## HMCTS (Mental Health)

## GUIDANCE FOR THE CONDUCT OF CASES BEFORE THE RESTRICTED PATIENT PANEL

drafted in collaboration with the National Probation Service Victim Contact Scheme.

This guidance has been agreed between the Mental Health Casework Section (MHCS) within the Ministry of Justice, His

Majesty’s Courts and Tribunals Service (HMCTS), (Mental Health), and the Tribunal judiciary. It sets out the respective roles and responsibilities of those involved in applications and referrals from or concerning restricted patients in England and Wales, so that all parties are aware of their obligations. The guidance is set out in three parts: Pre-hearing, Hearing & Post-hearing. It also incorporates guidance in respect of victims.

The status of this document is non-statutory guidance. It was fully revised and republished in May 2015. Additional copies of this document are available in electronic format on the Ministry of Justice website and from HMCTS. A copy is also available on the National Probation Service (NPS) intranet (EPIC)

All correspondence between the tribunal office and the Ministry of Justice must quote both the tribunal reference (where it is known) and the Ministry of Justice reference (where it is known). It would also be helpful if any correspondence also quoted the patient's date of birth.

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# Section 1 Statutory Framework

This is covered by the Mental Health Act 1983 as amended, in particular but not limited to ss. 69-75, the Tribunal Procedure (First Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 as amended, (“the Tribunal Rules”) and the Senior President’s Practice Direction on the Contents of Statements and Reports in Mental Health Cases, most recently issued on 28th October 2013.

For the purposes of this guidance the definition of any particular term shall be that set out in Rule 1 of the Tribunal Rules unless otherwise specified. Any reference to the Act in this guidance should be taken as a reference to the Mental Health Act 1983, unless otherwise specified. Any reference to the Rules should be taken as a reference to the Tribunal Rules unless otherwise specified. The sections of the protocol relating to victims make provision pursuant to the Domestic Violence, Crime and Victims Act 2004.

# Section 2 Pre-hearing

**Detained Restricted patients**

* 1. ***Responsible Authority's obligations*** - Rule 32 (6) states that the Responsible Authority must send or deliver a statement containing the information and documents required by the relevant practice direction to the Tribunal so that it is received by the Tribunal as soon as practicable and in any event within 3 weeks after the responsible authority received a copy of the application or reference. Where the patient is a restricted patient, the Responsible Authority must also send a copy of the statement to the Secretary of State (Rule 32(7)). In practice, the Secretary of State will be provided with all the evidence filed in the proceedings under HMCTS’s obligation to send copies of all documents to all of the parties (Rule 32(3)).
  2. The Responsible Authority’s statement must contain a report from the Responsible Clinician, a social circumstances report, and a nursing report where the patient is detained in hospital, and all such reports must meet the requirements of the Practice Direction as set out in Part A (In-Patients) or Part D (Conditionally Discharged Patients). Attention is drawn, where relevant to the particular patient, to the more recent requirement to include material concerning mental capacity and deprivation of liberty (Paragraph 12(m) and 14(t); Paragraphs 32(j) and (k) and 33(v)), and MAPPA involvement (Paragraph 14(r) and (s), and Paragraph 33(t) and (u))
  3. ***HMCTS Obligations*** In addition to providing all disclosable documents to all parties, Rule 37 (3) requires the Tribunal to give reasonable notice of the time and place of the hearing (including any adjourned or postponed hearing), and any changes to the time date and place of the hearing to each party entitled to attend the hearing, including the Secretary of State. The period of notice must be at least 14 days except for those reasons stated in Rule 37 (4)(b). It is important that the tribunal office notify the Ministry of Justice as soon as possible once a hearing date is set. This information will be sent electronically to the MHCS Tribunal Correspondence mailbox at [mhcstribunalcorrespondence@justice.gov.uk](mailto:mhcstribunalcorrespondence@justice.gov.uk)

