Legal Aid Agency

IMPROVING YOUR QUALITY IN MENTAL HEALTH

A guide to common issues identified through Peer Review

Forward to the guide

Improving Your Quality in Mental Health

Users of this Guide must keep aware of the possibility of future changes and adapt their knowledge of law and procedure to them.

The focus of the delivery of legal aid is firmly on the provision of consistently good quality services for clients. The peer review process has provided a unique opportunity with access to a wealth of information directly related to the quality of legal advice and information given to clients and work carried out on behalf of clients. It allows us to identify areas of good practice and areas in need of improvement. The guide will also be considered by Reviewers in assessing work seen under Review.

We are pleased to introduce this edition of '*Improving Your Quality – Mental Health'* for the benefit of those wishing to achieve good levels of quality of legal advice and work. The Guide has been updated and changes in law and procedure have been incorporated into it.

The guide makes available common quality issues identified by Mental Health Reviewers. Derived from the entire body of peer review reports, analysis has concentrated on those issues frequently contributing towards lower ratings at Peer Review. Each issue is divided into 3 parts:

- A brief description of why the issue has been identified as important;
- The process by which an organisation can identify if the quality concern affects their work and advice; and
- Outline suggestions on activities/methods which could assist in improvement.

These suggestions for making improvements are not forcing a standard approach. Nor are they an exhaustive list; they are only some of the ways that improvements can be made. Your entity or organisation may have other ways of resolving the issues raised in the guide, it is not our intention to invalidate those approaches.

Some of the suggestions have also led to a more general debate concerning standard setting, and the best approaches to dealing with specific quality of advice issues. We continue to welcome the opening up of the world of legal competence to such scrutiny and debate.

Professor Avrom Sherr
Institute of Advanced Legal Studies
On behalf of the Peer Reviewer Panel in Mental Health

Foreword
Only members of the Law Society's Mental Health Tribunal Panel can represent a patient as an advocate at a First-tier Tribunal (Mental Health) under Legal Aid. The Law Society have enhanced the training and assessment requirements for membership of the Panel itself.

However, the requirement of Panel membership does not apply to advocacy conducted by barristers in independent practice. In the rare circumstances where such an instruction is necessary, practitioners with legal aid contracts need to be aware of the requirement to instruct appropriately skilled counsel who allow sufficient time for their vulnerable clients. This is also a requirement of the Bar Code of Conduct and is referred to in this edition. Providers should be aware that they remain responsible for ensuring that work carried out by counsel is compliant with their legal aid contract.

The Law Society's latest edition of the Practice notes, 'Representation before Mental Health Tribunals' is dated 23 February 2024. The Law Society guidance should be read in conjunction with this Guide. It has been greatly enhanced to assist practitioners with further guidance as to confidentiality and the use of independent reports.

Peer reviewers have considered the following as among "major concerns" in files examined:

1. Section or detention papers not being seen or examined, including renewals, Community Treatment Orders and Revocations. Section papers not being checked to establish that they are valid.

2. Medical records not being examined, or no evidence to support the assertion that they had been examined.

3. No evidence of written advice specifically tailored to the client's situation; instead, there is a complete reliance on standardised correspondence.

4. No evidenced attempt to check the Tribunal decision for legality.

5. Where there is no written advice at the conclusion of a case in terms of rights as to informal status/ rights under s117 of the Mental Health Act 1983 (as amended) (s117 rights) / detained patients' further rights of application or referral and relevant entitlement/detention dates.

6. Where there is a conflict of interest demonstrated on a file, for example by acting for a party opposing discharge as well as for an applicant patient seeking discharge.

7.Where there is no evidence of an informed discussion with the client about whether to request a Medical Examination (PHE) in accordance with Rule 34 of The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (the Rules) in non s2 cases.

8. Where there is concern as to the client's capacity, has a Rule 11 appointment been considered, and has the issue as to the client's capacity been noted, and kept under review as the case progressed? Where there is an appointment under Rule 11 (7) (a) or (b) TPR, has relevant guidance and case law been followed?

9. In cases where the Nearest Relative had the power to discharge the client from section, where no attempt had been made to:

a) Identify the Nearest Relative with the client;

b) Discuss with the client the Nearest Relative's powers; and/or

c) Seek the client's consent to contact the Nearest Relative.

10. Is the file accurate and is it possible to understand the sequence of events from the file.

11. Has the client been informed of their right to choose a Face to Face or remote tribunal.

Peer reviewers accept that particular circumstances might prevent these issues from becoming "major concerns." Illustrations would include the client refusing consent to access medical records or making it clear he, or she, wanted no, or limited, correspondence.

Similarly, additional issues might be major concerns, such as inadequate attendance, considering the particular context of the file samples seen.

The “merits of the case” could be a very difficult area in mental health cases. In particular, “early advice” in this area was frequently felt to be unrealistic. This guide reflects this view. This is not to say, however, that peer reviewers felt that the prospects of success should not generally be discussed when appropriate with the client.

Representation and advocacy in Mental Health cases need to be effective and positive action needs to be taken. Cases may progress to conclusion without active intervention, but this is unlikely to be effective for the clients and may constitute inadequate work on the part of the practitioner.

Contents

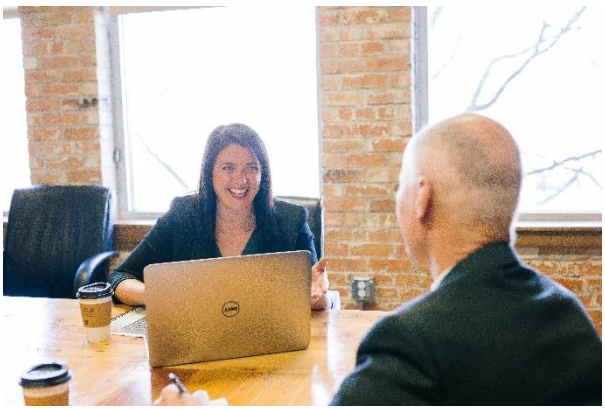
1. Is the file readable and accurate?

Why does it matter?

