



Ministry
of Justice



HM Prison &
Probation Service

Mentally disordered offenders - the restricted patient system

Background Briefing

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1 Purpose of this guidance

This guidance provides stakeholders (including patients and their families, victims, Responsible Clinicians and other report writers and multi-disciplinary team members) with an overview of the restricted patient system in England and Wales and the role of the Secretary of State for Justice and the Mental Health Casework Section (MHCS) in Her Majesty's Prison and Probation Service (HMPPS).

2 Legal Provisions

The statutory framework is provided by:

- The Mental Health Act 1983 (specifically, but not limited to, Part III);
- Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 and The Mental Health Review Tribunal for Wales Rules 2008 (“the Tribunal Rules”);
- Criminal Procedure (Insanity) Act 1964;
- Domestic Violence, Crime and Victims Act 2004 (and The Code of Practice for Victims of Crime 2015)
- Crime (Sentences) Act 1997

3 Glossary of terms

“**HMPPS**” – Her Majesty's Prison and Probation Service, an agency of the Ministry of Justice

“**Index offence**” is the offence for which the offender was convicted or made subject to a special verdict

“**MAPPA**” – Multi Agency Public Protection Arrangements

“**MHA**” refers to the Mental Health Act 1983

“**MHCS**” is the Mental Health Casework Section in the Ministry of Justice

“**Responsible Clinician**” or “**RC**” is the clinician, usually a psychiatrist, responsible for the care of the restricted patient either while detained in hospital or under supervision in the community

“**Secretary of State**” refers to the Secretary of State for Justice

“**The Tribunal**” refers to both the First-tier Tribunal (Mental Health) in England and the Mental Health Review Tribunal for Wales

“**VLO**” is the Victim Liaison Officer

4 Key Points

Restricted patients are mentally disordered offenders who are detained in hospital for treatment and who are subject to special controls by the Secretary of State for Justice. They include offenders who are diverted from the courts to the hospital system, and those who are transferred to a secure hospital from prison and made subject to a restriction order or direction.

There are three routes into the restricted patient system:

- i. A restricted hospital order (s37/41 MHA) imposed by the Crown Court;
- ii. A hospital and limitation direction (s45A MHA) imposed by the Crown Court alongside a sentence of imprisonment
- iii. A transfer from prison (s47/49 MHA for serving prisoners, s48/49 MHA for those on remand or civil or immigration detainees)

Restricted patients differ from unrestricted or civil patients in that the restriction order or direction imposed by the Crown Court or the Secretary of State under the Mental Health Act 1983 (MHA) limits the powers of the Responsible Clinician and in some cases the Tribunal to make decisions about the patient.

The Responsible Clinician does not have the power to decide on certain matters relating to the management of the restricted patient such as transfer between hospitals or leave in the community without the consent of the Secretary of State.

In the case of patients who are subject to restricted hospital orders (sections 37 and 41), the Responsible Clinician does not have the power to discharge the patient without the consent of the Secretary of State (the Secretary of State and the Tribunal can also direct the patient's discharge). Similarly, a conditionally discharged restricted patient can only be recalled to hospital by the Secretary of State.

In the case of sentenced prisoners who have been detained under either section 45A of sections 47/49, the Tribunal does not have the power to direct discharge into the community.

The Secretary of State's powers under the MHA in relation to restricted patients are exercised by officials in the Mental Health Casework Section (MHCS) in Her Majesty's Prison and Probation Service (HMPPS).

5 Different types of restriction orders/directions

5.1 Hospital orders – ss37/41 Court disposal

Under section 37(1) of the MHA, which applies to England and Wales, in the case of a mentally-disordered offender convicted of an imprisonable offence¹, criminal

¹ A s37 hospital order cannot be imposed for an offence which attracts a mandatory life sentence

courts (Crown Court and magistrates' courts) may make a hospital order admitting the offender to hospital for treatment rather than imposing a prison sentence.

