

Mental health tribunals and deferred discharges for people with learning disabilities and/or autism

What is Transforming Care?

Transforming Care is an initiative by NHS England and Care Quality Commission and others stakeholders in public health to reform treatment and care plans for people with learning disabilities and/or autism. The programme was initiated in response to the Winterbourne View scandal and recognition that people with learning disabilities and /or autism are at higher risk of abuse and neglect in detention.

The primary objective of Transforming Care is to significantly reduce the number of people with learning disabilities and /or autism committed to hospital facilities who could better be cared for in the community by:

- fostering Transforming Care partnerships between NHS, local government and CCGs to enable community services to work together to meet individuals' needs.
- carrying out regular care and treatment reviews which are aimed at developing an individual care plan and achieving discharge and independence of the patient as quickly as possible.

The objectives and principles to achieve this are set out in the Transforming Care National Plan and the associated Service Model.

Can a Nearest Relative¹ apply for their loved one to be released?

The Nearest Relative of a PWLDA detained under section 2 or 3 of the Mental Health Act has the right to request to the hospital that the patient be discharge on 72 hours' notice. If the patient is detained under section 3 MHA and the responsible clinician stops the hospital from discharging the patient,² the Nearest Relative is entitled to apply to the Mental Health Tribunal for a review of the decision.

What is a Mental Health Tribunal (“MHT”)?

A MHT is an independent judicial body that considers the need for continued detention of patients that are detained under the Mental Health Act (“MHA”). The tribunal can decide

¹ As defined in the Mental Health Act 1983 (as amended).

² The responsible clinician may stop the hospital from releasing a patient following a request for discharge if they believe the patient may be a risk to him/herself or others.

that the patient's detention needs to be continued or if the patient should be discharged. It is also able to recommend or set a date in the future at which the patient should be discharged and make recommendations on how this target can be achieved.

The tribunal consists of three members: one judge, one psychiatrist and one non-medical mental health expert. The tribunal is independent, meaning that none of the members of the tribunal should be connected with the hospital, Authority hospital or community services with which the patient is connected.

At the MHT, the patient will be accompanied by a responsible clinician and a social worker. The patient is also entitled to a solicitor ("MHA Solicitor").

It is not for the patient and the MHA Solicitor to prove that the patient should no longer be sectioned. The professionals refusing the discharge must prove that the patient should not be discharged (and not that the patient meets the criteria for detention under the MHA).

What options does the MHT have when making a decision?

(i) Immediate discharge:

The MHT can discharge the patient from the section, provided the panel feels that the criteria for detention have not been met or the detention cannot be justified. The patient can then agree to stay voluntarily in hospital or may decide to leave immediately. The patient may then also choose to stop any treatment.

(ii) Deferred discharge:

The tribunal can defer the discharge to a future, specified date, making specific recommendations for treatment. The discharge must take place on the date given. If there is a reason that the patient is not discharge on the date the MHT must review such decision.

(iii) Continue the detainment:

The tribunal may decide to continue the section, and the panel will make recommendations to the care team regarding continuing care.

Common issues at MHTs affecting PWLDAs

Despite the introduction of Transforming Care, progress has been very slow and many people with learning disabilities and /or autism continue to be detained. It has been often been found that MHTs are not an effective route to discharge for people with learning

disabilities and /or autism. Set out below are some of the common issues reported at MHTs:

- Narrow scope of MHT review:

MHTs must discharge patients under section 72 MHA if they are not satisfied that the patient is suffering from a mental disorder of a nature or degree which warrants his/her detention, or if their continued detention cannot be justified under the MHA.

A people with learning disabilities and /or autism is only considered to have a mental disorder for the purposes of section 72 MHA if the PWLDA displays ‘abnormally aggressive or seriously irresponsible behaviour’. This distinction may lead the MHT focuses too heavily on whether the person meets the requirements for detention rather than whether it is satisfied that continued detention is the best care plan for the patient.

The MHT should not look at the reasons why the patient was detained in the first place and should only look at how the patient is now and whether the patient should still be detained or discharged.

- A lack of knowledge about what good care for PWLDAs looks like:

The MHA often focuses on whether or not the patient meets the criteria to be detained, and not on triggers for ‘abnormally aggressive or seriously irresponsible behaviour’ and whether the patient is receiving the right care or whether care could be better achieved in the community.

Expert psychologists have found that large institutions can make matters worse for people already suffering from anxiety and sensory overload. This can trigger behaviour which is considered “aggressive” or “seriously irresponsible”, which only worsens the pre-existing condition and makes it increasingly easy to detain under the criteria set out above. There is also a risk of an individual losing skills and becoming less independent. This risk makes it even more difficult to provide care packages to address these needs and therefore less likely that the patient will be discharged.