- Properly organised and understandable files are an important basis for all subsequent preparation work.
- Electronic files should be readily accessible and easy to follow.
- Files that are disorganised and contain factual inaccuracies or illegible handwriting can be misleading.
- Disorganised files will not pass the quick “pick up” test for another adviser who may have to consider the file at short notice.

How can I check this on my files?

- Are files organised?
- Are the documents, letters and file notes in each file arranged in chronological order?
- Are all handwritten file notes and pro forma legible?
- Have file notes and pro forma that contain illegible handwriting been transcribed?



- Are dates and other information on the files accurate and complete?

What will help?

- Include this issue in File Review.
- Ensure that the date is clear on all file notes, attendance notes and correspondence so they can be organised in chronological order.
- Consider typing/dictating any handwritten notes that are difficult to read.
- Ensure that the sequence of events on the file can be easily understood.

“Understandable files are an important basis for all subsequent preparation work”

2. Were the advisers selected to be involved in the matter appropriate and effective?

Why does this matter?

- Mental Health cases require specialist knowledge of:
  - Mental health law;
  - The procedure of the First Tier (Mental Health) Tribunal ("the Tribunal");
  - The Law Society's Practice Note "Representation before mental health tribunals" current edition dated 12 December 2019 ("The Practice Note")
  - Mental disorders and treatment;
  - Understanding clients with mental disorders, derived from a substantial experience of dealing with such clients.

Mental Health clients may require reassurance that their representative is working with them to achieve the result they are seeking. A lack of continuity in representation can cause anxiety and it is necessary for advisers to attempt to build a rapport with clients.

How can I check this on my files?

- Will a member of the Law Society's Mental Health Tribunal Panel be conducting the advocacy at the Tribunal as required by the Civil Legal Aid Contract? Alternatively, if counsel has been instructed has that counsel sufficient expertise to adequately represent the client at the Tribunal; in particular, can they comply with Outcomes 10, 11 and 13 of the Bar Conduct Rules with respect to competence, best interests and ensuring that the needs of vulnerable clients are met?

- Have postponement and adjournment requests been made where necessary.

- Have eligibility periods been carefully considered and noted on the file?

What will help?

- Review training and supervision for such advisers.

- Ensure that clients are informed at an early stage in relation to changes of fee earners or use of agents. Ensure that clients know the name of the person who will be representing them.
- Undertake frequent and thorough reviews of files conducted by less experienced advisers.

3. Was the initial contact with the client timely?

Why does this matter?

- When clients are detained in hospital, they may feel isolated and vulnerable (particularly in acute admission cases). It is therefore vital that the adviser does not delay in communicating with the client to take instructions and to give initial advice.

- Delay might lead to a breach of the need for a “speedy” Tribunal hearing as set down in Article 5(4) European Convention on Human Rights as incorporated into the Human Rights Act 1998.

- Instructions by way of confidential meetings are the starting point to the taking of instructions/giving of advice and therefore should be accomplished as soon as possible.

- Some cases (e.g. Section 2 appeals) must be dealt with very quickly to avoid the right of appeal being lost or the hearing going ahead with inadequate preparation.

How can I check this on my files?

- Does the file record when and how initial contact with the firm was made?

- Was it established at an early stage whether there was any particular urgency?

- In a Section 2 Tribunal case, and any other obviously urgent matter, was the client seen within 2 days of initial contact?

- In other cases, was the client seen within 7 days? If not, was the delay explained to the client?

- If the client has not applied to a Tribunal within an appropriate eligibility period, has a request for a reference by the Secretary of State to the Tribunal been considered?

What will help?

- Ensure that any support staff that receive calls on behalf of advisers are trained to identify new case enquiries and bring them to the advisers' immediate attention.

- Ensure that advisers allow sufficient time in their weekly schedules to be able to swiftly respond to new enquiries.

- Consider whether the firm has the resources to take on a new case, particularly a Section 2 Tribunal case. Such consideration should include the availability of suitable Law Society Panel member advocates or counsel with sufficient expertise.

- Maintain details of local IMHAs.

"Delay might lead to the breach of the need for a speedy Tribunal hearing."

4. Are clients who are detained in hospital communicated with sufficiently regularly to obtain instructions and inform them of progress?

Why does this matter?

- Communication with clients is particularly challenging in mental health cases. A client with mental health difficulties who is detained in hospital has limited opportunity to contact their legal adviser and may find giving instructions difficult.

- It is a Solicitors' requirement that clients be informed of the objectives, issues, steps to be taken and progress in their case. To ensure compliance in mental health cases, careful communication will often be required. Representatives should have proper regard to the client's mental capacity or other vulnerability, for example a learning disability /hearing impairment.

- It is vital that the adviser maintains a good rapport and regular contact with the client so that, over time, detailed instructions on all aspects of the client's case can be taken.

- A client's instructions, and their clarity, may change during the case on account of changing mental health and/or the effects of medication.

- The client may need an interpreter and/or signer.

- Clients who are completely unable to give instructions raise important conduct issues. The Practice Note should be considered, as should the case of *VS v St. Andrew's Healthcare (2018) UKUT 250 (AAC)*. If necessary, an appropriate application should be made to the Tribunal to be appointed under Rule 11 (7)(b) (in England) and Rule 13 (in Wales) and thereafter to act in the client's best interests. A client's position/condition in a mental health setting can be extremely fluid and important developments (positive or otherwise) can be missed without regular contact. However, there are no hard and fast rules – some clients will need more contact than others.

- Since the Covid-19 pandemic, it has become easier to attend upon clients remotely, for example by using Microsoft Teams. This may suit some clients but not others. Representatives should be mindful of the needs and wishes of each client. Clients should be offered face to face meetings or at least be made aware that another provider may be able to offer these if the representative cannot do so, for example due to the travel distance involved.

How can I check this on my files?

- Are the client's instructions, as recorded in attendance notes, clear and comprehensive?

- Does the number and frequency of attendance notes, correspondence and telephone calls to the client show that regular contact with the client is maintained?

- Are clients in hospital kept informed of the progress of their case in a timely manner?

