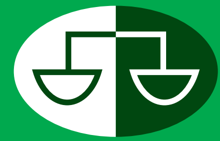

Independent
Quality Assessment
of Legal Services

IMPROVING YOUR QUALITY

A guide to the common issues identified through peer review

mental health

Foreword

Improving Your Quality

A guide to common issues identified through Peer Review

The focus of the delivery of legal aid is firmly on the provision of consistently good quality services for clients.

The introduction of the peer review process provides a unique opportunity with access to a wealth of information directly related to the quality of legal advice and information given to clients. It allows us to identify areas of good practice and areas in need of improvement.

We are pleased to introduce 'Improving Your Quality – Mental Health', which is intended to give the profession access to peer review findings and help support those wishing to achieve the highest levels of quality of legal advice and work.

The guide makes available common quality issues identified by the Mental Health Peer 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 suggesting a standard approach. Nor are they an exhaustive list; they are only some of the ways that improvements can be made. Your 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 may also lead to a more general debate concerning standard setting, and the best approaches to dealing with specific quality of advice issues for Mental Health work. We would welcome the opening up of the world of legal competence to such scrutiny and debate.

Avrom Sherr
Director of Institute of Advanced Legal Studies

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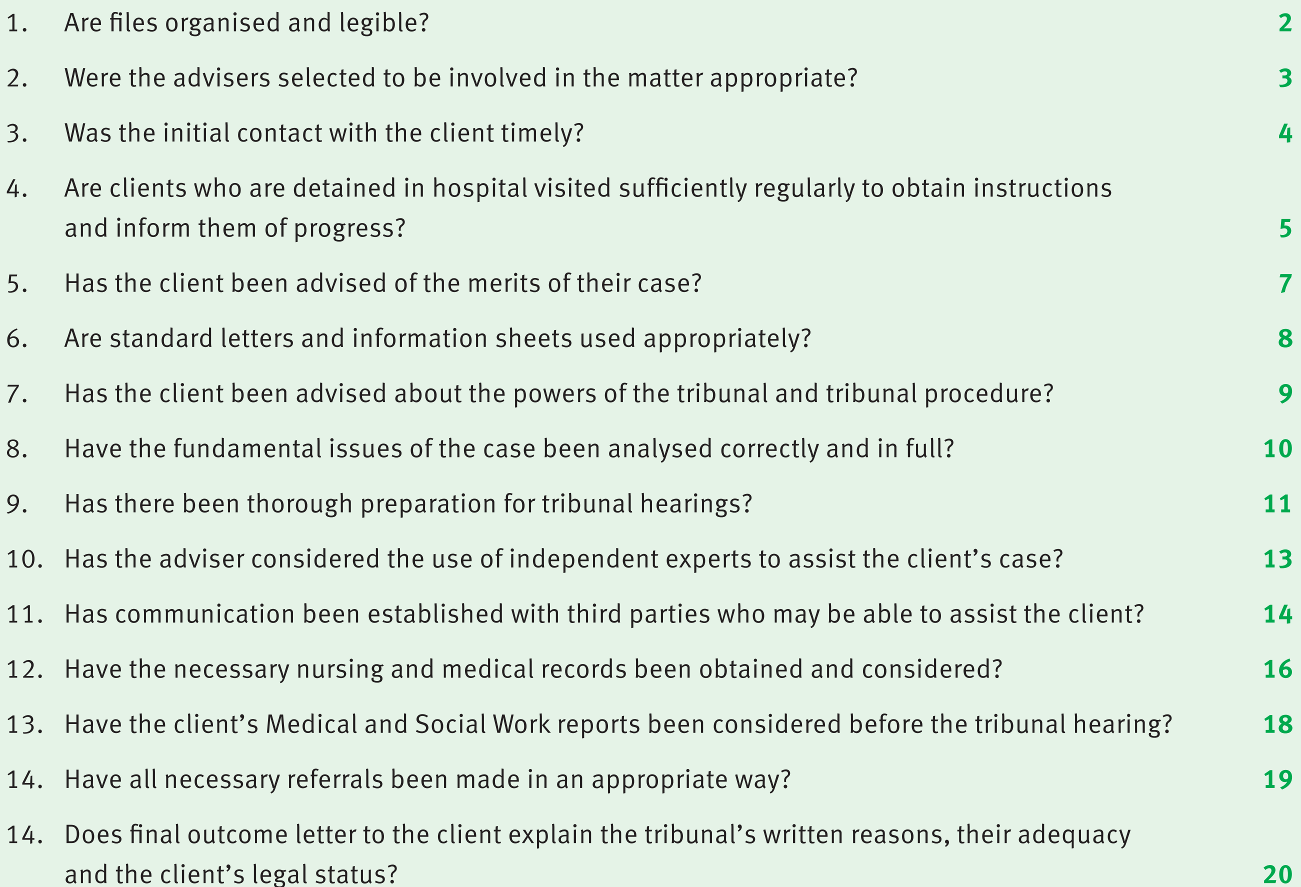