Transforming Care recognises that people with learning disabilities and /or autism is a very heterogeneous group with diverse and complex needs on a case by case basis. The initiative requires focus on individual care packages in the community where more services and community members are available than in a large institution.

The Service Model sets out nine overarching principles which define what ‘good’ services for people with learning disabilities and/or autism whose behaviour challenges should look like.

- A lack of knowledge about Transforming Care:

MHTs do not always apply or acknowledge the Transforming Care objectives and principles for people with learning disabilities and /or autism.

The MHA Solicitor should make the MHT aware that the patient concerned is a PWLDA and that any decision should adhere to the objectives and principles of Transforming Care, including:

- that the PWLDA should be detained for as short a period as possible
- treatment should be given in the least restrictive way possible and should help patients to be as independent as possible; and
- the commission must put in place a treatment and care plan with a focus on discharge from day one and such care plan should be reviewed regularly.

- A lack of community provision offering no alternative for consideration

Many communities do not have effective synergies and partnerships between the NHS, the local authority and other community services, leading to gaps in services and funds available to patients, making it difficult to put together a comprehensive care package based on community services. Unless a robust care package is presented at the MHT with evidence that it can meet the person's needs, the conclusion is likely to be continued detainment.

How can MHT's use their powers to encourage or require commissioners to develop individual packages of support rather than leaving people in hospital?

- Judges could be urged, when no alternative solutions are being presented, to use their powers to order a 'deferred discharge' and recommend treatment more often.
- Deferred discharge could be used to speed up commissioner's development of an appropriate package of care.
- The MHTs should have reference to the objectives of the National Plan and principles of the Service Model on which it is largely based. This model emphasises the importance and value of maximising the independence of each patient, creating personal care plans for each, giving as much autonomy as possible to the patient and allowing the patients, wherever possible, to live and receive support within the community rather than in an institution.

If you are a nearest relative, you can use a letter like this to write to the representative of the patient to request they advocate for a discharge or deferred discharge

[Date]

To [insert name of representative]

Mental Health Review Tribunal for [name of patient]
[Ref: [insert reference if applicable]]

I write to you as the nearest relative of [name of patient] (the “Patient”) in connection with the Mental Health Tribunal scheduled for [insert date].

As you are aware, the Patient is a person with a [learning disorder and/or autism]. It is widely reported that the circumstances of detention make it increasingly difficult to achieve a discharge for a person with [learning disabilities and/or autism]. Detention triggers behaviour which is considered aggressive, which in turn can worsen their pre-existing conditions and lead to a cycle of detention that is not beneficial to the health and safety of the patient and does not facilitate successful treatment.

The NHS and Care Quality Commission (among others) have recognised the diverse range of needs as well as particular vulnerabilities of people within this group in the Transforming Care National Plan and Service Model. This plan sets out special objectives and principles to be adhered to when considering the treatment and discharge of persons within this group in addition to the general principles set out in the Mental Health Act Practice Code

I would be grateful therefore for you to include in your submissions to the tribunal:

- The Patient is a person with a [learning disorder and/or autism] and therefore Transforming Care applies.
- Under the Mental Health Act 1983 the tribunal must discharge the patient if it is not satisfied that the [learning disorder and/or autism] is associated with aggressive or seriously irresponsible conduct of a nature or degree which makes it appropriate for [him/her] to be detained in the hospital or that the detention is justified in the interests of the health and safety of the patient or others.
- The tribunal has discretion to direct the discharge of the Patient on a future date which allows time for a treatment plan to be carried out.
- The tribunal must apply the objectives and principles of Transforming Care and the Mental Health Act Practice Code in making its decision, including:

- the principle that admission to hospital facilities should be only for the duration necessary for that patient.
- the importance given to providing patients with personalised care plans and allowing them greater autonomy with regards to their treatment options.
- the ‘Golden Thread’ underpinning the Transforming Care Service Model regarding quality of life, which stresses the importance of supporting people to live in their own homes within the community, supported by local services.

The tribunal should be strongly urged to:

(A) order that the Patient be discharged; or

(B) only if there is a practicable and achievable treatment plan evidenced by the commissioner, use its discretion to order a deferred discharge.

Finally, in advance of the tribunal, please notify the relevant commissioner that, in line with Transforming Care, they are expected to provide evidence of their efforts towards planning a discharge of the Patient.

I thank you for your assistance in this important matter. Please do not hesitate to contact me with any questions or further instructions.

Signed,

[Your signature]

[Your name in print]

[Phone number]

[Email address]

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