

Guidance on Restricted Patients and the Mental Health Act

October 2020 (v1.0)

Document History

Document version	Date of Issue	Revision description
1.0	22.10.2020	This guidance was created as part of the Parole Board's project to launch fully revised and updated member guidance.

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Treatment in hospital under the Mental Health Act 1983 (as amended 2007)

- 1.1 This is a brief overview of this subject. For more detailed information and guidance see the background information document produced by the Mental Health Casework Section ('MHCS') of Her Majesty's Prison and Probation Service (HMPPS):
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/670671/RP_Background_Brief_v1_Dec_2017.pdf
- 1.2 A prisoner who has a Mental Disorder which is of a nature or degree to justify treatment in a hospital for their own health or safety, or for the safety of others, and where appropriate medical treatment is available, can be transferred to hospital, under the Mental Health Act 1983 (as amended 2007) ('MHA'). This can take place against their will. Under the MHA, prisoners with a mental disorder cannot be treated against their will in prison, because prison is not considered a hospital under the NHS Act 1977. The Secretary of State has the power to direct transfer to a secure hospital, where he is satisfied by the reports of at least two medical practitioners that the prisoner meets the MHA criteria and if he is of the opinion that it is expedient to do so.
- 1.3 "Nature" in the context of the MHA is the type of mental disorder (diagnosis) and clinical features of the disorder, such as its chronicity and length, and whether it is constant, relapsing, remitting, and responsive to treatment, as well as issues such as risk-related behaviour (including to the patient's own safety)
- 1.4 "Degree" in the context of the MHA is usually described as the current symptoms of the mental disorder, such as delusions, hallucinations, or paranoia.
- 1.5 The specific section of the MHA that is used to detain the person in hospital depends on the stage within the criminal justice process. There are several sections applicable to the remand period (including for urgent treatment), but, as this is not relevant to the Parole Board's function, they are not covered in this guidance.
- 1.6 Following conviction for an imprisonable offence, an offender can be admitted to hospital for treatment, rather than receive a prison sentence. This is done under section 37 (Hospital Order) MHA and can be combined with section 41 (Restriction Order) MHA when it is "necessary for the protection of the public from serious harm". This prevents the offender leaving hospital (either temporarily on leave or discharge) or transferring to a different hospital without the consent of the Secretary of State,

although the offender can be discharged by the relevant Tribunal¹. A hospital order is not a punishment; the offender is effectively diverted away from the criminal justice system and into the secure hospital system for treatment. Therefore, they will not come within the parole process, but this sentence may appear on an offender's criminal record. If so, they may still be subject to conditional discharge and under clinical supervision with Ministry of Justice oversight. The Secretary of State retains the power to recall a conditionally discharged restricted patient to hospital from the community, should their mental health deteriorate and their risk increase. Should this be a relevant factor to your consideration, you may wish to make directions to ascertain the offender's legal status insofar as the section 37/41 MHA hospital order is concerned. If the court simply made a section 37 MHA order, once the offender is discharged from hospital, there is no similar ongoing power to recall them to hospital.

- 1.7 A hospital order cannot be made where the sentence is fixed by law (for example in cases of murder which carry a mandatory life sentence). It is, however, possible for the Secretary of State to issue a transfer direction under section 47 MHA on the same day that a court sentences the offender.
- 1.8 All patients may apply to the relevant Tribunal after six months detention in hospital and once in every 12-month period thereafter. If no such application is made, the Secretary of State must make a statutory referral at least every three years. Transferred prisoners (under section 47/49 MHA) may additionally apply in the first six months following their transfer to hospital.

Jurisdiction

- 2.1 Restricted patients are mentally disordered offenders who are detained in hospital for treatment and who are subject to special controls by the Secretary of State for Justice. They include offenders who are diverted from the courts to the hospital system, and those who are transferred to a secure hospital from prison and made subject to a restriction order or direction.²
- 2.2 If a prisoner is transferred to a hospital during their parole review, they become a restricted patient under the MHA and the Parole process is suspended. Accordingly, the Parole Board no longer has jurisdiction over the case. Please refer to paragraph 15.1 for further information.