## Victims

The Tribunal will keep up to date lists of contact details for regional Victim Liaison Officers (VLOs). The Tribunal caseworker will notify the VLO identified on the patient’s case file as soon as a Tribunal application has been made and is accepted or when they have received a referral from the Mental Health Casework Section (MHCS). They will also then notify the VLO as soon as a date for the hearing has been set to ensure that the victims have time to make written representations about discharge conditions should they wish to do so. HMCTS will acknowledge receipt of any written submissions, and the Tribunal judge will be invited to direct what parts of the panel’s decision will be provided to the VLO in a letter informing the victim of the outcome of the hearing. Victim engagement in Tribunal proceedings is governed by the Practice Guidance concerning the involvement of victims, which is available from HMCTS (issued on 1st July 2011 by the Chamber President). Non-disclosure applications made on behalf of victims by VLO’s are dealt with sensitively, within the test in Rule 14(2) of likelihood of significant harm arising from disclosure. This test should be borne in mind when drafting the victim statement, and any application for non- disclosure should be made as early in the proceedings as possible.

* 1. ***Secretary of State's obligations*** - Rule 32(7A) and (7B) requires the Secretary of State, on receipt of the Responsible Authority’s statement, to send a statement of any further relevant information to the Tribunal as soon as practicable and in any event –
     1. in proceedings under section 75(1) of the Mental Health Act 1983, with reference to a conditionally discharged restricted patient who has been recalled to hospital, within 2 weeks after the Secretary of State received the relevant authority’s statement; or
     2. otherwise, within 3 weeks after the Secretary of State received the Responsible Authority’s statement.

The Secretary’s of State’s statement “…shall set out any written comments on the statement received from the responsible authority. In addition, the Secretary of State shall provide the following information as directed by Rule 32(7B):

1. a summary of the offence or alleged offence that resulted in the patient being detained in hospital subject

to a restriction order or, in the case of a patient subject to a restriction or limitation direction, that resulted in him being remanded in custody, kept in custody or sentenced to imprisonment;

1. a record of any other criminal convictions or findings recorded against the patient;
2. full details of the history of the patient's liability to detention under the Mental Health Act 1983 since the restrictions were imposed;
3. any further information in the Secretary of State’s possession that the Secretary of State considers relevant to the proceedings.”

In the preparation of the statement the Secretary of State shall review the circumstances of the patient’s detention, and in particular whether the patient is the subject of more than one ss.37/41 direction or equivalent, and shall give consideration where necessary to referring all or any such orders to the Tribunal to be dealt with and heard together.

Alternatively, the Secretary of State shall notify the Tribunal in such cases that it will act in accordance with any Tribunal discharge decision in relation to other outstanding matters not then before the Tribunal. The Ministry of Justice has not yet made the operational changes necessary to be able to identify multiple 37/41 or equivalent cases automatically, but it is agreed that other cases involving the same patient would be relevant for the purposes of Rule 32(7B)(d), and caseworkers shall use due diligence in identifying other matters and bringing these to the attention of HMCTS at the point of any referral. HMCTS (Mental Health) will refer any such cases that may be identified for case management by a Salaried Judge at an early stage.

* 1. The report will be sent electronically to the HMCTS (Mental Health) restricted mailbox with an electronic copy of previous convictions or written confirmation that the patient has no prior convictions. The Ministry of Justice’s target is to provide the Secretary of State's response to the Responsible

Authority’s statement within the statutory deadline in 100% of cases. The MHCS gives very high priority to the delivery of that target. The Tribunal office should expect that, save for exceptional circumstances, it will receive the Secretary of State's statement within the statutory deadline. The Ministry of Justice accepts that, if it has failed to provide the Secretary of State's response to the Responsible Authority’s statement within the 21 day statutory deadline, then the Tribunal is entitled to proceed without it (subject always to the Tribunal

being satisfied that the Responsible Authority’s statement has been received by the Secretary of State). An electronically generated acknowledgment of the Responsible Authority’s statement sent to the dedicated Tribunal communication email address, or a fax receipt confirmation, will constitute sufficient evidence of receipt by the Secretary of State.

Where necessary, the Ministry of Justice may be contacted by telephone by the Tribunal judge to confirm that the documents have been received. The Secretary of State may in certain circumstances, request an extension to the time limits. The Tribunal will decide whether this is appropriate.