The Crown Court may also make a hospital order in such cases where the offender has been found unfit to plead (but found to have committed the act), or has been found not guilty by reason of insanity (section 5 of the Criminal Procedure (Insanity) Act 1964). In each case, the Crown Court may also impose a restriction order (see below); this is mandatory where the offender was charged with murder (section 5 of the Criminal Procedure (Insanity) Act 1964). Where a patient is found unfit to plead and detained under a hospital order, the Secretary of State may later remit the case to court once the patient has been assessed as fit to plead (S5A(4) Criminal Procedure (Insanity) Act 1964.)

The decision to impose a hospital order is at the discretion of the court but it must be satisfied, on the written or oral evidence of two registered medical practitioners, that the offender is suffering from a mental disorder of a nature or degree which makes it appropriate for them to be detained in hospital for medical treatment, and that such treatment is available, and that with regard to the circumstances of the case (including the nature of the offence and the character and criminal history of the offender), that a hospital order is the most appropriate means of dealing with them. At least one of the two registered medical practitioners must have given evidence orally.

A hospital order is not a punishment; the offender is effectively diverted away from the criminal justice system and into the secure hospital system for treatment.

Restrictions

Where the Crown Court makes a hospital order under section 37, it may also impose a restriction order under section 41 of the MHA, if it considers that it is necessary to do so to protect the public from serious harm. A magistrates' court cannot make a section 41 order, but if it considers that one may be appropriate, it may, instead of making a section 37 order (or dealing with the offender in another manner), commit the offender to the Crown Court under section 43(1) with a view to that order being made.

The section 41 restrictions last for as long as the hospital order, unless the restriction order is discharged. The restricted patient will remain detained in hospital for as long as he or she continues to meet the criteria for detention under the MHA.

While a section 41 restriction order is in force, certain aspects of the patient's management which would otherwise be at the discretion of the patient's Responsible Clinician (for example leave of absence, transfer to another hospital or discharge into the community) become subject to the consent of the Secretary of State.

5.2 Hospital direction and limitation direction – s45A Court Disposal

The Crown Court has the power to make a hospital direction and limitation direction under section 45A of the MHA, where it decides that an appropriate sentence is one of imprisonment, but considers that it is necessary to immediately divert the offender to hospital for treatment². The Court must be satisfied, on the written or oral evidence of two registered medical practitioners, that the defendant is suffering from a mental disorder of a nature or degree which makes it appropriate for them to be detained in hospital for medical treatment, and that such treatment is available.

Section 45A provides the Crown Court with an appropriate disposal for a mentally disordered offender where it considers that while the offender's responsibility for his actions is reduced, it is still high. The Court must first consider whether it is appropriate to impose a hospital order before deciding to impose a sentence of imprisonment.

Section 45A involves the imposition of a hospital direction *and* limitation direction. The limitation direction has the same effect as a restriction order under section 41.

A patient who is subject to a s45A hospital and limitation direction may serve his entire sentence in hospital if he continues to meet the criteria for detention under the MHA. While in hospital the patient will be managed as if he had been transferred from prison under s47 (see below). The limitation direction ceases to have effect on the patient's sentence release date, but the hospital direction continues in force until the patient is discharged. Therefore, if the patient continues to meet the criteria under the MHA for detention in hospital, they may remain detained in hospital beyond the date on which they would have been released from their sentence, but will no longer be subject to the restrictions.

If a patient subject to a s45A was sentenced to an indeterminate sentence (indeterminate sentence for public protection or a discretionary life sentence), the limitation direction remains in effect for the duration of their detention in hospital, even past the minimum term or tariff period. The release date for such sentences is not fixed and is determined by a direction to release by the Parole Board. The Parole Board cannot consider release until the tariff expiry date and the case will not be referred to the Parole Board while the patient remains detained under the MHA, until such time as the Tribunal has decided that, but for the limitation direction, they would be suitable for discharge.