- Every client will be different. Certain clients are likely to require more attendances, for example if they have a limited attention span. Other examples include:
  - Those with significant impairment.
  - Those whose mental health is fluctuating in the course of the case.
  - Those who are suffering side effects from changing medication.
  - Those who require interpreters or signers.
  - Those who are facing lengthy reports to consider for a Tribunal.
  - Those who strongly contest many of the details of the Responsible Authority's case.

- If the client needs an interpreter or signer, has the representative obtained one?

- Has the Tribunal been informed of the necessity for an interpreter? It will not be possible for the representative to use the tribunal interpreter on the day of the hearing owing to potential conflict so they should consider engaging their own interpreter/signer for the day of the hearing.

- Where clients are completely unable to give instructions, has the Law Society's Practice Note been considered and followed?

- Has your firm got the resources to provide face-to face services when this is something that the client wants/needs? If not, have you considered referring the client on to a more local firm?

What will help?

- Record all visits to clients in hospital on attendance notes.

- Send follow-up letters to clients in hospital confirming their specific instructions, together with the advice supplied, action agreed and confirmation of progress in the case; unless there is some special noted reason why the client cannot receive this information in writing. Such special reason might include issues of distress or misunderstanding caused to the client. In these circumstances consideration should be given to additional visits to the client.

- If the client is a long way from your office, consider referring the case to another solicitor who is nearer and who is likely to provide a better service more easily and be more flexible regarding visits; although if a client is transferred to another hospital during the currency of a Tribunal application you will want to weigh this against the benefits of consistent representation.

- Where possible, generally attempt to ensure continuity in the adviser visiting the client.

- On a file that has gone to hearing (other than in Section 2 cases), after an initial visit, it is likely that you will need to have contact with the client several times prior to the hearing to take further instructions, and consider notes, section papers and Tribunal papers. The meeting to discuss Tribunal reports should (except in Section 2 cases) be a sufficient period before the hearing to allow the adviser to follow up any instructions from the client as to the content of the reports (for example as to factual inaccuracy).

- Give specific consideration, once any written Tribunal decision is available, to the need to visit the client to discuss this and, if there is no discharge, the subsequent review and appeal possibilities (see also elsewhere in this guide).

- Independent Mental Health Act Advocates (IMHAs) may be involved in certain clients' cases. They may, if appropriate, assist in communication and to this end may, with the client's agreement, be informed of the key advice that has been provided. The client should be made aware, however, that such advocates may not be bound by the same duty of confidentiality as solicitors are. In addition, contact with IMHAs in this way will not be a substitute for "face to face" meetings with the client.

- In Section 2 cases, attempt to obtain reports and meet with the client to discuss the reports before the day of the Tribunal.

- Confirm that the Tribunal is aware of the role of an interpreter and, if necessary, has allowed more time for the case.

"A client with mental health difficulties who is detained in hospital has limited opportunity to contact their legal advisor and may find giving instructions difficult."

5. Has the client been advised of the merits of their case?

Why does this matter?

- Consideration should be given to advising the client of the strengths and weaknesses of their case. However, it is accepted that such advice may not always be easy to provide, especially if the client's mental state is fragile or changeable.

- As far as possible, the client's expectations regarding the prospects of success need to be managed.

How can I check this on my files?

- Do files show consideration of advice on merits has been given in an attendance note?

- Is consideration of the advice on merits updated to reflect changes in the case?

- Do files satisfy the quick "pick up" test on this point, i.e. could another adviser pick up the file, without any prior knowledge, and understand what the client's instructions were and what advice had been given?

- If the client is unable to read, or will be distressed by correspondence, has this been noted on the file?

What will help?

- If the adviser is unable to provide advice to the client (e.g. for lack of information), the adviser should consider confirming that fact to the client in writing. If the adviser considers that merits advice is inappropriate, at least for this stage in the case, then a note of this should be made on the file.

- Address this issue generally in Supervision.

- Ensure that advice on merits is assessed in File Review.

- Consider discussing merits at key points in the case, for example after the receipt of reports for the Tribunal.

- Where a client is unable to read easily or understand advice (or indeed provide instructions), additional meetings should be considered to discuss prospects of success generally.

"The client's expectations regarding the prospect of success need to be managed."

6. Are letters and information sheets used appropriately?

Why does this matter?

- It is a solicitors' requirement that clients are informed as to the objectives agreed; issues; steps to be taken; and progress in their case.
- Standard letters can be useful in ensuring clients receive clear and consistent information. However, such letters need to be tailored to the client's specific instructions and circumstances. If they are not specific, they could cause worry and confusion to clients.
- Similarly, if information sheets are used, they need to be clearly applicable to the client's situation. Information sheets are not a substitute for tailored correspondence.

How can I check this on my files?

- Are letters to clients tailored to their individual circumstances?
- Do letters comply with solicitors' requirements?
- Have clients received letters containing unclear and inconsistent information, perhaps based on unedited standard letters?
- Do the information sheets given to clients contain any irrelevant information?
- If the client is unable to receive such correspondence, is this noted on the file?

What will help?

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- Make sure that advice letters include a specific record of the client's instructions with some individual reference to the details of the client's case, the advice given and the action that the adviser is to take.
- Ensure that information or fact sheets relate to one type of case only. For example, an information sheet for Section 37/41 cases should not contain information on when a nearest relative can exercise powers of discharge.
- If the client is unable to receive such correspondence, has consideration been given to further meetings to advise and take instructions?

"Are standard letters to clients tailored to their individual circumstances?"

7. Has the client been advised about the powers and the procedure of the Tribunal?

Why does this matter?

- The client needs to be advised about the timescales of a case together with Tribunal powers and hearing procedures. If not advised, the client will not know what to expect and may worry unnecessarily.
- Clients should always be advised of their right to choose a face- to- face hearing or a video hearing and should be given tailored advice about this.
- Mental health clients may forget or misunderstand advice given in face-to-face meetings; it is therefore important to confirm this advice in writing so that the client can refer to it at a later stage in the proceedings.
- Clients should be advised about any changes in procedure when they occur, for example that video hearings in England will now be recorded.