¹ First Tier Tribunal (Mental Health) in England or the Mental Health Review Tribunal for Wales

² Mentally disordered offenders – the restricted patient system. Background Briefing. December 2017

Prisoners who require transfer to hospital during their sentence (section 47/49 MHA)

- 3.1 A prisoner who needs treatment of their mental disorder while serving their sentence can be transferred to a mental health setting³, by the Secretary of State under section 47 MHA. This will usually be a secure setting, but in exceptional cases could be a non-secure inpatient setting. The Secretary of State must be satisfied by reports from at least two registered medical practitioners that the prisoner is suffering from a mental disorder that is of a nature or a degree which makes it appropriate for the prisoner to be detained in a hospital for medical treatment and that appropriate medical treatment is available for the prisoner.
- 3.2 The level of security of the mental health setting is determined by the Mental Health Casework Section (MHCS) of Her Majesty's Prison and Probation Service (HMPPS). MHCS makes all decisions relating to restricted patients under delegated authority of the Secretary of State. The Secretary of State will usually make prisoners transferred to hospital subject to a restriction direction under section 49 MHA. This imposes the same restrictions as an order under section 41 MHA (see above) but additionally restricts the powers of the Tribunal, such that it cannot *direct* discharge.
- a. Determinate or fixed term sentences – If the restricted patient remains in hospital, the restriction direction expires at the point of their automatic release date (generally the CRD). If they continue to meet the detention criteria of the MHA, they are not immediately discharged from hospital and remain detained under a “notional section 37”. This means that they can be discharged by their Responsible Clinician (RC) or the Tribunal. They are no longer subject to the oversight of the Secretary of State in relation to those decisions, or decisions relating to leave or transfer to a different hospital. Some of these restricted patients may well be subject to a licence and probation supervision, while they remain in hospital.

If the restricted patient no longer requires treatment in hospital before their automatic release date, they can be remitted to prison to complete their sentence. The Secretary of State may remit a restricted patient to prison on receipt of notification from the RC or the Tribunal that they no longer meet the MHA detention criteria. The time spent in hospital counts towards the length of their sentence.

- b. Indeterminate sentence – The restriction direction remains in place as long as the restricted patient remains detained in hospital. Neither the RC nor the Tribunal can, therefore, discharge the restricted patient into the community. If the restricted patient is pre-tariff and the RC decides that they no longer require treatment in hospital, they

³ When referring to mental health settings throughout this guidance, this includes such settings as mental health units, secure hospitals and psychiatric units.

can apply to the Secretary of State to have them remitted to prison, where they continue to serve their sentence. Prior to remission, the RC should arrange a section 117 MHA (pre-discharge) meeting to which the mental health team of the prison should be invited. A later parole review will be greatly helped by a copy of the minutes of this meeting and the discharge summary being included in the dossier.

Post-tariff indeterminate sentence transferred prisoners detained under section 47/49 MHA

- 4.1 As with all patients detained under the MHA, post-tariff indeterminate sentence transferred prisoners can apply to the Tribunal, but because of the section 49 MHA transfer direction, the Tribunal does not have the power to discharge them. They can make a determination that, had the restricted patient been detained under section 37/41 MHA, they would have conditionally discharged them. This tends to be referred to as a "recommendation" for conditional discharge. The Secretary of State has the power to discharge a section 47/49 (or 45A) MHA indeterminate sentenced prisoner at this stage, but generally only does so in exceptional circumstances. It is important to recognise that the Tribunal does not discharge the restricted patient and they remain detained under section 47/49 MHA until either the Secretary of State remits them to prison, or, more usually, they are referred to the Parole Board to decide whether the test for release is met. Where a referral to the Parole Board is made, it will only cover consideration of release, it will not include the option of recommending open conditions if the test for release is not met. If the referral does invite the Board to comment on the suitability for open conditions, please notify the Secretariat who will query this with PPCS. Where the Parole Board considers the case, but does not direct release, the restricted patient remains detained under the MHA and continues to be subject to that regime (i.e. a new decision from the Tribunal is required before the case is referred to the Parole Board again, or the restricted patient is remitted to prison).
- 4.2 Usually, the Tribunal recommends that the restricted patient should remain in hospital, pending the outcome of the Parole Board review. In order to make such a recommendation, the Tribunal must consider the impact of a return to prison and the recommendation is usually made on the basis that a return to prison would result in a relapse/deterioration in mental disorder. During the period between the Tribunal decision and the conclusion of the Parole Board review, the restricted patient will usually continue to have leave from hospital, under section 17 MHA, which must be approved by the MHCS. Often this will be very extensive and much more frequent than is the case with release on temporary licence ('ROTL') from open conditions. If a discharge accommodation has been identified, the Secretary of State will often allow up to five nights leave per week at the accommodation.

