

Mental Health Act Policy Practice Guidance Note		
Tribunal Discharge Guidance – V05		
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Appendix 1	Mental Health Tribunal - Note Of Evidence	

1 Introduction

- 1.1 A situation may arise where the Tribunal decides to discharge a patient contrary to the advice/ opinion of the treating clinicians. This practice guidance note (PGN) aims to provide guidance to staff in this eventuality.
- 1.2 It is not open to Cumbria, Northumberland, Tyne and Wear NHS Foundation Trust (the Trust/CNTW) to simply seek to re-section the patient; this would be

unlawful where it is simply an attempt to override the Tribunal's decision. The re-sectioning of a patient following an earlier Tribunal decision can be an appropriate action and is detailed later in this PGN.

2 Responsibilities

- 2.1 Doctors and Responsible Clinicians (RC) in charge of the treatment of patients (or their nominated deputy) and other health care professionals will have regard to the details in this practice guidance note and highlight any issues with the operation of this document to their line manager. Details of specific duties are given within the guidance of this document.
- 2.2 Training and development – will ensure training is available for those staff needing to update their knowledge of Mental Health Tribunals.
- 2.3 Mental Health Legislation Committee (MHLC) – will ensure this practice guidance note is monitored, reviewed and updated as necessary.

3 Background

- 3.1 It is the Tribunal's role to review detention and to discharge if the Tribunal is not satisfied that the detention criteria are met (as set out in s.72 and 73 of the MHA). In the case of non restricted patients this includes discretion to discharge even though the detention criteria are met.
 - 3.1.1 For restricted patients (Section 37/41) where the Tribunal can make a conditional discharge, case law has established that the Tribunal cannot impose conditions which would amount to an 'objective' deprivation of liberty outside hospital, because the statutory framework under the Mental Health Act simply does not allow for this and the fact that a patient with capacity consents to the conditions does not mean the Tribunal can impose them.
 - 3.1.2 If the Tribunal is satisfied that a patient is agreeable to supervision outside hospital and that this will protect both the patient and the public, it could consider granting an absolute discharge or make a conditional discharge with conditions which do not involve an objective deprivation of liberty.
 - 3.1.3 In respect of patients who lack capacity, the Tribunal could adjourn/defer discharge to permit an application to the Court of Protection to authorise a deprivation of liberty. The Tribunal cannot impose conditions amounting to a deprivation of liberty, and deprivation which arises as a result of the care plan will be the jurisdiction of the Deprivation of Liberty Safeguards (DoLS) framework or Court of Protection alone.
- 3.2 The Tribunal's decision can only be challenged in certain circumstances and not just because clinicians disagree with it. Examples of situations in which a challenge may be appropriate are:
 - Where the Tribunal did not apply the correct law or wrongly interpreted the law
 - Where the Tribunal made a procedural error

- Where the Tribunal had no evidence, or not enough evidence, to support its decision
 - Where the Tribunal did not give adequate reasons for its decision in the written statement of its reasons
- 3.3 The Tribunal Procedure Rules 2008 do provide a means of challenging a Tribunal decision. Where there is an error of law in the decision it may be reviewed by the Tribunal, or where there is a procedural irregularity, it can be set aside (Rules 49 and 45). There is also a process for appeal of the Tribunal's decision to the Upper Tribunal, for which leave must first be sought (Rule 46).
- 3.4 An application for leave to appeal must be made within 28 days of the written reasons for the decision being received.
- 3.5 If a stay of the decision is required pending the appeal process, then an application for a stay must be made as a matter of urgency (see below).

4 Challenging the Tribunal Decision

- 4.1 If there is concern in advance of a Tribunal that there may be a discharge contrary to the medical advice of Trust witnesses, this should be identified to the MHL Office as early as possible to ensure that the necessary steps can be taken, including the obtaining of legal advice, to properly manage the process.
- 4.2 If there is a concern that the Tribunal's decision is unlawful, in certain circumstances the Trust may seek to challenge the decision. Such a challenge is likely to be necessary in circumstances where the decision places the patient or third parties at risk.
- 4.3 If there is a concern that the Tribunal's decision is unlawful and that a challenge may be appropriate then the following steps should be followed as soon as possible:
- 4.3.1 The Mental Health Legislation Team must be contacted so that they can provide the relevant information to enable access to any legal advice that may be required.
- 4.3.2 The Mental Health Legislation Team (and legal team) will need to be provided (as soon as possible) with:
- A note of the Tribunal's decision (see below)
 - A note of the evidence presented to the Tribunal (see below)
 - Copy reports and other documentation provided to the Tribunal
 - Comments from the RC and care team (as appropriate) on the issues raised by the decision, in particular relating to any risks posed by the patient to themselves or others
 - Any interim measures that need to be/ can be taken pending any challenge of the Tribunal's decision (see below)