If during the period of the sentence the offender's health improves such that they no longer meet the criteria for detention in hospital, the offender may be transferred to prison to serve the remainder of their sentence. At this point, the hospital and limitation direction no longer has any effect. Should the offender's mental health deteriorate while continuing to serve their prison sentence, they may be transferred back to hospital as a serving prisoner, under ss47/49.

² A s45A hospital direction and limitation direction cannot be imposed for an offence which attracts a mandatory life sentence

S45A directions are made relatively rarely by courts in comparison to s37/41 hospital orders, but their numbers have increased in recent years.

5.3 Transferred prisoners – ss47/49

Sentenced prisoners may be transferred from prison to hospital by the Secretary of State for treatment under section 47 of the MHA. The Secretary of State must be satisfied, by reports from at least two registered medical practitioners, that the person is suffering from a mental disorder of a nature or degree which makes it appropriate for them to be detained in hospital for medical treatment, and that appropriate medical treatment is available. The Secretary of State must also be of the opinion, having regard to the public interest and all the circumstances that it is expedient to direct transfer to hospital.

The Secretary of State may make these transferred prisoners subject to a restriction direction under section 49 of the MHA, which imposes the same restrictions as an order under section 41. The Secretary of State will generally impose restrictions when a s47 transfer is directed to ensure that the offender is not discharged from hospital in circumstances where they should be returned to prison or other place of detention and in order to ensure that relevant decisions relating to the patient's management in hospital require his consent. Where a transfer does not take place until very shortly before the prisoner would otherwise be released, if appropriate, the Secretary of State will issue the transfer direction without the s49 restriction direction.

Please refer to the relevant Prison Service Instruction for full details on the process for transfer from prison to hospital.

If a patient subject to a s47/49 transfer was sentenced to an indeterminate sentence (indeterminate sentence for public protection or a discretionary life sentence), the restriction direction remains in effect for the duration of their detention in hospital, even past the minimum term or tariff period. The release date for such sentences is not fixed and is determined by a direction to release by the Parole Board. The Parole Board cannot consider release until the tariff expiry date and the case will not be referred to the Parole Board while the patient remains detained under the MHA, until such time as the Tribunal has decided that, but for the restriction direction, they would be suitable for discharge.

5.3.1 Determinate or fixed term sentences

Where the prisoner remains in hospital, the restrictions will expire at the point of the automatic release date and they will then be managed solely by doctors with no input from the Secretary of State as an unrestricted patient. Patients in this situation are sometimes referred to as “notional s37s”.

5.3.2 Indeterminate sentences

Restrictions will remain in place for so long as the patient remains detained in hospital.

5.4 Transferred prisoners – ss48/49

Remand prisoners, civil prisoners and immigration detainees may be transferred from prison or immigration detention to hospital by the Secretary of State for treatment under section 48 of the MHA. The Secretary of State must be satisfied, by reports from at least two registered medical practitioners, that the person is suffering from a mental disorder of a nature or degree which makes it appropriate for them to be detained in hospital for medical treatment, that he is in urgent need of such treatment and that appropriate medical treatment is available.

Where the Secretary of State issues a transfer direction in respect of persons awaiting trial or sentencing in the Crown Court, and persons remanded in custody by a magistrates' court, they must also give a restriction direction under section 49 of the MHA, which imposes the same restrictions as an order under section 41. Restriction directions are discretionary in respect of civil prisoners and immigration detainees.

5.5 Powers in relation to all transferred prisoners

5.5.1 Restriction direction or limitation direction

A s49 restriction direction or s45A limitation direction has the same effect as a section 41 restriction order. The same restrictions exist in relation to the management of the patient while in hospital, such that Responsible Clinicians require the consent of the Secretary of State to transfer a patient to a different hospital, allow leave in the community or discharge. Where such a patient appears before the Tribunal, however, the Tribunal's powers are restricted to notifying the Secretary of State that the patient is suitable for discharge. It cannot direct discharge, unlike a ss.37/41 patient. In such circumstances, the Secretary of State does not usually discharge the patient into the community, but instead, will return them to prison to continue serving their sentence.

