

GUIDANCE to TRIBUNAL Members No. 2/2024

Child and Adolescent Mental Health Tribunals

Purpose of this Guidance

1. This guidance applies to any hearings involving a person of any age up to 18 who is subject to proceedings under the Mental Health (Care and Treatment) Act 2003. This age limit accords with the definition of a child in the 2003 Act and with the UN Convention on the Rights of the Child ('UNCRC'). Merely because someone has reached the age of 18 does not mean that the guidance has no application. It may be that some steps in it are good practice for a young person of 18 or over who is attending a hearing.
2. The purpose of this guidance is to provide a framework aimed at ensuring that the experience that children and young people have at tribunals is trauma-informed and child friendly. The principles of trauma-informed practice are safety, trust, choice, collaboration and empowerment. In line with these principles, it may not always be appropriate to take the steps outlined in this document. A child's need for safety is paramount.
3. The guidance also focuses on steps required to comply with UNCRC. The guidance will take effect from 16 July 2024, when the UNCRC (Incorporation)(Scotland) Act 2024 will come into force. If a party or other attendee at a hearing alleges non-compliance with UNCRC, the President's Office must be informed by the convener, as there may be notification duties under the 2024 Act'.

Meanings

In this guidance, these words have the following meanings.

child	for the purposes of the Mental Health (Care and Treatment) Act 2003, a child is a person of any age up to 18
Rules	all rule references are to the Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Rules 2005
a tribunal	the three members who will consider the application, appeal or review and make a decision
7 Golden Rules	7 Golden rules for participation Children and Young People's Commissioner, Scotland (CYPSC)

Before the Hearing

4. To ensure a hearing remains child centred, planning is essential. Practical arrangements for the child's participation in the hearing should be discussed in the tribunal's pre-hearing discussion. The factors outlined in the following paragraphs should be considered as part of this discussion.

Who needs to be present in the hearing and when

5. It is important to identify at the pre-hearing stage exactly who the parties, relevant persons, witnesses and attendees are. Too many people within the hearing can be a barrier to a child's participation. The tribunal has a duty to mitigate the effects of this and to discharge its function in the manner that best secures the welfare of the child and encourages, amongst other things, meaningful patient participation.
6. During the pre-hearing stage, members should decide who should be present and when, with the aiming of keeping the number of people in the hearing at any one time to a minimum. Parties have a right to be present throughout a hearing whereas a witness who is not a party can be asked to leave after giving evidence. Rule 63(7) provides the power for the tribunal to exclude from the hearing any person who is to appear as a witness in the case until such time as they give evidence, if they consider that it is fair in all the circumstances to do so.
7. It is expected that a nurse escort will attend a hearing with a child who is in hospital at the time of their hearing. The expectation is that the nurse will remain in the room with the child for the duration of the hearing. It is possible, however, for a request to be made to the members for the nurse to wait outside the hearing room, with reasons for the request. The members will require to seek the views of others on the matter, and take a decision on the request, following a process which is fair to all.

Modes of Attendance

8. Rule 52(c) provides that the tribunal can hold a hearing or hear evidence by telephone, video link or other communication if the tribunal is satisfied this would be fair in all the circumstances. It can be unhelpful for a child to have people attending by various different means. For any participant wishing not to attend by the same means as the child, consideration should be given to any impact this may have on the child's ability to participate.

Meeting the child before the commencement of the hearing

9. If the hearing is in-person, and the child is in attendance, the Convener should introduce themselves to the child in the waiting area before the hearing starts. The child may want to meet the specialist members before the hearing starts and if this is the case the Convener or the clerk will bring the child into the hearing room to meet the other members. If the child wishes to be accompanied they should be allowed to bring the person of their choice.

The child and the hearing room

10. The child may also wish to see the hearing room in advance of the hearing, and should be offered the chance to do so before the hearing takes place. Arrangements should be made with the clerk to facilitate this. If the child wishes to be accompanied, they should be allowed to bring the person of their choice.
11. The child may find it helpful to choose where they would like to sit in advance of the hearing starting. If this is the case the clerk should take a note of this and ensure that the tribunal are aware. It may be helpful for the child to enter the hearing room and take their seat before other participants.
12. The child may prefer to be in the hearing room before the tribunal members attend. If so, the clerk will inform the tribunal members once the child is settled in the hearing room before the tribunal members and other participants enter the hearing room.

During the Hearing

Starting on time

13. Generally, the hearing should commence on time, irrespective of any difficulties which may be unfolding outside the hearing room, even if this requires the hearing to start and then be adjourned shortly afterwards. This sets a clear measure of the tribunal's respect towards the patient and the process. There may be occasions where this is not appropriate for example if the child is attending but is delayed.