- 4.3 It is important to recognise that the test the Tribunal applies to decide if they would have discharged the restricted patient had they been detained under section 37/41 MHA is completely different from the test the Parole Board applies. The Tribunal has to decide if the restricted patient is detainable under the MHA, which is whether it is satisfied:
- That the restricted patient is suffering from mental disorder of a nature or degree which makes it appropriate for them to be detained in hospital for medical treatment; or
 - That it is necessary for the health or safety of the restricted patient or the protection of others that they should receive that treatment; or
 - That appropriate medical treatment is available.
- 4.4 For example, the Tribunal could decide that the restricted patient no longer has a mental disorder, even though they may be a risk to others, and is, therefore, no longer detainable under the MHA.
- 4.5 The Parole Board review is not bound by the earlier decision of the Tribunal because of the difference in the test to be applied in the two situations. Therefore, a subsequent oral hearing may decide not to release a restricted patient if it decides that it is not satisfied that it is no longer necessary for the protection of the public that they should be confined. The Ministry of Justice will then decide whether the restricted patient should remain in hospital or be remitted to prison.
- 4.6 It is important to note that, when a restricted patient is released by the Parole Board, both transfer direction under section 47 MHA and the restriction direction under section 49 MHA lapse. Even though the Tribunal has considered what conditions would have been necessary on discharge and usually listed those conditions in its decision, the offender is not subject to any of those conditions unless the conditions are also included in the licence.

Hospital and Limitation Direction - Section 45A MHA

- 5.1 There is one MHA disposal from court following conviction that may result in an offender later coming within the parole process. In this situation, the court decides that imprisonment is the appropriate sentence, but considers that the offender should be immediately transferred to hospital for treatment. The court imposes a sentence of imprisonment (determinate or indeterminate) and directs the offender to hospital. Once in hospital, in effect, the restricted patient is dealt with as if they were a transferred prisoner under section 47/49 MHA. The Limitation Direction has the same effect as a Restriction order under section 41 MHA and a restriction order under section 49 MHA. In short, the powers of the clinician are restricted such that they must seek the consent of the Secretary of State before taking

certain decisions and the powers of the Tribunal to direct discharge are also restricted. A Hospital Direction cannot be made where the sentence is fixed by law.

- a) Determinate or fixed term sentences – Some determinate sentence offenders may spend their entire sentence in hospital. The Limitation Direction ceases to have effect once the restricted patient's release date is passed, but the Hospital Direction remains in force until the patient is discharged from hospital. Therefore, if the restricted patient continues to meet the criteria under the MHA for detention in hospital, they may remain detained in hospital beyond the date on which they would have been released from their sentence but will no longer be subject to the restrictions.

However, once it is decided that the restricted patient no longer requires treatment in hospital and if their release date has not passed, they will usually transfer to prison to complete their sentence. They may later come within the parole process, depending on the type of their sentence.