5.5.2 Remission to prison

Sections 47/49 transfers (serving prisoners)

Under section 50, serving prisoners may be transferred back to prison where, before the release date, the Secretary of State is notified by the Responsible Clinician or the appropriate Tribunal that the person no longer requires treatment in hospital or that no effective treatment can be given.

Sections 48/49 transfers

Under section 51, remand prisoners who are awaiting trial or sentencing in the Crown Court may be transferred back to prison where treatment in hospital is no longer necessary, or, if the court so directs, be released on bail. On the prisoner's arrival in prison, or release on bail, the transfer direction ceases to have effect.

In respect of prisoners who were remanded by the magistrates' court before being transferred to hospital, where the court is satisfied that the accused no longer requires treatment in hospital, the court may direct that the transfer direction ceases to have effect (section 52). The transfer direction would also cease to have effect when the period of remand expires, unless the accused is sent to the Crown Court (section 52).

Civil prisoners and immigration detainees who are also subject to a section 49 restriction direction may be transferred to the place in which they would have been detained, once they no longer meet the criteria for detention in hospital (section 53).

Section 117 meetings

Where practicable an after care meeting under s117 meeting should take place prior to remission to prison so that the prison and healthcare providers in the prison are provided with handover information and are able to appropriately plan for the patient's safe return to prison, including arrangements for any ongoing treatment and medication to be provided while in prison. If the transfer back to prison has to take place urgently, it may be necessary to hold the s117 meeting after discharge from hospital. Please refer to the separate forms and relevant Prison Service Instruction for full details on the remission process.

6 How the restricted patient system works in practice

6.1 Admission and detention

A restricted patient entering the hospital system from the courts (that is, under sections 37 or 45A) will typically begin detention in one of the three high secure hospitals (Broadmoor, Rampton or Ashworth) or in a medium secure hospital. It is possible for such patients to initially be admitted to lower security hospitals, particularly where they have already spent some time on remand in hospital under section 48 and have been receiving treatment prior to the imposition of the hospital order or hospital direction.

Those entering the system as transferred prisoners (that is, under sections 47 or 48) will initially be transferred to a hospital offering an appropriate level of security. This can be anything from high to low secure or, where appropriate, a locked unit such as a Psychiatric Intensive Care Unit. The level of security required will depend on the circumstances of the case and the level of risk the patient presents.

The speed with which a patient will progress through the hospital system depends on a number of different factors (for example the response to treatment, the patient's ability and desire to engage with treatment, the complexity of the patient's mental disorder(s)) and as such is variable. A patient subject to a restricted hospital order under s37/41 may spend significantly more or less time detained than they would have had they received a sentence of imprisonment. A patient who is subject to a sentence and then transferred to hospital under s47/49 may spend longer in hospital than they would have in prison.

This means that some patients will need to remain detained in a secure hospital for a very long time where their condition warrants it. Conversely, a patient who has committed a very serious offence and who is very dangerous when unwell, may nevertheless stabilise quickly once on medication and may be safely managed in the community on conditional discharge after a relatively short period.

Responsible Clinicians must provide the Secretary of State with an annual report detailing the patient's progress.

The parameters of the Responsible Clinician's power are based on the detention authority in place (the hospital order or transfer direction warrant). The Responsible Clinician has the power to move the patient within the limit of the description of the place of detention on the detention authority. If, for example, a hospital order simply states "Broadmoor hospital", the Responsible Clinician has the power to transfer the patient into any ward or unit within that hospital and to allow the patient into the grounds of the hospital. If the order states "medium secure unit, Thornford Park Hospital", then the Responsible Clinician has the power to move the patient to any medium secure unit within that hospital and to allow the patient into the medium secure perimeter. Where the order simply states the name of the hospital and that hospital has different levels of secure unit on the same site, then the Responsible Clinician does not legally require the Secretary of State's consent to move the patient from a medium secure unit to a low secure unit in the same site. For this reason, it is helpful if courts ascertain the level of security the patient is to be admitted into and to specify that on the hospital order (if not the name of the specific unit or ward). For full details on transfer or community leave, please refer to the separate guidance for each.