Making introductions

14. Once everyone is seated, the Convener should begin the round of introductions. In a remote hearing, the Convener should begin the round of introductions, working from the tribunal members first to the remaining attendees.
15. The child should be asked how they want to be referred to, including their preferred name, and this should be respected throughout the hearing.
16. If the child expressed a preference as to their preferred pronouns this should be respected throughout the hearing.

Explaining the manner of proceedings

17. Rule 63 sets out that at the beginning of the hearing the Convener shall explain the manner and order of proceedings and the procedure the tribunal intends to adopt. A clear explanation of how the tribunal will be conducted is required. This may need to be broken down and refreshed during each stage of the hearing.
18. A child is likely to be particularly anxious about the nature and depth of evidence which will be heard. It is helpful to reassure the child at the start about how evidence will be dealt with and in particular that the purpose of the hearing is not to rehearse the written evidence but that there may be questions arising from this.
19. As part of the explanation it should be mentioned that the proceedings are recorded and the purpose of this.

Unrepresented child

20. Where the child is unrepresented, the Convener should remind the child of their right to representation at the outset of the hearing. A child may have capacity to instruct a solicitor but choose not to do so. That right must be respected.

Curators *ad litem*

21. Where a child does not have capacity to instruct a solicitor, a Curator *ad litem* may be appointed to the child to safeguard their rights.
22. Incapacity is defined in the Adults with Incapacity (Scotland) Act 2000. Capacity is not a static concept. A child may lack capacity to exercise some rights, but have capacity to exercise others. A child's age is not determinative of their capacity to instruct a solicitor.
23. The Mental Welfare Commission for Scotland recommends a functional approach when determining capacity to make a decision. This focuses on whether an individual is able to make the particular decision at the particular time when the decision has to be made. The tribunal should have regard to this definition when considering the meaning of capacity, although they are not bound to follow it.
24. A child is not to be treated as lacking capacity by reason only of a lack or deficiency in a faculty of communication, if that lack or deficiency can be made good by human, electronic or mechanical aid (whether of an interpretative nature or otherwise).
25. Where a Curator *ad litem* requires to be appointed the tribunal must consider whether they require to make a decision or can adjourn the hearing. A decision appointing a Curator *ad litem* should be made under Rule 55. If there are any factors which are relevant to the appointment of a Curator *ad litem*, these should be conveyed to the clerk. For example, if English is the child's second language it may be possible to appoint a Curator *ad litem* who can communicate in the child's first language.

Planned and regular breaks

26. Do not rely on a child to ask for a break or say that they need one. A child is likely to struggle to ask for a break. In addition a child's concentration span is generally shorter than that of an adult and there may be specific factors that impact this. Therefore planned, regular breaks are beneficial. In order to determine the frequency of planned breaks it may be helpful to ask how long the child would usually be able to concentrate for and whether there are any factors which would make that more difficult. A good benchmark to use is a child's longest lesson at school or college if they attend one.
27. There is a particular need to be mindful of the need for breaks where there are planned meal times. It is helpful at the beginning of the tribunal to establish if there is a need to break at particular times. If a child requires to have meals or snacks at certain times this requires to be accommodated, even if this means adjourning shortly after commencing.

28. It is also important to acknowledge at the commencement of the proceedings that breaks will be provided where necessary. Tribunal members require to be alert to the need for breaks through verbal and nonverbal communication.
29. It may also be helpful to state to the child that breaks will be taken after certain evidence has been heard.
30. It is important when planned breaks are agreed that these take place at the agreed time.

Use of Sensory Items

31. A child may best be able to participate when making use of sensory aids such as fidget toys. The use of sensory items can improve concentration and some children find these helpful. A child should be made aware that they are free to use sensory items throughout the hearing if they have some with them. Some hearing suites will have a supply of these and it would be helpful to share these with the child.

Use of Written Evidence

32. The purpose of the hearing is not to rehearse evidence which is already before the tribunal in written form. Where information is already produced within written documentation submitted to the tribunal it does not require to be repeated in detail. This evidence can be summarised where appropriate. If relying on written evidence this must be made clear to parties.

Avoiding language which is not child friendly

33. Rule 63 provides that the Convener shall explain any legal terms or expressions which are used. Statutory language should be used sparingly and when it is used should be explained in plain English. The use of acronyms and abbreviations should be avoided.

The Views of the child

34. In discharging duties under the 2003 Act, the tribunal should have regard to the views of the patient. In order to comply with Article 12 of the UNCRC, every child who is capable of forming their own views has the right to express those views freely in all matters affecting them. Children have the right to be heard directly, or through a representative or an appropriate body in any judicial proceedings affecting them. It is good practice to ask a child when and how they wish to give their views. This should also include making the child aware that they may be able in certain circumstances to give their views without the presence of other participants.
35. There may be limited circumstances where it is not possible to obtain the views of a child, or they may not wish to express a view. But hearing the child is important,

and tribunals should make every effort to do so, in whatever way works best. They should try to overcome communication barriers, taking all necessary steps to obtain the child's views in a way that is appropriate to their age, maturity, understanding, wellbeing, choice and needs. Involvement of advocacy may be crucial in this respect. In some situations, the views of the child will be conveyed by an advocacy worker rather than the child.