How can I check this on my files?

- Is there advice on Tribunal powers and procedures, including the role of the Medical Member visiting the client before the hearing, confirmed in attendance notes and letters to client? In addition, has the client been advised as to the need to decide on whether to request a pre hearing examination by the Medical Member in a non s2 Tribunal case? Have they been informed that they can opt out of a s2 pre hearing examination? Has the client been advised about the right to choose the hearing format?
- Is the written advice clear and specific to the client's case? In particular, check that it does not require the client to identify his/her case from a list of possible sections.
- Has the client been advised about how long the procedure should take, with clear explanations as to delays, for example due to adjournments?

What will help?

- Information sheets explaining the powers of the Tribunal and Tribunal procedure, appropriately tailored to the client's specific section.

- Advice re Tribunal powers/procedure etc. is important and is often best explained in a face-to-face meeting, details of which should be recorded on file, and followed up by a letter confirming the discussion.

- Put headings in template letters to prompt advisers to record advice on Tribunal powers and procedures.

"Are clients advised on timescales, tribunal powers and hearing procedures (where appropriate)?"

8. Have the fundamental issues of the case been analysed appropriately as the case progresses?

Why does this matter?

- A lack of analysis of the fundamental issues relevant to the client's case may lead to incorrect or inappropriate advice being given to the client.
- There may be a critical lack of appropriate preparation work, including necessary enquiries, if this analysis is not carried out.
- There is a risk that cases may drift without direction, perhaps even leading to negligence.
- Case work before the hearing should be timely and identify key issues at an early stage. This will ensure that hearings are effective.
- Eligibility periods should be considered when considering the best timing of applications.

How can I check this on my files?

- Do the attendance notes and client letters show that tailored advice is being given to the client?
- Have the nursing and medical records been considered so that key issues are highlighted as soon as possible? Has the adviser considered all issues arising in the case, based especially on:
  - The client's instructions.
  - Examination of the medical records.
  - Examination of reports.
  - Enquiries from third parties.
- Do cases progress in a timely manner?
- Has essential information been obtained from the client and been recorded either in statement(s) or by completing appropriate pro forma forms?
- Is there evidence of Tribunal preparation in the form of CMR1 requests for directions and instructions to agents and experts where appropriate.
- Is there evidence of thorough preparation, for example, in the form of notes of questions prepared in advance of the hearing, letters sent to Responsible Clinicians ("RCs"), the Nearest Relative (NR), together with other appropriate third parties, as outlined elsewhere in this guide, before

the hearing, together with evidence that medical notes have been perused?

- Is case work before the hearing timely and does it identify key issues at an early stage, ensuring that hearings are effective?

- Are eligibility periods considered when advising the client on the timing of their application.?

- Are automatic referrals considered when considering the timing of applications?

What will help?

- Consider drafting a simple case plan and keep it under review, especially after key events in the case such as a s117 meeting or receipt of Tribunal reports.

- Use standard attendance notes, pro forma headings, which require the action to be taken and the case objective to be identified.

- Consider other aspects of this Guidance.

"There may be a critical lack of appropriate preparation..... if this analysis is not carried out."

9. Has the adviser considered the use of independent experts to assist the client's case?

Why does this matter?

- To comply with the Practice Note you should consider whether it is appropriate to obtain independent evidence in a Tribunal case.
- Some cases are more likely to fail without independent expert evidence to challenge the Responsible Authority's evidence and/or to deal with gaps in that evidence.
- Failure to consider independent expert evidence may mean that central issues, including diagnosis, in the case are missed.
- Lack of expert evidence may mean that the case is ill prepared.
- Expert evidence may cover a range of issues. Medical experts can cover diagnosis, treatment, placement, risk and prognosis. Cognitive issues may need to be addressed by a psychologist. An occupational therapist may help on activities of daily living. A social worker may help on placement and funding issues.

How can I check this on my files?

- Do advisers identify the central issues and consider what independent expert evidence (if any) might assist. Before instructing independent psychiatrists, do advisers consider:
  - Whether the Responsible Clinician's report contains (or is it known that it will contain or be likely to contain), a diagnosis about which there is any reasonable doubt and/or recommendations (for example, as to detention, treatment, transfer and/or aftercare) which are not acceptable to the patient?
  - If so, is it likely that an independent psychiatric report would assist the patient in achieving an outcome more acceptable to the patient in all the circumstances of the particular case, including as to treatment (possibly in another geographical area) and/or hospital leave?
- Are independent experts properly instructed, so that they adequately understand, the criteria for the client's detention and the relevant issues on which they must comment?
- In particular, have the following areas for instruction been considered:

  - Does the client have the capacity to instruct an adviser in proceedings before the Tribunal?
  - Have the relevant discharge criteria applicable been met?
  - What is the present clinical diagnosis?
  - What further benefits (if any) would arise from further psychiatric or psychological medical treatment and the timescale on which these benefits can be expected to arise?
  - Could future treatment be given in a less restrictive setting and/or can any suggestions be made for alternative arrangements for care and treatment?
  - Could the client live in the community and manage self-care? (You should consider what support would be required).
  - What is the risk assessment model used by the responsible authority?
  - What is the prospect of future dangerous behaviour either to self or to others?
  - What details (if any) appear to have been omitted from other reports already served in the proceedings?
  - What are the meaning and implications of technical diagnosis, prognosis and treatment (including medication) set out in the attached reports/papers?
  - What is the source of reference materials used and can you cite these, and provide references and copies?

- Have the experts been provided with appropriate material to allow them to produce a robust report?

- Have the independent psychiatrists been advised as to their right of access to medical records and the client under the provisions of s76 of the Act? If other independent experts require access to medical records, has the hospital's policy for access for such experts under the Data Protection Act 2018 been considered?

- Have the experts been instructed promptly when the view of the Responsible Authority and/or the Ministry of Justice has become clear?

- Are clients advised on the use of experts in attendance notes or advice letters?

- Has consideration been given to requesting attendance at the Tribunal by an independent expert whose report supports the client's application? If

so, have the client's instructions been taken on the prospect, if necessary, of a postponement in the Tribunal's hearing date?