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Are files organised and legible?

Why does it matter?

- Files that are disorganised and contain illegible handwriting are difficult to refer back to.
- Disorganised files will not pass the quick "pick up" test.

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 up any handwritten notes that are difficult to read.

"Disorganised files will not pass the quick "pick up" test."

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

Why does this matter?

- Mental Health cases require specialist knowledge of the law, tribunal procedure, psychiatric care and treatment, and substantial experience in dealing with clients with mental illness.
- The use of inexperienced advisers on Mental Health cases raises concerns as to whether the advice given is appropriate, correct, comprehensive and timely.
- 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?

- Are appropriate proofs of evidence taken from the client or a detailed, initial instructions pro forma recording essential information about the client and the case?
- Is there evidence of tribunal preparation in the form of a case analysis or skeleton argument?
- Alternatively, is there evidence of thorough preparation, for example, in the form of notes of questions prepared in advance of the hearing, letters sent to RMOs before the hearing and evidence that medical notes have been perused?
- Has the client received written advice on the specific merits of their case?

What will help?

- Implement initial instructions pro forma tailored to Mental Health cases.
- Undertake frequent and thorough file reviews of files conducted by inexperienced advisers.
- Review use of training and supervision for such advisers.

> “Undertake frequent and thorough file reviews of files conducted by inexperienced advisers.”

Was the initial contact with the client timely?

Why does this matter?

- When a client is 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" MHRT 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.
- If there is delay there could be prejudice to the client (e.g. missing an important deadline to apply to the MHRT).
- 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 firm was made?
- Was it established at an early stage whether there was any particular urgency?
- In a Section 2 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?

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.

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 advisor and may find giving instructions difficult.
- 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.
- Clients who are completely unable to give instructions raise important conduct issues. 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. Phone calls and feedback through letters can be more beneficial for some clients.

"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."

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?
- Where clients are completely unable to give instructions, were the Law Society's "Guidelines for Legal Representatives – Representation at Mental Health Review Tribunals" clearly 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.
- Ensure that the client receives written confirmation of instructions, advice and progress of the case, unless there is very clear evidence or advice to the contrary.
- 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.
- Where possible 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 to the possible need to visit the client to discuss the outcome once any written decision is available.
- In Section 2 cases, attempt to obtain reports and meet with the client to discuss the reports before the day of the tribunal.

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

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

Why does this matter?

- The client needs to be advised of the strengths and weaknesses of their case. If not advised the client will be unable to make informed decisions and may be confused as to the likely outcome of their case.
- The client's expectations regarding the prospects of success need to be managed.

How can I check this on my files?

- Do files show early realistic advice on merits in the initial attendance note and client care letter or if not is the reason for that clearly noted?
- Is the merits advice clear, i.e. not vague or ambiguous such as "you have a reasonable prospect of success"?
- Is the advice on merits updated to reflect changes in the case?
- Is advice updated as different stages in the case are reached?
- Do files satisfy the quick "pick up" test (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 (i.e. for lack of information), the adviser should confirm that fact to the client in writing.
- Address this issue in Supervision.
- Ensure that advice on merits is assessed in File Review.
- Put headings in template letters to prompt advisers to record advice on merits.
- Where a client is unable to read easily or understand advice (or indeed provide instructions), additional meetings should be considered.