- b) Indeterminate sentences – Pre-tariff indeterminate sentence prisoners will usually be returned to prison if it is decided that they no longer require treatment in hospital. They will then be referred to the Parole Board once their tariff date has passed. If the tariff has expired, the Tribunal often makes a recommendation that, should the Secretary of State decide not to discharge them, they should remain in hospital. The Secretary of State generally accepts such a recommendation and so the referral to the Parole Board is made while the transferred prisoner remains in hospital. See below for more details.

- 5.2 If a section 45A MHA restricted patient is remitted to prison, but later becomes unwell while serving their sentence, the Secretary of State may transfer them back into hospital for treatment, but does so under section 47 MHA, as for any other serving prisoner.

Practicalities of the process of referral to the Parole Board

- 6.1 If the Tribunal has decided that, had the restricted patient been detained under section 37/41 MHA, they would have conditionally discharged them, the MHCS will initiate the process of referral to the Parole Board for indeterminate sentenced transferred prisoners who are post tariff or less than six months from tariff expiry. The MHCS notifies the Public Protection Casework Section (PPCS) of the relevant cases with a view that PPCS should refer appropriate cases to the Parole Board.

Holding an oral hearing in a Mental Health Setting

- 7.1 Any restricted patient detained in a mental health setting following a Tribunal decision that they would be discharged if they were detained under section 37/41 MHA, must be referred for an oral hearing if release on the

papers is not possible.⁴ Their case will be prioritised at the next listing schedule. The oral hearing will be held at the relevant mental health setting where the patient is detained.

Composition of the panel for oral hearings held in a Mental Health Setting

8.1 The panel should usually include a psychiatrist member because they will bring their experience as a consultant psychiatrist and their professional knowledge to inform decision making in these settings. Depending on the case, a psychologist member might also be required in addition to a psychiatrist, usually these would be for more complex cases where the restricted patient has a personality disorder, often in combination with other mental disorder. When making MCA or panel chair directions, where it is unclear which type of specialist member is required for a case in a mental health setting, members are encouraged to contact a psychiatrist member for advice.

Dossiers for Parole Board hearings taking place in Mental Health Settings

9.1 The legal test for release and principles for review apply for restricted patients as they do to all prisoners, but the dossier will be different. At the MCA stage it is good practice to direct provision of the following documents if they are not already in the dossier:

- a. Any psychiatric/psychological reports prepared for trial
- b. Any psychiatric/psychology reports prepared during the sentence, prior to transfer to hospital.
- c. All reports submitted to the MHT, to include as a minimum the RC's report, the Nursing report, the Social Circumstances report, any Facilities report, and any related addendum reports.
- d. The Tribunal decision letter that triggered the Parole Board review
- e. Updated psychiatric/psychological/nursing reports which would include a report by the RC. (It is likely that the MHT will have been at least 12 months before the oral hearing.)
- f. The current HCR-20 and/or other relevant risk assessments.
- g. A report from the community offender manager, which should include their recent contact with the restricted patient and the inpatient mental health team as well as with the proposed community mental health team.
- h. The proposed Risk Management Plan and whether a specialist mental health accommodation is proposed and if not, how will the specialist

⁴ There is a Parole Board policy that, prisoners in a secure hospital setting / mental health unit or where it is their first parole review by the Parole Board after discharge by a MHT, automatically progress to an oral hearing if they cannot be released on papers. However, please note that the policy is currently paused and will be reviewed.

mental health support needs be provided. Planned liaison with the community mental health team and arrangements for a mental health review if recall is proposed. Suggested licence conditions.

- i. An updated Social Circumstances report from the hospital social worker, if relevant.
- j. A report by the proposed community care coordinator (usually a community psychiatric nurse, social worker or other mental health professional). This should detail the proposed community care plan, including the proposed accommodation, if this is a specific mental health provision, whether a place been offered and if funding has been agreed.
- k. Any report from the proposed community consultant psychiatrist.
- l. A report from the accommodation provider giving details of the staffing levels (whether 24 hour), ability to enforce a curfew and/or sign in, activities provided, drug testing, working with the community mental health team and usual length of stay.