**Late or non-submission of Responsible Authority statements for detained restricted patients**

* 1. This can lead to unnecessary delays and adjournments which prejudice the interests of justice. Attention is drawn to the overriding objective contained in Rule 2 of the Rules and the obligation imposed by Rule 2(4) on all parties to help further the overriding objective and to co-operate with the Tribunal generally, and the Tribunal’s power to issue both directions to give written evidence, and summonses to attend a hearing, and to refer defaulting witnesses or a responsible party to the Upper Tribunal to be dealt with for contempt.
  2. Rule 7 states that failure to comply with the Rules does not make tribunal proceedings void. If a party has failed to comply with a requirement in the Rules, a practice direction or a direction, the Tribunal may take such action as it considers appropriate.
  3. ***Role of the Tribunal office*** - The Tribunal office is not responsible for chasing late evidence. Directions and orders can be issued by the administration under devolved powers, and appropriate cases will be referred to a Registrar or Salaried Judge for consideration of other formal enforcement action. The Tribunal may, on its own initiative, make such directions as may be necessary to ensure the prompt provision of the required documents, and the Ministry of Justice has the same right as any other party to request that such directions be issued.

**Submission of late Responsible Authority statements to the Ministry of Justice - requests for postponement or adjournment of hearing**

* 1. Tribunals will sometimes request a Ministry of Justice response to a Responsible Authority statement that has been submitted less than three weeks prior to the hearing date. In these circumstances, the HMCTS caseworker will contact the person named as the relevant contact for the patient on the updated caseworker list, arranged alphabetically according to the patient’s surname. For urgent requests the Ministry of Justice will endeavour to make a suitable person available to discuss any case during office hours, for example the Team Manager or Head of Casework Team for the patient’s caseworker, if the named caseworker is not available.
  2. ***Position of the Ministry of Justice*** - Under the Rules and Practice Direction the Ministry of Justice, although required to respond as soon as practicable, has a maximum of 3 weeks in which to respond to the Responsible Authority statement (2 weeks in the case of Secretary of State references following a recall). The Ministry of Justice, however, fully appreciates the need to avoid adjournments, if at all possible, as they not only cause additional work for all parties involved but can also be unfair to the patient. The Ministry of Justice will make all reasonable efforts to assist the Tribunal in preventing the need for adjournment by providing its response to the

Responsible Authority’s statement even in cases where this has been provided late.

* 1. It will not always be possible for the Ministry of Justice to respond to every Responsible Authority statement that is submitted late. In particular, this may not be achievable where:
     1. the Ministry of Justice assessment is that the patient poses a potentially serious risk if discharged; and
     2. the late report increases the likelihood that the tribunal may discharge; and
     3. the time available does not allow the Ministry of Justice to submit a properly considered response.
  2. Where the Ministry of Justice has at least five working days in which to consider the late Responsible Authority statement it will use all reasonable endeavours to provide a response. The Mental Health Casework Section can be contacted by telephone by a Tribunal caseworker, a case management Judge or the Tribunal Judge if the Secretary of State’s statement has not been received, and the Ministry of Justice

will use its best endeavours to ensure that a statement is delivered in time or an appropriate response is given.

Contacts for the Mental Health Casework Teams are to be found on the Ministry of Justice website.

* 1. Where the hearing is in respect of a Section 75 (1) reference (where the Secretary of State has recently recalled the patient to hospital) the provision of a response, even at short notice, will receive greater priority.

**Submission of documents other than the Responsible Authority’s statement to the Ministry of Justice**

* 1. Any independent reports commissioned by the patient's

representatives, victims’ representations regarding possible conditions, or addendum reports from the patient's care team will be sent to the Secretary of State under Rule 32(3). Any failure by the Tribunal to supply copies of such documents to the Ministry of Justice may give rise to a right to challenge a Tribunal discharge decision under Rule 45. A Tribunal Panel shall presume that the Tribunal has complied with its obligations under Rule 32(3) unless there is evidence to the contrary, and shall make appropriate enquiries by telephone if in any doubt.