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

Are standard letters and information sheets used appropriately?

Why does this matter?

- Using standard letters without tailoring them to the specific case can lead to clients receiving irrelevant information.
- Standard letters, which are not tailored to the client's circumstances, are likely to cause confusion and worry to clients.

How can I check this on my files?

- Are standard letters to clients tailored to their individual circumstances?
- Have clients received letters containing unclear and inconsistent information?
- Do the information sheets given to clients contain any irrelevant information?

What will help?

- 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.
- Make sure that advice letters include a specific record of the client's instructions, some individual reference to the details of the client's case, the advice given and the action that the adviser is to take.

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

Has the client been advised about the powers of the tribunal and tribunal procedure?

Why does this matter?

- The client needs to be advised about the timescales, tribunal powers and hearing procedures. If not advised the client will not know what they should 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?

- Are clients advised on timescales, tribunal powers and hearing procedures (where appropriate)?
- Is 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?
- Has the client been advised of the tribunal doctor's visit and reminded of this shortly before the hearing?

What will help?

- Information sheets explaining the powers of the tribunal and tribunal procedure.
- Put headings in template letters to prompt advisers to record advice on tribunal powers and procedures.
- Advice re MHRT powers/procedure etc. is important and is often best explained in a face-to-face meeting, details of which should be recorded on file.

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

Have the fundamental issues of the case been analysed correctly and in full?

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 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 and at the time they would be viewed by an MHRT Medical Member?
- Has the adviser considered all issues arising in the case?
- Do cases progress in a timely manner?

What will help?

- Consider drafting a simple case plan and keep it under review.
- 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.

"Has the adviser considered all issues arising in the case?"

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 in case law relevant to the client's case, and perhaps his or her liberty. Failure to apply these might result in negligence.

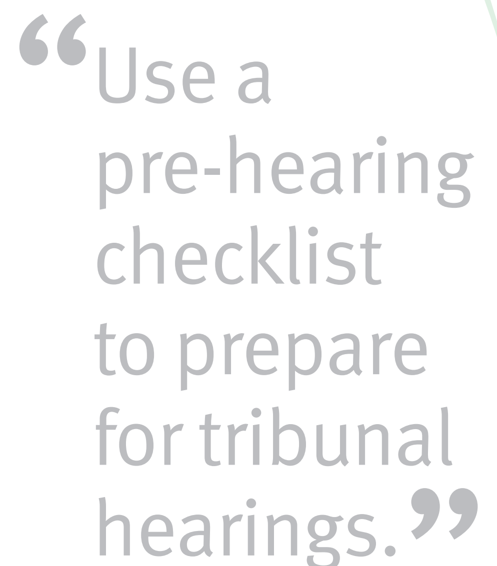
How can I check this on my files?

- Is the case objective and action to be taken kept under continuous review as the case progresses?
- Do advisers read through the file, professional reports and medical notes before any hearing?
- Is a case analysis or skeleton argument prepared prior to any hearing?
- Alternatively, is there evidence of thorough preparation, for example, in the form of notes of questions prepared in advance of the hearing, letters sent to RMOs before the hearing and evidence that medical notes have been perused?
- Are pre-hearing discussions held with the client about the issues and approach to be taken at the hearing?
- Where appropriate, is the client's case discussed with the nearest relative or other family and friends?
- Where appropriate, is consideration given to the use of independent experts to assist the client's case?
- Has there been consideration of attendance at a s117 pre-discharge after care meeting, given that these meetings should take place before MHRTs and will be of considerable importance in some cases?
- Has there been consideration of, and contact as necessary, with professional third parties (see separate section)?
- Has there been the application of relevant case law?