What will help?

- Maintain an approved panel of experts, incorporating specialist experts for unusual cases.
- Review the reports produced by experts instructed.
- Ensure that instruction letters to experts are reviewed by mental health supervisors before being sent.
- On any checklist or pro forma case plan used, ensure that there is a prompt consideration of the instruction of experts.
- Consideration of medical records, prior to the receipt of reports, together with attendance at s117 or other case conferences, may assist to determine the basis for the Responsible Authority's opposition to discharge and enable early informed instruction of experts.

"Failure to consider independent expert evidence may mean that central issues....of the case are missed."

10. Has communication been established with third parties who may be able to assist the client?

Why does this matter?

- Communication with third parties is necessary to:
  - Proactively gather evidence to properly prepare and conduct a client's case.
  - Gather the information needed to advise the client on the strengths and weaknesses of their case.

- Key third parties include:
  - The Mental Health Act Administrator.
  - The Tribunal.
  - The Nearest Relative.
  - The Responsible Clinician (the "RC").
  - The Ministry of Justice (in appropriate cases).
  - The Care Co-ordinator/Community Psychiatric lead professional and/ the named Social Worker.
  - Hospital Managers.
  - Independent Mental Health Advocates.
  - Previous advisers.

- Contact with the Mental Health Act Administrator at the commencement of the case will alert them to the application and the need for reports and, if necessary, to liaise with the Tribunal. It might also assist if the Administrator wishes to send reports straight to the adviser, rather than face a delay of going via the Tribunal.

- The Tribunal needs to be informed that the adviser is acting at an early stage, particularly if the client has made his or her own application; with the HQ1 Form promptly completed. In addition, there needs to be subsequent monitoring of the service of reports (see also elsewhere in this guide) and that they comply with the relevant Practice Directions both as to timing and content. If it is considered that further case management directions are required a timely application needs to be made.

- In some cases, the Nearest Relative can apply for discharge from section and can sometimes have rights to apply to the Tribunal for discharge. If a barring certificate has been issued by a RC the subsequent legal test for discharge following an application by a Nearest Relative is principally based on dangerousness.

- The Ministry of Justice, or the RC in non -restricted cases, have the power to discharge the client from section prior to the Tribunal, or grant community leave. In restricted Tribunal cases it might be useful to know the progress of any community leave application made by the RC to the Ministry of Justice.

- The RC has to consider the convening of a “s117 meeting” in accordance with the Mental Health Act 1983 : Code of Practice 1983 (the Code) Chapter 33 in order to take reasonable steps to identify aftercare provisions if a Tribunal discharges the client.

- The locality care co-ordinator or equivalent professional will have important information as to plans for aftercare under s117, including any required accommodation and funding, together with any Needs Assessment completed under s9 Care Act 2014.

- Hospital Managers not only have a power to discharge from section in unrestricted sections but will also take evidence, both in written and oral form, from the RC, key nurse and social circumstances professional; usually the same individuals who will give evidence at a forthcoming Tribunal.

- Independent Mental Health Advocates (IMHAs) may be involved in clients’ cases. If an IMHA is already involved with the client they may be a useful source of information and might have attended ward rounds, meeting with the RC etc. This may be especially helpful if the client’s memory is poor.

- Advisers who have acted for the client previously may have invaluable earlier reports, background information and earlier Tribunal decisions. In addition, in cases where a criminal conviction, or finding of fact, is likely to be of significance to a subsequent Tribunal and/or the client disputes the facts surrounding the criminal proceedings, consideration should be given to obtaining the criminal papers from the appropriate previous adviser.

- Advisers currently acting for the client on other parallel matters, such as criminal or family proceedings, may be able to provide important information that is pertinent for the forthcoming Tribunal.

How can I check this on my files?

- Are discussions and/or correspondence with relevant third parties outlined above recorded?

- Are letters sent to RC and care co-ordinator /social supervisor (and perhaps family and friends) raising issues about aftercare planning and support, or accommodation problems that the client might face etc? In particular, is a letter sent to the RC asking if a s117 aftercare planning has been arranged?

- Are letters sent to the Nearest Relative, with the client's consent, asking for views regarding discharge from detention (where appropriate)?

- Has there been any attendance at significant aftercare planning meetings? (as indicated by paragraph 33.11 of the Code)

- If appropriate, has a Care Programme Approach (CPA) meeting and/or a Care and Treatment Review (CTR) been arranged?

- Is there correspondence with the Tribunal, for example:
  - If an application is being sent on behalf of the client, checking that it has been received?
  - If an application has already been sent in by the client, is there a letter to the Tribunal confirming that the firm acts for the client and requesting reports when available?
  - Has the HQ1 Form been completed?
  - Chasing any late reports which are in breach of Rule 32 of the TPR and if necessary, applying for a case management Direction.
  - Requesting that the Tribunal Medical Member conduct a PHE, if so instructed, in non- s2 Tribunal cases.

- Is there a letter to the Mental Health Act Administrator confirming that the firm acts for the client in a forthcoming Tribunal and asking for assistance with any late reports?

- Is there an application to the Data Controller assigned under the Data Protection Act 2018 requesting access to medical and nursing records in preparation for Tribunal, or, if appropriate, to the authority supervising the client on a Community Treatment Order?

- Has there been consideration of attending a Hospital Managers' Hearing and/or the evidence obtained from these proceedings together with the details and reasons for the decision?

- Are there letters requesting reports and chasing up delays, for example, to Mental Health Act Administrators for both Managers and Tribunal hearings; or, in the case of the Tribunal, an application for a Direction for late reports under Rule 5?

- Are there letters to appropriate previous advisers asking for papers and/or ongoing advisers in other relevant matters?

- Are there any letters to Complaints Officers in hospitals (where appropriate)?

- Throughout has contact with other parties been with the client's consent?

What will help?

- Adopt a practice of routine enquiry with health professionals and other third parties, subject to the client's consent.

- The use of a checklist to ensure that all the relevant options for third party contact have been considered.