* 1. The Ministry of Justice is not obliged to comment on each supplementary report. Consequently a Tribunal may proceed in the absence of Ministry of Justice comments on supplementary reports and documents, as long as the Tribunal is satisfied that they have been sent to the Ministry of Justice. The Ministry of Justice accepts that an electronically generated acknowledgment of any report sent to the dedicated Tribunal communication email address or a fax receipt confirmation will constitute sufficient evidence of receipt by the Secretary of State.
  2. The Secretary of State may however provide a supplementary statement in respect of any further reports that are received if s/he has any relevant additional information or opinion to offer. The Ministry of Justice response may be an oral, emailed or faxed statement. The statement will contain the patient's name, the Tribunal office reference, and the Ministry of Justice's reference, and should also identify the reports to which the email or fax refers.

**Requests for adjournments by the Ministry of Justice**

* 1. The Ministry of Justice may, in common with other parties, make an application to adjourn a Tribunal hearing at any time it sees fit.

**No notice evidence**

* 1. The approach to ‘no notice’ oral evidence which directly contradicts the written evidence previously presented, for example where the Responsible Clinician now supports discharge contrary to their previously expressed opinion, is a matter for the exercise of reasonable judicial discretion at the hearing. The Tribunal will consider each case on its facts in the context of the relevant law, having regard to the power to adjourn and give directions if this is considered to be necessary, and to the interests of justice and fairness overall.

**Legal representation**

* 1. Under Rule 11 any of the parties may be represented at the tribunal hearing. The Ministry of Justice will notify the Tribunal at the earliest opportunity where it wishes the Secretary of State to be represented, especially if it needs to request a postponement to instruct Counsel.

**Conditionally discharged restricted patients**

* 1. ***The Secretary of State's obligations*** - Where the patient is a conditionally discharged restricted patient, the Secretary of State must immediately provide to the Tribunal the names and addresses of the responsible clinician and any social supervisor in relation to the patient (Rule 32 (4)(a)). If known, the Secretary of State will also send details of any Victim Liaison Officer engaged in the case to the Tribunal. Rule 32(4)(b) provides that, in relation to a conditionally discharged patient the Responsible Clinician and any social supervisor named by the Secretary of State must, upon being notified by the Tribunal of an application or reference, send or deliver to the Tribunal all the documents specified in the Senior President’s Practice Direction so that they are received by the Tribunal as soon as practicable and in any event within 3 weeks after the notification.
  2. As with detained restricted patients, the Ministry of Justice must send a statement to the Tribunal, as set out above at paragraph 2.5. The Ministry of Justice target is to provide the

Secretary of State's statement on time in 100% of cases, unless an extension to the timescales has been granted by the Tribunal and MHCS gives high priority to the delivery of this target. The Secretary of State’s statements will be emailed to the HMCTS, Mental Health restricted mailbox.

**Section 3 - the Hearing**

**Role of the HMCTS (Mental Health) in respect of detained restricted patients**

* 1. The role of the First-tier Tribunal (Mental Health) in the case of restricted patients is limited to determining whether or not the statutory criteria for detention in hospital continue to be met and, if not, whether discharge should be absolute or subject to conditions. Tribunal panel members should be aware of the case law relating to restricted patients, and the limitations on their role: for example in contrast to the powers under s72, Tribunals hearing restricted cases have no power to make statutory recommendations in respect of leave or transfer to another hospital. Guidance on the law is given in Richard Jones’ Mental Health Act Manual, copies of which are supplied to all Tribunal judges. It is the responsibility of each Tribunal judge to be familiar with recent case law developments and to take advantage of the training opportunities offered by the tribunal. In addition, guidance on common problems arising in restricted cases is given in the course of ongoing tribunal training.

**Re-convened hearings following a deferred conditional discharge**

* 1. Following *R on the application of IH v Secretary of State for Health [2002] EWHC (iv646)*, a deferred conditional discharge is a provisional decision which the tribunal may re-visit at any point prior to ordering a conditional discharge. If ordering a deferred conditional discharge the Tribunal should not defer the conditional discharge to a specific date, as the power to reconvene only arises if arrangements have not been made to the tribunal’s satisfaction for the provisional conditions to be put into place. In order to ascertain the position, Tribunal judges can, and should, enquire about progress where a deferred conditional discharge is pending, and the tribunal can re-convene to reconsider the matter if arrangements have not been made to the tribunal’s satisfaction. If it does reconvene, the Tribunal can rescind its earlier deferred conditional

discharge decision if it subsequently finds the criteria for detention are met. Equally, it can discharge absolutely, vary the conditions or uphold the original, provisional, decision.