6.2 Progress through the hospital system - Secretary of State's powers

The treatment provided to restricted patients is the responsibility of the doctors and hospitals that care for them, and the Secretary of State does not have any form of clinical role. The Secretary of State does, however, have various powers concerned with managing a restricted patient's contact with the community, designed to ensure that the public is protected. How decisions are made in the exercise of these powers reflects the Secretary of State's vitally important role in delivering public protection while having regard to patients' rights to treatment.

The Secretary of State's powers under the MHA in relation to restricted patients are exercised by officials in MHCS in HMP/PPS. All decisions made flow from a risk assessment, which officials undertake, having regard not only to clinical opinion about patient need but also to the patient's offending history and to public safety.

Officials considering an application in relation to a restricted patient will consider a number of different factors including, but not limited to:

- Clinical opinion, diagnosis and risk factors;
- Seriousness of the index offence and any previous convictions;
- Location of the index offence and whether there is any potential for contact with the victim of the index offence;
- In the case of community leave or discharge, whether there are any representations from the victim regarding conditions to which the patient should be subject (e.g. a condition not to contact the victim or not to enter a particular area);
- Current presentation and behaviour of the patient;
- Progress made (reaction to medication, psychological interventions, relapse prevention, patient's insight into mental health);
- History of detention (e.g. previous recalls, previous transfers);
- Offending behaviour (including, but not limited to, the link between mental health and offending);

- In the case of a transferred prisoner – whether the patient is well enough to be returned to prison
- Where relevant, views of MAPPA agencies, including Offender Manager

6.3 Hospital transfers (s19)

Responsible Clinicians may want to move the patient to a different hospital for a number of reasons. Where the patient is subject to restrictions, the Responsible Clinician must seek the Secretary of State's consent to move the patient to a different unit or hospital to that named on the initial detention authority (the hospital order, hospital direction, transfer direction or recall warrant).

A transfer to a different hospital may be a "level" transfer, where a patient is being moved to a hospital of the same level of security. This often happens where the patient was initially admitted to a hospital outside of their home area and the transfer is to repatriate them to their home area, or where a different hospital may be able to offer a specific treatment or intervention.

Patients can also transfer up, to a more restrictive level of security, if the Responsible Clinician considers that this is necessary. This can happen, for example, where the patient's mental health has deteriorated and his risks have increased, such that he can no longer be safely detained where he is currently placed.

Patients may also progress and improve to the point where they no longer need to be detained under their current level of security and the Responsible Clinician will seek consent to move them down a level in security. It is often also appropriate to test patients out in less restrictive conditions before eventually considering discharge.

6.4 Community leave (s17)

The Secretary of State recognises that well thought out leave, which serves a definable purpose and is carefully and sensitively executed, has an important part to play treating and rehabilitating restricted patients. It also provides valuable information to help Responsible Clinicians, and the Secretary of State, in managing the patient in hospital, and to all parties, including the Tribunal, when considering discharge into the community.

The vast majority of patients will at some stage improve to the point where the risk they pose is considered sufficiently low that their recovery can gradually be tested out on escorted and then unescorted leave in the hospital grounds and then progress to escorted and then unescorted leave in the community for short periods.

Where appropriate, the Secretary of State may also consent to a patient having overnight leave. Overnight leave is most often used where a patient is progressing toward potential discharge and there is a need to test the patient with overnight leave at the proposed discharge address. This testing period is often useful to prepare the patient for a successful return to life in the community. Not all patients will need to be tested on overnight leave before discharge. Occasional overnight leave may also be used to help rebuild family ties.