5 Stay of decision

- 5.1 The effect of the Tribunal's decision may not be immediate. Specifically:-
- 5.1.1 Unrestricted patients may have their discharge delayed until a specified future date.
- 5.1.2 Restricted patients may be conditionally discharged if the Tribunal considers it appropriate for them to be liable to be recalled. The Tribunal can defer the direction to conditionally discharge until such arrangements that appear to the Tribunal to be necessary for the discharge have been made to their satisfaction. If the effect of the decision is not immediate then any appeal of the decision can proceed while the patient remains in hospital.
- 5.2 Where discharge is immediate however, or where steps need to be taken before the decision takes effect and the patient is discharged, then it may be possible to apply for a stay of the decision. An application for a stay will be appropriate in circumstances where the patient poses a risk to themselves or others and will not agree to remain in hospital informally.
- 5.3 The necessary steps to obtain a stay must be taken immediately, with appropriate input from the MHA Office. An application for a stay of a Tribunal decision can be made in two ways:
- 5.3.1 Orally during the course of a Tribunal hearing
- 5.3.2 By written application to the Tribunal
- If the patient cannot be persuaded to stay in hospital informally during the process of an appeal, it is essential that a stay is sought immediately, preferably as part of the Tribunal hearing; where possible, legal advice should be sought.
- 5.4 In such circumstances it is unlikely that written reasons for the Tribunal decision will be available and a note of the decision will have to be relied upon instead (see below).
- 5.5 Seeking a stay of the Tribunal's decision will, of course, only be an option where the decision itself is being challenged. If the decision to discharge is 'stayed' the patient will remain subject to detention pending appeal/ review.
- 5.6 Where a stay is granted in circumstances where the patient has already left the hospital, they may be treated as AWOL and s.18 will apply.

6 Evidence of Proceedings

- 6.1 Since it may not be possible to wait for the Tribunal's written reasons before making any application (e.g. where a stay is sought), it is important that a note of the Tribunal's decision is always made. This is the responsibility of the patient's Responsible Clinician or their representative at the Tribunal.

- 6.2 So far as possible, notes of key points should also be taken during the course of the Tribunal, particularly if there is any concern that a challenge may be necessary.
- 6.3 Immediately after the Tribunal, where it appears an application for review or appeal may be appropriate, a full Note of Evidence should be made using Appendix 1. This should cover so far as possible:
- The decision of the Tribunal
 - Key evidence given by each witness
 - Any points of law considered or discussed
 - Any areas of disagreement between the various parties or witnesses
 - Any involvement of and evidence from an independent expert
 - Key issues of concern to the Tribunal

7 Re-detention following Tribunal Discharge

- 7.1 In certain circumstances a patient may be re-detained shortly after a Tribunal's decision to discharge.
- 7.2 Where this is an attempt to overturn the decision made by the Tribunal, then this will be unlawful.
- 7.3 Case law has established that an application for section following a Tribunal discharge should only be made where the AMHP (being aware of the discharge) has formed a 'reasonable and bona fide opinion that he has information not known to the Tribunal which puts a significantly different complexion on the case as compared with that which was before the Tribunal'.
- 7.4 This may include information subsequently discovered which was not taken into account by the Tribunal as well as things that may have occurred since the Tribunal's decision. Guidance is available regarding the completion of report from the MHA office.
- 7.5 In relation to Hospital Managers this means that care should be taken when admitting someone who has been re-detained following a Tribunal discharge. Case law has held that where Hospital Managers are aware of a previous Tribunal decision to discharge they should ensure that any subsequent application should be 'critically considered' to ensure that there is justification for the application in the light of the Tribunal's decision.

8 Impact on Equality and Diversity

- 8.1 In conjunction with the Trust's Equality and Diversity Officer this practice guidance note has undergone an Equality and Diversity Impact Assessment which has taken into account all human rights in relation to disability, ethnicity, age and gender. The Trust undertakes to improve the working experience of staff and to ensure everyone is treated in a fair and consistent manner.

9 Training and Support

- 9.1 Training - Training of staff to comply with this practice guidance note will be integrated into the MHA/MCA training programme. A stand alone session may be delivered in response to local need.
- 9.2 Support for the operation of this practice guidance note will be sought via line management, the Mental Health Legislation Steering Group and Mental Health Legislation Committee.

10 Review

- 10.1 This practice guidance note will be reviewed on 3 yearly basis or sooner if there are changes to relevant legislation or national/local guidance.

11 Monitoring

- 11.1 This practice guidance note will be monitored by the Mental Health Legislation Steering Group. Any issues with the operation of this document will be brought to the attention of the Mental Health Legislation Steering Group who will report outcomes of any required actions to the Mental Health Legislation Committee.