“Poor preparation is likely to lead to ineffective cross-examination of health professionals.”

What will help?

- Use attendance note pro forma, which require the adviser to identify the case objective and any action to be taken, on each occasion that work is undertaken.
- Use a pre-hearing checklist to prepare for tribunal hearings.
- Prepare skeleton arguments for tribunal hearings.
- Confirm in writing the approach agreed with the client.
- Ensure that advisers read through the file, professional reports and medical notes before hearings.
- Consideration of the Mental Health Review Tribunal Transaction criteria.
- Ensure that the firm subscribes and/or has access to latest relevant case law developments.
- As necessary, contact LSC Specialist Advice Line.



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

Why does this matter?

- Some cases are more likely to fail without independent expert evidence to challenge the determining 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 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?
- Are clients advised on the use of experts in attendance notes or advice letters?

What will help?

- Maintain an approved panel of experts.
- Keep a log of references to the use of specialist experts in unusual cases.
- On any checklist or pro forma case plan used, ensure that there is a prompt in respect of this issue.

"Lack of expert evidence may mean that the case is ill prepared."

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

Why does this matter?

- Communication with third parties (for example, RMO, social workers, Nearest Relative, other relatives and friends) is necessary in order to:
  - Properly conduct a client's case.
  - Gather the information needed to advise the client on the strengths and weaknesses of their case.
  - Gather information as highlighted in the Mental Health Review Tribunal Criteria.
- A proactive approach to identifying and communicating with relevant third parties is important for the effective preparation of cases for the MHRT.
- In some cases the Nearest Relative can apply for discharge from section and can sometimes have rights to apply to the MHRT for discharge. If a barring certificate has been issued by an RMO the subsequent legal test for discharge following an application by a Nearest Relative is simply based on dangerousness.
- The Home Office, or the RMO as appropriate, have the power to discharge the client from section prior to the MHRT, or grant community leave.
- Hospital Managers have a power to discharge from section in unrestricted sections and will take evidence, both in written and oral form, from both RMO and social worker, usually the same individuals who will give evidence at a tribunal, before making their decision.
- A social worker, or Community Psychiatric Nurse, will have important information as to plans for aftercare under s117, including necessary accommodation.
- The RMO has to consider the convening of a meeting (a "s117 meeting") in accordance with 27.7 Codes of Practice in order to take reasonable steps to identify aftercare provisions if an MHRT discharges the client.
- Good communication may help counter delays in the MHRT system in relation to obtaining reports. Avoiding delays will help the adviser meet the timescales set out in Rule 6 MHRT Rules 1983 and avoid a breach of Article 5(4) of the European Convention on Humans rights (requirement of a speedy hearing).

How can I check this on my files?

- Are discussions and/or correspondence with relevant third parties recorded?
- Are letters sent to the Nearest Relative, with the client's consent, asking for views regarding discharge from detention (where appropriate)?
- Are letters sent to RMO and social worker (and perhaps family and friends) raising issues about aftercare planning and support, or accommodation problems that the client might face etc?
- Has there been any attendance at significant aftercare planning meetings (as allowed by paragraph 27.8 Mental Health Act Codes) or case conferences held in accordance with the provisions of paragraph 27.2 of the Code?
- Is there correspondence with the MHRT, for example, sending in appeal, checking that it has been received and registering/chasing up reports/dates/decisions?

- Is there a letter to the MHRT confirming that the firm acts for the client and requesting reports when available?
- Is there a letter to the Mental Health Administrator confirming that the firm acts for the client in a forthcoming MHRT?
- Is there an application to the Data Controller assigned under Data Protection Acts 1998 requesting access to medical and nursing records in preparation for MHRT?
- Has there been consideration of attending a Hospital Managers' Hearing and/or the evidence provided there and the details and reasons for the decision?
- Are there letters requesting reports and chasing up delays (for example, to Mental Health Act Administrators in Managers Hearing cases)?
- Are there any letters to Complaints Officers in hospitals (where appropriate)?

What will help?