- The practice of using standardised letters to third parties may assist, for example to the RC regarding s117 aftercare planning meetings, but only if the letters are adapted to each case.

- Ensure that the firm has sufficient resources to monitor communication with third parties; including diarising key events such as responses to HQ1 forms and the appropriate timing for the receipt of Tribunal reports

- Ensure these issues are covered in File Review, supervision and training.

- For guidance on issues of confidentiality in contacting third parties the following should be consulted:

  - The appropriate Guide to the Professional Conduct of Solicitors and The Law Society's Practice Note;
  - If necessary, the Ethics Guidance Helpline at the Law Society

"Adopt a practice of routine enquiry with health professionals and other third parties, subject to the client's consent."

11. Have the detention papers been reviewed and have the nursing, medical and, if appropriate, Community Health Team records been considered?

Why does this matter?

- A failure to check the Section papers carefully may result in the client being detained unlawfully if there are errors on admission or renewal; this may lead to significant prejudice to the client and even negligence on the part of the adviser.

- In Community Treatment Order (CTO) “recall” cases the records will show whether procedure and time limits have been properly followed.

- Medical and nursing notes contain vital information that may assist in the preparation of the client’s case, and their early examination is likely to form a key element for an initial case plan, even before the Responsible Authority’s reports have been received.

- Social services records and/or combined Community Mental Health Team records may be particularly significant in CTO cases.

- Needs Assessments may be on either the medical or social services file and might be of significance for discharge plans.

- Records may contain factual inaccuracies, and the client’s instructions must be taken in good time so that the records can be corrected.

- Medical records are potentially before the Tribunal as evidence, particularly if the Medical Member of the Tribunal will have examined them, and the RC, social circumstances professional and nurse will all be aware of them. Not to have examined them on behalf of the client is likely to put her/his case at a disadvantage.

How can I check this on my files?

- Are copies of section papers and any renewal documents on the file?
- Where the patient is detained under a Restriction Order are any previous conditional discharges or recall warrants on the file?

- Alternatively, is there a note on the file confirming that detention papers have been considered with relevant details recorded on the file?

- In CTO cases, have recall/revocation papers been checked?
- Have all section papers been checked for validity?
- Are there detailed file notes and/or summaries of the medical and nursing records on the file?
- Have the medical and nursing records been applied for and considered at an early stage in the case and subsequently close to the time of the Tribunal Medical Member's assessment? If there is doubt as to the identity of the Data Controller, or required procedures for access to records, has this been clarified?
- Have there been any attempts by the hospital to restrict access under s45 Data Protection Act 2018? If so, has the guidance set out in *Dorset Healthcare NHS Foundation Trust v MHRT (2009) UKUT 4 (AAC)* been considered with, if necessary, an application made to the Tribunal to obtain full access?
- Are there attendance notes on the file recording discussions with the client regarding medical and nursing records?
- Does the file include a letter to the client confirming the client's instructions regarding medical and nursing records?
- If relevant, has an application been made for Social Services or Community Mental Health Team records; for example, if there are contested details of incidents involving a social circumstance professional in the community prior to detention or in relation to an ongoing Community Treatment Order?

What will help?

- Ensure that the identity of relevant Data Controllers is known, together with any special forms or procedures they wish to use.
- Ensure that requests to access the client's records are made under the provisions of s45 Data Protection Act 2018 as soon as possible.
- Remind Mental Health Act Administrators of the relevant legislation requiring notes to be provided and seek Tribunal directions in situations of non-compliance. Consider complaining to the Chief Executive of the relevant hospital Trust.
- Ensure you promptly discuss medical and nursing records with the client as part of taking instructions.

"Medical records are potentially before the Tribunal as evidence.....not to have examined them on behalf of the client is likely to put his/her case at a disadvantage."

12. Have the client's Tribunal reports and statements been considered promptly on receipt?

Why does this matter?

- Medical, Nursing, and Social Circumstances reports should be obtained and considered well before the Tribunal hearing to ensure that there is time to take instructions and to take any further action that may be required. In section 2 cases, reports should still be obtained as early as possible, together with the section application and medical recommendations.

- The statement from the Responsible Authority, or Ministry of Justice, will contain critical information about the client.

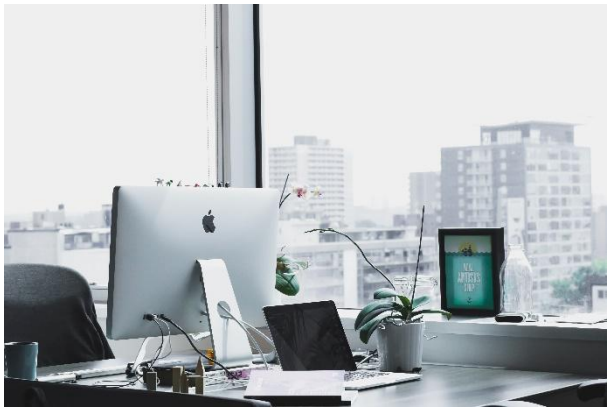
- Any statement from the victim in a relevant case made under the Domestic Violence (Crime and Victims) Act 2004, as amended by the Mental Health Act 2007 may not comply with any relevant Tribunal Practice or specific Directions or may otherwise be inappropriate. In addition, the client may need to be further advised on the role of such statements and the rights of victims in general.

- Reports or statements may contain factual inaccuracies, which may prejudice the client's case if they remain uncorrected or not examined against medical records or previous reports used as a source of information. The issue of inaccurate earlier reports and "institutional folklore" used in Tribunal reports was referred to as a particular area of concern in the case *of R (AN&DJ) v MHRT & Others [2005] EWHC 587 (Admin) paragraph 129*.

- Reports and statements from the Responsible Authority or Ministry of Justice, may not be sufficiently comprehensive, and may not comply with the provisions of the relevant Tribunal Practice Direction. If necessary, a request for a Direction to remedy this will need to be quickly considered.

- Medical reports may not be from a qualified doctor. If the client is receiving medication this may not be adequate for evidential purposes. Again, a Direction may need to be sought urgently from the Tribunal.