Responsible Clinicians may also seek consent to allow a patient escorted leave to attend a medical appointment or for escorted compassionate leave.

While each case will be considered carefully, as a general rule, a patient who was sentenced and directed to hospital by the Court under section 45A or who has transferred from prison under section 47/49 will not be permitted leave in the community while detained under the MHA where he or she would not have been given such leave whilst in prison. The presumption for many of these patients is that their care pathway will see their return to prison to continue their sentence rather than release into the community. However as this is not always the case, and because leave can form a part of a patient's treatment, discretion is needed and the Secretary of State will consider requests for community leave on an individual basis.

7 Entitlement to consideration before the Tribunal

Detained patients

Section 70 of the MHA states that a restricted patient subject to a hospital order (sections 37/41 MHA) or a transfer direction (sections 47/49 and 48/49 MHA) or a hospital direction (section 45A MHA) has the right to apply to the Tribunal once in the second six month period of detention after the date of the hospital order or direction and once in any subsequent period of 12 months thereafter. Under section 69(2) MHA, restricted patients subject to a transfer direction (47/49 and 48/49) may additionally apply in the first six months after the date of the direction.

Section 71(2) of the MHA requires the Secretary of State to refer the case of any detained restricted patient whose case has not been considered by the Tribunal within the last three years. Such a referral does not affect the patient's right to apply directly.

Conditionally discharged patients

Under section 75(2) of the MHA, restricted patients who have been conditionally discharged may apply directly to the Tribunal once during the second year from the date of discharge and once in every subsequent two year period. A patient is 'conditionally discharged' for the purposes of counting time, on the date he is physically discharged from the hospital once the conditions have been met. In the intervening period, the patient is still detained under the hospital order.

A patient who withdraws an application may apply again during the same period of eligibility (see section 77(2) MHA). The patient may apply and withdraw more than once, but is only entitled to one review in each eligibility period (whether detained or discharged).

8 Discharge

8.1 ss37/41 hospital orders

Restricted patients subject to hospital orders under sections 37 and 41 may be conditionally discharged from hospital and absolutely discharged from their restriction order by either the Secretary of State (under section 42), the Tribunal (under section 73), or the Responsible Clinician with the consent of the Secretary of State (under section 23).

Discharge can be absolute (no conditions and no further powers over the patient), or, more often, conditional (patient is subject to conditions and may be recalled to hospital by the Secretary of State). Hospital orders are made “without limit of time”, meaning that a patient may be detained indefinitely (but with regular reviews) and, when discharged, subject to conditions and potential recall indefinitely (or until a decision is taken to discharge them absolutely).

8.1.1 Secretary of State powers

The vast majority of discharge decisions are made by the Tribunal. The Secretary of State has the power to discharge at any time, but will not usually consider discharge without a request from the Responsible Clinician. The Secretary of State and the Tribunal has the power to discharge absolutely, or subject to conditions. Most patients will initially be discharged conditionally, meaning that they remain subject to recall to hospital in the future and that there is a requirement for the Responsible Clinician to provide the Secretary of State with regular updates on the patient.

When the Secretary of State considers conditional discharge, a full risk assessment will be carried out in the usual way described above. Consideration will be given to the suitability (and in some cases the existence) of the proposed discharge plan, including suitable accommodation. Where appropriate, the Secretary of State may want to see that the patient has been thoroughly tested on community leave, including overnight leave to the proposed discharge placement where necessary.

The restrictions continue to apply following conditional discharge from hospital including monitoring by the Mental Health Casework Section (within Her Majesty’s Prison and Probation Service of the Ministry of Justice) which includes the power to recall the patient to hospital if his or her mental health requires the patient to be detained for treatment (including where the patient is thought to present an increased risk to the public, or a risk to themselves).