- Adopt a practice of routine enquiry with health professionals and other third parties, subject to the client's consent.
- The practice of using standardised letters to third parties may assist but only if the letters are adapted to each case.
- Ensure that the firm has sufficient resources and organisation to monitor communication with third parties.
- Ensure this issue is covered in File Review, supervision and training.
- For guidance on issues of confidentiality in contacting third parties: Guide to the Professional Conduct of Solicitors (Principles 16.01 and 16.02) & The Law Society's "Guidelines for Legal Representatives – Representation at Mental Health Review Tribunals".
- Consideration of Mental Health Act Codes of Practice.

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

Have the necessary nursing and medical 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.
- Medical and nursing notes contain vital information that may assist in the preparation of the client's case.
- Records may contain factual inaccuracies and the client's instructions must be taken in good time so that the records can be corrected.

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 some relevant details recorded on the file?
- 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?
- Have any attempts by the hospital to restrict access under s7 Data Protection Act 1998 and the Data Protection (Subjects Access Modification)(Order) 2000 been considered and if necessary an application made to the Regional Chair of the tribunal to obtain full access subject to Rule 12(2) 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 Records (for example if there are contested details of incidents involving a social worker in the community prior to detention)?

"Medical and nursing notes contain vital information that may assist in the preparation of the client's case."

What will help?

- Ensure that early requests to access the client's records are made under the provisions of s7 Data Protection 1998 as soon as possible.
- Ensure you 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 making an application to the tribunal Regional Chair and/or complaining to the Chief Executive of the relevant hospital Trust.

"Ensure you discuss medical and nursing records with the client as part of taking instructions."

Have the client's Medical and Social Work reports been considered before the tribunal hearing?

Why does this matter?

- Medical and Social Work 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.
- Reports may contain factual inaccuracies, which may prejudice the client's case, if they remain uncorrected or examined against medical records.

How can I check this on my files?

- Are there file notes detailing perusal of the reports at an early stage in the case?
- Do files show that the client has given specific instructions on issues raised in the reports?
- Has action been taken to address issues arising from the reports in accordance with the client's instructions (for example to compare reports with medical records or third parties)?
- Have reports been cross-referenced with notes from records to check for inaccuracies, inconsistencies or omissions?

What will help?

- Ensure the MHRT office is pressed for early service of the reports in accordance with the MHRT Rules. If necessary seek a Direction from the Regional Chair of the tribunal under the provisions of Rule 13 of the tribunal rules if a breach of service under Rule 13 has occurred.
- Ask hospital administrators to send reports to you direct, when they are sent to MHRT.

"Are there file notes detailing perusal of the reports at an early stage in the case?"

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.
- 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 work, medical and/or psychiatric 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?

What will help?

- Include questions designed to highlight the potential for any such problems into an initial questionnaire or pro forma.

"Do the client's social work, medical and/or psychiatric reports raise issues that require specialist help?"

Does the final outcome letter to the client explain the tribunal's written reasons, their adequacy and the client's legal status?

Why does this matter?

- Final outcome letters to clients should explain the tribunal's decision, their legal status, time limits for future applications and advice on the grounds for 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 right to s117 aftercare if discharged from section.

How can I check this on my files?

- Do final outcome letters to clients include the tribunal decision and explain the tribunal's reasons for their decision?
- Do final outcome letters accurately reflect the tribunal's written decision?
- Are clients given advice on continued detention (where appropriate) and of entitlement to aftercare?
- Are clients advised when further applications can be made to the tribunal or hospital managers?
- Are clients given advice on aftercare where appropriate?

What will help?

- Ensure that clients are given post-hearing advice face to face particularly if they remain in hospital, on or off section.
- 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. It is not sufficient simply to quote from the decision; further comment is needed.

> "Do final outcome letters accurately reflect the tribunal's written decision?"

Mental Health Peer Review Panel Members

Ian Campbell

Richard Charlton

Neil Confrey

Simon Gledhill

Maureen Grenville

James Kieran

Jonathan Willis

(as of July 2006)