36. The CYPCS [7 Golden rules for participation](#) (summarised in the Appendix) provides child-centred guidance, which will be of assistance to the tribunal.

Taking the views of the child in the absence of parties

37. The child's views may be taken by the tribunal in the presence of the parties or (where the parties agree) outwith their presence. The three members and the clerk should remain present during this time.
38. Where the parties do not agree, Rule 69 can be considered. If the tribunal consider it appropriate to proceed under Rule 69 to hear the views of the child outwith the presence of parties, the tribunal should explain their reasons for proceeding in this manner. The three members and the clerk should remain present during this time.
39. Where the parties are absent, the child should be informed at the beginning that their views will be shared with the parties when they return to the hearing room. The Convener should provide a verbal summary of the child's views to the parties when the parties return to the hearing room.

Asking a child questions

40. A child should be asked if they are willing to answer questions from the tribunal and, if they say no, that should be respected. Before asking that threshold question, however, it may be helpful to explain how questioning would proceed.
41. Being prepared for questions and having someone to explain questions works well for children. A tribunal should use questions at a level the child can understand. There are a number of strategies to support children to understand questions and to be able to participate meaningfully.
42. The following strategies may assist in asking questions:
- a) One person should be identified to ask the child pre-agreed questions;
 - b) Check you have the child's attention before asking a question;
 - c) Keep questions as short and simple as possible and do not ask multiple questions in one;
 - d) Avoid leading questions;
 - e) Start with a question the tribunal already knows the answer to, this can be helpful to build rapport and put the child at ease;

- f) Allow plenty of time to respond to a question;
- g) Repeat questions if needed - do not re-word your original question immediately as it can be more helpful to repeat it;
- h) Always wait for the child to answer one question before moving on to another;
- i) Look for signs that the child has not understood a question. These might include the answer given not relating to the question, withdrawal of eye contact, an increase in fidgeting and a change in physical posture; and
- j) Be aware that the child is likely to be in a heightened state of anxiety at the tribunal - this can make listening, maintaining focus, processing language and answering difficult.

Disagreement between the child and the parent

43. Care should be taken where there is a disagreement about the issue(s) in the case, between the child and their parent. Assuring both parent and child that their views will be carefully considered by the tribunal may assist so that the parent and child do not feel they require to resolve their different opinions between themselves. The Convener should intervene where necessary to defuse any rising emotions and make use of adjournments to give some 'breathing space' to settle any stress or discomfort.

After the Hearing

The decision

44. After evidence and submissions have concluded, the Convener should explain what happens next. This should not be a surprise to the child, having been covered in the explanation at the start of the hearing. The tribunal can provide an oral decision at the hearing or, in exceptional cases, can reserve its decision. If the decision is reserved, the Convener will need to explore and confirm how the decision is to be communicated verbally to parties after the hearing. The Convener should also explain how long the tribunal will take to issue its written decision.
45. Wherever possible, the content of the written decision should be appropriate to the level of understanding of the child, so that they have the opportunity to consider it as fully as possible.
46. Article 3 of the UNCRC refers to the right of the child to have their best interests assessed and treated as a primary consideration in all actions concerning them undertaken by a wide range of bodies. This will include the Tribunal. As a rule of procedure, the decision making process must include an evaluation of the possible impact (positive or negative) of the decision on the child. Justification of the decision in the FFR should show that the right has been explicitly taken into

account, for example how the child's interests have been weighed against other considerations.¹

47. When deciding whether to make a Recorded Matter in order to specify a treatment, care or service the child should receive, you may also want to consider Article 6 of the UNCRC which refers to the right to life, survival and development. Development is interpreted as a "holistic concept, embracing the child's physical, mental, moral, psychological and social development".²

Same Panel Request

48. When a hearing is part heard the same panel will continue to hear the evidence until the conclusion of any adjourned hearing. When a hearing is not part heard but an interim order is made, consideration should be given to continuity. The views of the child and other relevant persons should be considered. If there is good reason for the continued hearing to be heard by the same tribunal members a same panel request should be made.

Mode of Hearing

49. At the end of a hearing which is adjourned for any reason the child should be asked their preference for the mode of the next hearing.

Laura Dunlop KC
President

¹ [General comment no.14 \(2013\) on the right of the child to have his or her best interests taken as primary consideration.](#)

² [General comment no. 5 \(2003\): General measures of implementation of the Convention on the Rights of the Child](#)

APPENDIX



Seven Golden Rules for Participation

1



Understand my rights

2



A chance to be involved

3



Remember – it's my choice

4



Value me

5



Support me

6



Work together

7



Keep in touch