8.1.2 The Tribunal powers

The Tribunal can only consider cases where there is a referral from the Secretary of State, or where there is an eligible application from the patient. In the case of detained restricted patients subject to a hospital order under ss 37/41 MHA, the role of the Tribunal is limited to determining whether it is satisfied:

- That the patient is suffering from mental disorder of a nature or degree which makes it appropriate for them to be detained in hospital for medical treatment; or
- That it is necessary for the health or safety of the patient or the protection of others that they should receive that treatment; or

- That appropriate medical treatment is available.

If any one of these statutory criteria is not met and, then the Tribunal *must* order that the patient should be discharged and decide whether that discharge should be absolute or subject to conditions (section 73). The Tribunal may defer a conditional discharge (section 73(7) MHA).

8.1.3 Absolute discharge

The Tribunal must absolutely discharge a restricted patient when it is not satisfied that the above criteria for detention are met *and* where it is satisfied that it is not appropriate for the patient to remain liable to be recalled.

The Secretary of State also has the power to discharge a restricted patient absolutely (section 42 MHA). Again, the power may be exercised at any time, but in practice the Secretary of State will not usually consider absolute discharge without an application to do so. The Secretary of State is not bound by any statutory criteria in exercising this power, but in practice will generally apply the same test as the Tribunal. The Secretary of State will therefore consider the circumstances of the index offence; the potential risk that the patient presents or may present in the future; the degree of harm to which the public may be exposed if the patient re-offends; the risk and likelihood of a recurrence or exacerbation of any mental disorder, and the likelihood of the need to recall the patient for further treatment in hospital in the future.

8.2 Discharge - s45A, ss47/49, 48/49 MHA

Where a restricted patient is detained in hospital under a transfer direction or hospital direction, the Tribunal must consider whether the criteria set out above are met. However, if any one of the statutory criteria is not met in these cases, the Tribunal does not have the power to order the patient's discharge, unlike in the case of a section 37 patient. Instead, it must notify the Secretary of State:

- Whether, in its opinion, the patient would be entitled to be absolutely or conditionally discharged from hospital were they detained under sections 37 and 41 (rather than a sentenced prisoner); and
- If the Tribunal considers that the patient would otherwise be entitled to discharge, it may make a statutory recommendation under s74(1)(b) that if the Secretary of State does not so discharge them, they should remain in hospital.

If the Tribunal considers that the criteria for detention in hospital continue to be met, the transferred prisoner remains in hospital as a restricted patient.

If the Tribunal considers that if the patient did not also have a prison sentence, the patient would have been entitled to discharge, the Secretary of State will consider whether to notify the Tribunal that he may be so discharged. The MHA states that if the Secretary of State notifies the Tribunal that it agrees with the conditional discharge within 90 days, the Tribunal must direct the patient's discharge. Although the MHA provides a 90 day period, in practice this decision is made as soon as

possible after the Tribunal decision. Note however that where the patient was transferred to hospital under section 48 MHA, the patient cannot be discharged; instead they must remain in hospital or be transferred to the appropriate place of detention.

Before reaching a decision regarding the discharge of a sentenced prisoner, the Secretary of State will consider all the circumstances of the case. However, other than in exceptional circumstances, the Secretary of State will not generally agree to discharge a sentenced prisoner into the community. The transferred prisoner will instead be returned to prison to serve the remainder of their sentence and, where the offender is eligible, a referral will be made to the Parole Board to consider release.

If there is a Tribunal recommendation that the transferred prisoner remain in hospital if not discharged, the Secretary of State will generally follow that recommendation unless there are cogent reasons to return the patient to prison. Such reasons might include safeguarding issues if the patient's risk to others (unrelated to his mental disorder) increases following the Tribunal hearing to the extent that he cannot be safely managed in hospital and is no longer engaging with treatment. Where the transferred prisoner's eventual release is a matter for the Parole Board (in all indeterminate or life sentences and some determinate and extended sentences) and they are eligible for consideration before the Parole Board, an immediate referral will be made. The Parole Board will then generally hold its review in the hospital in which the patient is detained.