- Social Circumstances reports may raise issues such as funding, placement and disputed catchment area responsibility. If the report writer is not an approved mental health professional (AMHP), they might not be in a position to provide the required evidence to the Tribunal. In addition, issues of perceived risks in the community, including the views of Multi Agency Public Protection Arrangements (MAPPA) referred to in the report, and any 'restricted areas' or 'exclusion zones' in restricted cases, may require urgent further investigation. Reports and statements may contain material which is not to be disclosed to the client under the provisions of Rule 14, which may require urgent consideration and action.



- After receipt and instructions on these reports, independent reports will have to be promptly considered, (or re-considered, if this was done earlier) subsequent to an earlier review of medical records or attendance at a s117 meeting.

How can I check this on my files?

- Are there file notes detailing perusal of the reports and statements promptly after their receipt? Are the reports and statements sufficiently comprehensive, and do they comply with the provisions of the relevant Tribunal Practice Direction? In addition, is there material not to be disclosed under Rule 14? In either case has a request for a Direction using the case management powers of the Tribunal been considered?

- Do files show that the client has promptly given specific instructions on issues raised in the reports/statements?

- Has action been taken to address issues arising from the reports in accordance with the client's instructions? Have reports been cross-referenced with notes from records to check for inaccuracies, inconsistencies or omissions? If necessary, have steps been taken to obtain earlier reports if references to them are disputed by the client?

- In applicable cases under the provision of the Domestic Violence (Crime and Victims) Act 2004 the victim and/or his or her family may have made a statement. Does the file show that urgent enquires have been made as to whether they wish to attend the Tribunal hearing and if so the response of the Tribunal to this, including the guarantee of medical confidentiality and whether a Direction is to be made under Rule 38(5)? In addition, does the file indicate that the client has been fully advised as to the role of the victim(s), the Tribunal's Practice Guidance for such victims and the role of the victim's evidence? Finally, does the file show whether necessary

consideration has been given for a further application for a Direction from the Tribunal, if this is appropriate, regarding such arrangements?

- Has the instruction of relevant independent experts been considered after consideration of these reports and instructions from the client?

What will help?

- Ensure the Tribunal Office is pressed for early service of the reports and statements in accordance with the Rules**.** If necessary, seek a Direction under the provisions of Rule 5 of the Tribunal Rules if a breach of service under Rule 32 has occurred.

- Ask hospital administrators to send reports to you direct, when they are sent to the Tribunal.

- Ensure advisers have sufficient time to visit clients promptly on receipt of reports.

- Ensure early authority is agreed to access medical records, and that any necessary earlier papers and reports have been obtained from previous advisers.

"Are there file notes detailing perusal of the reports at an early stage in the case? Reports or statements may contain factual inaccuracies, which may prejudice the client's case, if they remain uncorrected or not examined against medical records."

13. Have all necessary referrals been made in an appropriate way?

Why does this matter?

- Clients with mental health problems are more likely to have other significant issues for which they may need specialist help from legal practitioners in fields such as Welfare Benefits, Debt, Housing and Crime.
- Clients may need referrals to the Independent Mental Health Advocacy service for issues which are not appropriate for legal representation.
- If the adviser has no expertise in other areas of law, a failure to make an effective referral to another adviser or firm is likely to prejudice the client.

How can I check this on my files?

- Is there evidence (in attendance notes or correspondence) that the client has raised issues that require specialist help?
- Do the client's social circumstances, clinical and/or nursing reports raise issues that require specialist help?
- Does the file show discussions with the Nearest Relative and/or other family and friends about the possibility that the client may require assistance on other issues?
- Does the client face issues where advocacy assistance would be appropriate?

What will help?

- Include questions designed to highlight the potential for any such problems into an initial questionnaire or pro forma.
- Keep an up-to-date list of local advisers who will be able to take on referral work.
- Be aware of the details of the relevant IMHA service.

"Clients with mental health problems are more likely to have other significant issues for which they need specialist help."

14. Have the necessary steps been taken to represent children under 18 years at the Tribunal?

Why does this matter?

- Children are especially vulnerable if detained in hospital under the Mental Health Act.
- The relevant law can be complex due to the interaction with the Children Act 1989 and Mental Capacity Act 2005.
- Legal safeguards have recently been introduced to assist in the protection of children in hospital, the operation of which will need to be confirmed.
- The Local Authority in care cases, or the High Court in wardship cases, can be involved as the Nearest Relative.
- The Tribunal has established a specialist Child and Adolescent Mental Health Services (CAMHS) panel, at least one of whom should sit in such hearings.
- Other advisers may also be representing the client on other matters which may impact on the client's case.

How can I check this on my files?

- Has there been sufficient communication with the client, taking the client's needs and preferences into account?
- Is correspondence to the client suitable, bearing in mind especially age?
- Has the Tribunal and/or Mental Health Act Administrator correctly applied the law on annual Tribunal references?
- Have the statutory provisions under s131 of the Mental Health Act been complied with?
- Have enquiries have been made as to the identity of the Nearest Relative; to include the possibility of the Local Authority and/or the High Court?
- Has the identity of those with Parental Responsibility been established?
- If the Local Authority is the Nearest Relative and/or the child is in care, has the Authority made steps to visit the client in accordance with s116?
- Has the identity of the relevant social worker(s) been established?
- Is an alternative placement under s25 of the Children Act 1989 relevant?

- Does the Tribunal contain at least one member of the specialist CAMHS panel established to handle children's cases?

- Has Chapter 19 of the Code been generally considered?

- Has the Practice Note guidance been considered specifically in relation to children?

- Have capacity issues been addressed, in accordance with the principles set down in the Law Society's guidance, together with, as appropriate, the Mental Capacity Act 2005 and "Gillick" competence issues (*Gillick v West Norfolk and Wisbech Area Health Authority Authority [1985] 3 All ER 402 (HL*); in addition to the relevant guidance on capacity in Chapter 19 of the Code?

