

Forward to the guide Improving Your Quality in Mental Health

A guide to common issues identified through Peer Review

At the time of publication, it is not yet clear exactly what effects the EU Transition will have on law and process in this area. Users of this Guide must keep aware of the possibility for such changes and adapt their knowledge 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 taken into account 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 taken into account.

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.
- Outline suggestions on activities/methods which could assist 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.

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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 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 Representation before Mental Health Tribunals; the edition is dated May 2016. This guidance, which has the status of a Practice Note, 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. Relevant section or detention papers not being seen or examined
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; that is 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/ 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 seek a r 34 Medical Examination in non s2 cases
8. Where there is concern as to the client's capacity, has a rule 11 appointment has been considered, and has the issue as to the client's capacity been noted, and kept under review as the case progressed?

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

- a) To identify the Nearest Relative with the client
- b) Discuss with the client the Nearest Relative's powers
- c) To seek the client's consent to contact the Nearest Relative

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, but in the particular context of the file samples.

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.

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1. Are files organised and legible?

Why does it matter?

- Properly organised and understandable files are an important basis for all subsequent preparation work.
- Files that are disorganised and contain illegible handwriting are difficult to refer back to.
- 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?

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.

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

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

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 27th May 2016 (“The Law Society’s Practice Note”)
 - Mental disorders and treatment;
 - Substantial experience in dealing with clients with mental disorders.
- The use of inexperienced advisers on Mental Health cases raises concerns as to whether the advice given is appropriate, correct, comprehensive and timely. Some cases, for example those where the client is a child, may be particularly complex.
- Without the use of experienced advisers in the preparation of Mental Health cases it is likely that crucial issues will remain unidentified and the client’s case may be prejudiced, perhaps even leading to negligence.

How can I check this on my files?

- 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 a case analysis or skeleton argument?
- 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, together with other appropriate third parties, as outlined elsewhere in this guide, before the hearing together with evidence that medical notes have been perused?
- Has consideration been given to provide the client, at an appropriate point prior to the Tribunal hearing written advice on the specific merits of their case and has this been evidenced either in correspondence or in a file note?
- Will a member of the Law Society’s Mental Health Tribunal Panel be conducting the advocacy at the Tribunal as required by the Legal Aid Civil Contract **2018**? 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?

What will help?

- Implement initial instructions pro forma tailored to specific cases.
- Undertake frequent and thorough file reviews of files conducted by inexperienced advisers.
- Review use of training and supervision for such advisers.
- Consider the comments and suggestions in subsequent parts of this guide.

” Undertake frequent and thorough reviews of files conducted by inexperienced 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 visiting 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 face-to-face 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?
- If the referral was through an Independent Mental Health Advocate (IMHA), is the advocate aware that an adviser has visited the client?

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 swiftly to 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 visited 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 of that clients be informed of the objectives, issues, steps to be taken and progress in their case. To ensure compliance in mental health cases extensive communication will often be required. In taking instructions and during the course of the retainer, representatives should have proper regard to the [client's](#) mental capacity or other vulnerability, such as **incapacity**

- 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 Law Society's Practice Note should be considered, as should the case of **VS v St Andrew's Healthcare [2018] UKUT 250 (AAC)**, and if necessary an appropriate application should be made to the Tribunal **to be appointed under r.13 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 and some clients will need more contact than others.

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 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 hospital accepted that they should provide this service? If so, will it be of sufficient frequency to allow proper communication and can letters also be translated? In addition, is the client satisfied as to confidentiality arrangements?
- Has the Tribunal been informed of the attendance of an interpreter?
- Where clients are completely unable to give instructions, has the Law Society's Practice Note been considered and followed?

What will help?

- Record all visits to clients in hospital on attendance notes divided into instructions, advice and action to be taken.
- Send follow-up letters to clients in hospital confirming their specific instructions after each visit, 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.
- Monitor the local hospital policy regarding the use of interpreters, and if necessary consider complaint, contact with the Tribunal for a Direction or other remedy.
- 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 with regard to 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 visit 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 report (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 (IMHA) 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?

- 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 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.

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 preliminary assessment by the Medical Member in a non s2 Tribunal case.
- 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.

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 at the beginning of the case, 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?

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 note pro forma, 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 promptly considered the use of independent experts to assist the client's case?

Why does this matter?

- To comply with the Law Society Practice Note you should always 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.
- Prompt instruction of an independent expert may reduce the need for postponements in Tribunal hearings, or at least minimise the length of any such delays.

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 have to 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? 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 in order 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 Approved Mental Health Act Professional (“AMHP”);
 - 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 an RC the subsequent legal test for discharge following an application by a Nearest Relative in s3 cases is principally based on dangerousness.

- The Ministry of Justice, or the RC as appropriate, 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 33.11 of the Code of Practice in order to take reasonable steps to identify aftercare provisions if a Tribunal discharges the client.
- An AMHP 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 RC, key nurse and AMHP; usually the same individuals who will give evidence at a forthcoming Tribunal.
- Independent Mental Health Advocates 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 AMHP (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 allowed by paragraph 33.11 Mental Health Act Code of Practice)?
- If appropriate, has a Care and Treatment Review 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 Tribunal Rules and if necessary applying for a case management Direction
 - Requesting attendance of a Tribunal Medical Member, 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 hearing; 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 The Law Society's Practice Note;
 - If necessary, the Ethics Guidance Helpline at the Law Society
- Consideration of the current Mental Health Act Code of Practice..