**Ministry of Justice response to further reports where a deferred conditional discharge decision is pending**

* 1. The Ministry of Justice is under no obligation to respond to any further reports that the Tribunal receives following a provisional decision to grant a deferred conditional discharge. The Ministry of Justice will, of course, consider, in every case whether a response is necessary. The Ministry of Justice will not normally comment where the further reports are simply detailing progress made in meeting the provisional conditions imposed by the tribunal, but do not raise any issues regarding the patient's suitability for conditional discharge.

**Attendance of Ministry of Justice as observers**

* 1. From time to time staff from the Mental Health Casework Section of the Ministry of Justice may wish to attend a hearing as observers (as opposed to appearing as a representative or witness on behalf of the Secretary of State. For an observation, MHCS will request permission to observe at the time of drafting the Secretary of State's statement. They will write to the tribunal office providing them with the name(s) of the proposed observer(s) and the details of the case that the person wishes to observe. The request will then be passed to the Deputy Chamber President’s office for consideration. The Deputy Chamber President generally limits observers to one per hearing, and may operate a ‘first come first served’ approach. If permission is granted, attendance at the tribunal as an observer will also be subject to the patient's consent, which can be withdrawn at any time. It should be made clear to the panel that those attending from the Ministry of Justice do so as observers and should not be called to give evidence.

# Section 4 Post-hearing

# Notification of decisions

* 1. Rule 41 requires the tribunal to notify all parties, including the Secretary of State of the decision, with reasons, in writing within 7 days of the hearing.
  2. Where a patient has been granted an absolute, conditional or deferred conditional discharge, the Tribunal office will notify the Ministry of Justice within 24 hours of the hearing. This information will be sent electronically to the MHCS Tribunal Correspondence mailbox.
  3. It is particularly important that the Ministry of Justice is notified as soon as possible where the patient is given an immediate conditional discharge. The Ministry of Justice has a statutory responsibility for the management of conditionally discharged restricted patients, and cannot carry out this function unless it knows that the patient has been discharged, under what conditions and under whose supervision. This applies equally to confirmation that the conditions have been met following a deferred conditional discharge as this will then result in the making of a conditional discharge.
  4. Conditions on discharge must be only what is necessary and reasonable, having regard to the likely amelioration of risk to the patient or to other people. There is case law concerning conditions amounting to a deprivation of liberty ( *SSJ v. RB (2011) EWCA Civ 1608; also Secretary of State for Justice v. SB [2013] UKUT 0320 (AAC),* and *RH v. South London and Maudsley NHS Foundation Trust [2010] EWCA Civ 1273).* The decision in *RB* confirms that discharge conditions which amount to a deprivation of liberty will be unlawful.

**Deferred conditional discharges**

* 1. Where the tribunal defers a conditional discharge, it is for the tribunal to decide whether or not arrangements have been made to the tribunal’s satisfaction for the provisional conditions to be put into place
  2. Where the tribunal defers a conditional discharge and there is fresh evidence that the patient meets the criteria for detention in hospital or where it appears that the satisfactory arrangements have not been made to satisfy provisional discharge conditions, the Ministry of Justice may write to the Tribunal and ask them to reconsider their decision at a

reconvened hearing before the conditional discharge takes place.

**Deferred conditional discharges & automatic referrals**

* 1. Under section 71(2) of the Mental Health Act 1983 the Secretary of State is obliged to refer to the Tribunal the case of any detained restricted patient that has not been considered by the Tribunal for three years. This applies equally to those patients who have received a deferred conditional discharge but where three years have elapsed without a conditional discharge being ordered, or the tribunal re-convening to consider the case. Section 71(2) refers to the case not being considered "whether on his own application or otherwise, within the last three years". Where the tribunal has not re-visited a provisional decision on discharge for three years, that delay will trigger referral under section 71(2).

**Section 74 recommendations in respect of prisoners transferred to hospital under the MHA**

4.9 Where a tribunal makes a recommendation under section 74 in respect of a prisoner transferred to hospital, the tribunal office must inform the Ministry of Justice immediately of the recommendation decision. The Secretary of State must consider without delay his response to the recommendation.