change during the pandemic, it has concluded that it is now appropriate to make the change to rule 37(1) of the HESC Rules permanent.
- 10.5 No public consultation was undertaken in respect to the amendments made to the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, the Tribunal Procedure (First-tier Tribunal) Property Chamber Rules 2013, the Tribunal Procedure (Upper Tribunal) Rules 2008, and the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010. However, in accordance with paragraph 28(1)(a) of Schedule 5 to the 2007 Act, the TPC has consulted such persons as it considers appropriate which includes individually with all relevant government departments and stakeholders. This includes the Tribunal Chamber Presidents, legal and policy officials from the Department for Culture, Media and Sport and the Department for Environment, Food and Rural Affairs.

11. Guidance

- 11.1 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 website at: <http://www.justice.gov.uk/tribunals>

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 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.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation in respect to the impact of any changes to the Tribunal Procedure Rules is monitored by the Tribunal Procedure Committee by way of feedback from the Tribunal and users.

15. Contact

- 15.1 Vijay Parkash at the Ministry of Justice Telephone: 0203 334 4471 or email: Vijay.Parkash@justice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Kate Gregory-Smith, Deputy Director for Courts, Tribunals and Transparency Policy, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Parliamentary Under-Secretary of State, Lord Christopher Bellamy KC at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.