There is an exception to the above in relation to a small group of s47/49 transferred prisoners known as "technical lifers". Between 1985 and April 2005, life sentenced prisoners who had been transferred to psychiatric hospital for treatment could apply for technical lifer status, which had the effect of them being treated as though they had been sentenced to a s37/41 hospital order. Life sentenced transferred prisoners can no longer make such an application. For those technical lifers who remain in the system, their status is maintained and the Secretary of State will generally agree to conditionally discharge them from hospital once a Tribunal has determined that they no longer meet the criteria for detention under the MHA.

9 Conditionally discharged patients – ss37/41

Following conditional discharge, patients are generally supervised in the community by a psychiatrist (Responsible Clinician) and a social worker (social supervisor), and the MHCS receives regular reports from both supervisors. These patients can be recalled to hospital by the Secretary of State if they need to be detained for treatment (including where the patient is thought to pose a risk to themselves or others as a result of their mental disorder). A conditionally discharged patient cannot be recalled simply for breaching their conditions, unless the breach enables the Secretary of State to form a proper judgment that the statutory criteria for detention are established or where there is evidence to indicate that an urgent recall for assessment is required. In making this judgment, the Secretary of State will consider the health and safety of the patient, but also the safety of members of the public and in practice, patients will be recalled where that risk is linked to the patient's mental disorder. Some conditionally discharged patients need to be

recalled on a regular basis because their mental condition fluctuates or they stop taking their medication. Others will remain stable.

Once a patient has been stable in the community for some years, he or she may be absolutely discharged. Once this happens, the Secretary of State's powers cease to apply and the patient is no longer subject to recall to hospital.

9.1 Recall to Hospital

If a patient is recalled, the Secretary of State must refer their case to the Tribunal within one month of their return to hospital. If the patient is not discharged by the Tribunal, or by the Secretary of State, then they remain detain under the terms of the original ss37/41 hospital order as a restricted patient, with the same entitlement to regular review before the Tribunal and the same restrictions around their management in hospital.

10 Repatriation and Trans-National Transfers within the UK

The Secretary of State also has certain other powers and responsibilities under Part VI of the Mental Health Act relating to the transfer of restricted patients between constituent parts of the UK and repatriation to countries outside the UK.

11 Victims

The Domestic Violence, Crime and Victims Act 2004 gave qualifying victims of mentally disordered offenders certain statutory rights which are set out in the Code of Practice for Victims of Crime. In summary, victims are entitled to make written representations to the Tribunal about whether there should be any conditions attached to the offender's discharge and if so, what conditions they are requesting. These are most often conditions not to contact the victim(s) and/or conditions not to enter a particular area. The MHCS will inform the Tribunal of the VLO's details and the Tribunal will then invite the Victim Liaison Officer (VLO) to submit the victim's written representations.

The Secretary of State will also seek representations from victims when considering discharge and has undertaken to inform victims when consent to leave in the community is provided. Either the responsible clinician or the MHCS will contact the VLO in order to seek representations from victims. MHCS will inform VLOs if a discharged patient is recalled to hospital.

Links to the Victims' Code and the Department of Health's Code of Practice are provided below. There is also separate guidance issued by the Ministry of Justice in relation to victims and restricted patients.

12 Useful links

Further information and guidance can be found on the MHCS pages of the Gov.uk website at: <https://www.gov.uk/government/collections/mentally-disordered-offenders>

The Mental Health Act 1983 Code of Practice (Department of Health, 2015) outlines the restricted patient system in the context of the comprehensive information about the MHA for patients, families, carers and professionals and includes a chapter on restricted patients:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/435512/MHA_Code_of_Practice.PDF

Annual statistics about restricted patients are reported quarterly offender management statistics, in Oct-Dec reports. The latest reports can be found here:

<https://www.gov.uk/government/collections/offender-management-statistics-quarterly>

Code of practice for victims of crime:

<https://www.gov.uk/government/publications/the-code-of-practice-for-victims-of-crime>

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