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

11. Have the necessary nursing, medical and, if appropriate, Social Services or Community Health Team, records been obtained and 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 “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, AMHP 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 on the file?
- Alternatively, is there a note on the file confirming that section papers have been considered with relevant details recorded on the file?
- In CTO cases, have recall papers been checked?
- 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’s 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 under the provisions of Rule 5 of the Tribunal Rules?
- 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 an AMHP 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.
- Ensure you promptly discuss medical and nursing records with the client as part of taking instructions.
- If there are difficulties in access to medical and nursing records, consider applying the procedure within [Dorset Healthcare NHS Foundation Trust v MHRT \(2009\) UKUT 4 \(AAC\)](#); making an application under Rule 5 to the Tribunal; and/or complaining to the Chief Executive of the relevant hospital Trust.

“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, (including Supervisor in Community Treatment Order cases), 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 any 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 in particular not comply with the provisions of the relevant Tribunal Practice Direction. If necessary a request for a Direction under Rule 5, the Tribunal Rules 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 appropriate social worker they might not be in the 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 Protections Arrangements (MAPPA) referred to in the report, and any “restricted areas” in restricted cases, may require urgent further investigation. Reports and statements may contain material which is not disclosed under the provisions of Rule 14, which may require urgent consideration and action.
- Subsequent to 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.

“Reports or statements may contain factual inaccuracies, which may prejudice the client’s case, if they remain uncorrected or not examined against medical records.”

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 in particular 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 under Rule 5 of the Tribunal Rules 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 inquiries have been made as to whether they wish attendance at 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 subsequent to 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 Tribunal 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 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?”

13. Has there been thorough preparation for Tribunal hearings?

Why does this matter?

- Failing thoroughly to prepare for a Tribunal hearing is likely to lead to an unfocussed approach and a poorly presented case.
- Without thorough preparation, fundamental issues in the case are likely to be missed.
- Poor preparation is likely to lead to ineffective cross-examination of health professionals.
- Recent legal developments might have occurred relevant to the client's case, and perhaps his or her liberty. Failure to apply these might result in negligence.
- The Tribunal will require information about the case by way of a Form HQ1; and further management directions if, for example, a hearing longer than a half day is required.

How can I check this on my files?

- Is the case objective and action to be taken kept under continuous review as the case progresses, for example after significant events, such as greater community leave, attendance at a s117 meeting, consideration of medical records or Tribunal reports, together with further instructions from the client?
- Do advisers fully read through the file, professional reports and medical notes before any hearing?
- Is a case analysis or skeleton argument prepared prior to any hearing, noting that the Tribunal will formally require a skeleton for any Human Rights Act argument?
- Is there evidence of thorough preparation, for example, in the form of notes of questions prepared in advance of the hearing; contact with relevant third parties before the hearing and evidence that medical notes together with section papers have been perused?
- Are pre-hearing discussions held with the client about the issues and the approach to be taken at the hearing?
- Where appropriate, has consideration been given to the use of independent experts to assist the client's case? If so has their attendance at the Tribunal been considered, along with need for any adjournment? Has this, in turn, been discussed with the client?

- Has there been consideration of attendance at a s117 pre-discharge aftercare meeting, given that these meetings should take place before Tribunals and will be of considerable importance in some cases?
- Has relevant case law been applied?

What will help?

- Use an attendance note pro forma, which requires the adviser to identify the case objective and any action to be taken.
- Use a pre-hearing checklist to prepare for Tribunal hearings.
- Prepare skeleton arguments for Tribunal hearings.
- Confirm, if possible in writing, the approach agreed with the client.
- Ensure that advisers read through the file, professional reports and medical and other notes before hearings.
- Ensure that the firm subscribes and/or has access to latest relevant case law developments, together the latest edition of standard reference books such as Jones' Mental Health Act Manual.

“Without thorough preparation, fundamental issues in the case are likely to be missed.”

14. 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 referral 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?
- Has the client forthcoming 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.”

15. 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 inter alia with regards 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?

- Have sufficient visits been made to see the client?
- Is correspondence to the client suitable, bearing in mind especially age?
- Has the Tribunal and/or Mental Health Act Administrator, correctly applied the amended law on annual Tribunal references?
- Has the hospital ensured that the accommodation where the child is detained is "suitable" in terms of the standards proposed under s131A, with which hospitals are encouraged to comply even before formal implementation?
- 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?

- Has a case conference been organised before the Tribunal and attendance by the adviser been requested?
- 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 of Practice been generally considered?
- Has the Law Society guidance "Representation before mental health Tribunals" 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 \[1985\] 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."

16. 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?

- Subsequent to the implementation of Rule 11(4)(a) of the Tribunal Procedure Rules 2008, Tribunal decisions are not sent directly to the client by the Tribunal but need, instead 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, 45, including, as appropriate permission to apply to the Upper Tribunal under Rule 46 in addition to any prospect of judicial review.
- 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 s17 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 detainability?

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 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; further comment is needed.

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

17. Appendix: Differences between Welsh and English Tribunal Practice and Procedure

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. Differences of which to be particularly mindful, although there are others as well, are that the MHRT for Wales do not require the production of a nursing report on an application concerning an inpatient (although the recommendations made in the Upper Tribunal decision of *WH vs Partnerships in Care* (2015) UKUT 695 (AAC), (2015) MHLO 132 @ para 2 may change that), and 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 (r 20), whereas in England this has become at least partly optional (MHT r 34).

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 is also far less wedded to the use of standard forms, in fact there are very few, and there are no standard listing availability forms, but from May 2017 there has been a standard application form (MHRTW-01) and a withdrawal application form (MHRTW18).

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.

Neil P Confrey
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