- Has access to the relevant medical records been obtained, especially with respect to capacity issues, or is the application of the procedure set down in *Dorset Healthcare NHS Foundation Trust v MHRT (2009) UKUT 4 (AAC)* appropriate with, if necessary, an application made to the Tribunal to obtain full access under the provisions of Rule 5 of the Tribunal Rules?

- Has contact been made, with consent as appropriate, with any other advisers involved with the client? If so, is it possible to receive details of pertinent reports and/or assessments regarding accommodation and/or family situation together with other legal proceedings which might be relevant for the Tribunal?

- Has there been consideration of whether a referral, particularly to a family and/or children's adviser, is required?

- Has an adviser of sufficient experience been allocated to the case?

What will help?

- Ensure that advisers have sufficient training in this area.

- Close supervision of the case, if a supervisor does not have direct conduct of the matter.

- Liaison with an adviser experienced in Children's law, if appropriate by way of a referral, or an existing adviser already acting for the child.

"Children are especially vulnerable if detained in hospital under the Mental Health Act."

15. Have adequate steps been taken to explain the Tribunal's written reasons; their adequacy; the right of review and appeal together with confirmation of the client's current legal status?

Why does this matter?

- Since the implementation of Rule 11(4)(a) of the Rules, Tribunal decisions are not sent directly to the client by the Tribunal but instead need to be sent by the advisor.

- Final outcome visits and letters to clients should explain the Tribunal's decision, their legal status, time limits for future applications and advice on the grounds for a review of the Tribunal's decision under Tribunal Rules 44 and 45, including factors relating to permission to apply to the Upper Tribunal under Rule 46 in additional to any prospect of judicial review. Consideration can be given to obtaining an 'Easy Read' decision for clients if required, for example, if a client is unable to read and write due to a learning disability.

- If clients are not advised of the above issues, they may be unsure of their legal position and their right to take the matter further.

- Clients will not be able to make informed decisions about the next steps in their case, including any right to s117 aftercare if discharged from section.

How can I check this on my files?

- Has a visit taken place, or at least consideration of such a visit, to discuss with the client the implications of the Tribunal decision?

- Do final outcome letters to clients:
  - Have the Tribunal's written decision enclosed?
  - Accurately reflect the Tribunal's written decision?
  - Explain the Tribunal's reasons for their decision?
  - Advise upon the legality of the decision and the subsequent appeal rights?

- Are clients assisted and represented, if appropriate, in any application for review of a decision to the First Tier Tribunal and to the Upper Tribunal?

- Are clients given advice on continued detention (where appropriate) and of entitlement to aftercare if they are discharged?

- Are clients advised when further applications can be made to the Tribunal or hospital managers as appropriate?

- Are clients given advice on aftercare, especially if they are discharged from detention?

What will help?

- Consider whether clients should be given post-hearing advice face to face, particularly if they remain in hospital, on or off section. This might be particularly appropriate if the client is unlikely to understand the decision and its implications, including the prospect of a review and/or appeal of the decision.

- Put headings in template letters to prompt advisers to record the Tribunal's decision and post hearing advice.

- Ensure that final outcome letters to the client explain Tribunal decision reasons and appeal rights. It is not sufficient simply to quote from the decision; legal advice should be given.

"Ensure that final outcome letters to the client explain Tribunal decision reasons and appeal rights."

16. Appendix: Differences between Welsh and English Law

This appendix outlines the differences between Wales and England in the practice of Mental Health law.

From 3 November 2008 the MHRT in England was absorbed into the Tribunal Service and became the First-tier Tribunal (Mental Health), part of the Health, Education and Social Care chamber, otherwise known as the Mental Health Tribunal (MHT). The Tribunal, Courts and Enforcement Act 2007 that had introduced these changes, had no impact upon the MHRT for Wales, which remains as a stand-alone, independent judicial body governing the Mental Health Act appeal process in Wales.

This has particular significance for those who represent patients in both jurisdictions, because although the law is the same (Mental Health Act 1983 as subsequently amended) its procedural implementation is different in Wales. At its simplest, even the statutory forms have different reference letters and numbers.

Representatives should be familiar with the Mental Health Act Code of Practice, published by the Department of Health, but cross-border representatives need also to be familiar with the Mental Health Act Code of Practice for Wales, published by the Welsh Assembly, available in English and Welsh from the MHRT for Wales website at www.wales.nhs.uk. There are no differences of great substance between the two Codes, but there are differences e.g. the Chapter 1 Guiding Principles in Wales are expressed differently to those in the English Code, although they have the same purpose. The Welsh Code is also set out very differently to the English Code.

Representatives also need to be able to refer to the MHRT for Wales Rules 2008 (S.I. 2008 No. 2705) whereas the MHT is governed by the Tribunal Procedure (First Tier Tribunal) (Health Education and Social Care Chamber) Rules 2008 and subsequent practice directions There are differences between the Welsh and English rules, for example the MHRT for Wales Rules make no provision for the Tribunal to set aside the whole or part of one of its own decisions (in contrast to the MHT rule 45). Furthermore, in Wales the Rules continue to provide for a pre- hearing medical examination by the MHRT medical member (Rule 20), whereas in England this has become at least partly optional (MHT Rule 34).

Representatives should be familiar with the Mental Health Review Tribunal For Wales Practice Direction – Statements and Reports For Mental Health Review Tribunals In Wales (October 2019). The Practice Direction takes into account the provisions of the Mental Health (Wales) Measure 2010 and the Social Services and Well-being (Wales) Act 2014.

There are also differences in the approach to case management at the MHRT for Wales of which Representatives, and Peer Reviewers, need to be aware.

Case management powers are set out in Rules 5 and 6, in both jurisdictions, but traditionally the MHRT for Wales has always been more reluctant to issue formal directions e.g. in relation to late reports, preferring to use more informal methods of report chasing, including as the last resort, a complaint letter to the Director/Chair/Chief Executive of the relevant body. The MHRT for Wales has historically been far less wedded to the use of standard forms, although there are now some standard forms which should be used.

For those representing detained patients in England or Wales, the quality issues and standards to be achieved, in terms of file management, are the same. Those who represent in both countries may, at points, need also to demonstrate on files their awareness of the differences between the two.

August 2026