9.2 It is good practice to direct the provision of all the pre-existing reports within a specified deadline, so that the dossier should be more complete when it is received by the panel chair.

9.3 The panel chair will need to check that these documents, and any additional documents required (such as a report from a substance misuse worker or occupational therapist, reports on overnight leave taken, outside work, offending behaviour programme reports), have been covered in the MCA directions, and make any further directions as required.

Witnesses for Parole Board hearings taking place in Mental Health Settings

10.1 Generally, the following witnesses will be appropriate at an oral hearing for a restricted patient in a mental health setting:

- a. The restricted patient's RC
- b. The restricted patient's primary nurse (who will be able to provide information about the restricted patient's day to day behaviour and engagement)
- c. The team social worker from the hospital
- d. The community offender manager
- e. The Care Coordinator and/or the consultant psychiatrist from the community team which will be responsible for the restricted patient's mental health care in the community.
- f. If possible, it is helpful to have a representative (preferably the manager) from the proposed supported accommodation, especially if the restricted patient has been having repeated overnight leave there.

- 10.2 Although this is a lengthy list of potential witnesses, in practice, it is only the RC, community offender manager and Community Mental Health Team members who will be questioned in any detail.
- 10.3 There will not be a prison offender manager or equivalent in a mental health setting. If the medical report was written by someone other than the RC (often it will be a less senior doctor supervised by the RC), it is not usually necessary to have the report author present as a witness as well as the RC.
- 10.4 The community offender manager is an essential witness at the Parole Board oral hearing. However, they may not have attended the MHT hearing, despite the fact that this is recommended. Many RCs will try and ensure that the community offender manager has maintained contact with the restricted patient and will consult the community offender manager (via the hospital social worker) regarding the care plan and accommodation upon release. General practice is that, once the MHT has issued the conditional discharge recommendation, the community offender manager should then review the case. If the community offender manager's review is not included in the dossier, it should be directed.
- 10.5 It is good practice to require all witnesses to remain throughout the hearing. Panels may find that the RC asks to leave after giving their evidence. This practice is not approved of by the MHT, and panels should consider such requests carefully on a case by case basis, always seeking the restricted patient's views via their representative. It is likely that a panel would need evidence of very compelling reasons to grant such a request.

Victims

- 11.1 The Code of Practice for Victims of Crime⁵ sets out the rights of victims of mentally disordered offenders (including restricted patients). Should a victim wish to make written representations to the Tribunal about whether there should be any conditions attached to the offender's discharge, they are entitled to do so (although they cannot in theory submit a victim personal statement). The MHCS will inform the MHT of the Victim Liaison Officer's (VLO) details and the MHT will then invite the VLO to submit the victim's written representations.⁶
- 11.2 However, once the case of a restricted patient has been referred to the Parole Board, the victim has exactly the same rights as any other case the Board deals with. The victim can write a victim personal statement ('VPS'), can request licence conditions, can apply to attend an oral hearing (if there

⁵ Ministry of Justice - Code of Practice for Victims of Crime – October 2015

⁶ Mentally disordered offenders – the restricted patient system. Background Briefing. December 2017

is to be one) to read out their statement, have their statement read out on their behalf, or pre-record their VPS. The fact that the offender is within a secure hospital setting has no bearing on this entitlement.

Logistics for Parole Board hearings taking place in Mental Health Settings

12.1 Time estimate

MCA members and panel chairs should bear in mind that restricted patients with a mental disorder may be even more anxious about a hearing than most prisoners. They may still have some residual symptoms of their mental disorder and they may need additional breaks to give instructions, listen to advice, or just relax.

12.2 Remote evidence⁷

Video link and telephone evidence may not be suitable for restricted patients in a number of cases. Remote evidence is unlikely to be appropriate for either the restricted patient or witnesses if a mental disorder is involved, or if there are numerous witnesses or complex risk issues. MCA members and panel chairs should also consider whether there are for example, learning difficulties, communication difficulties, language difficulties, or if a signer is required.

12.3 It should be noted that during the Covid-19 restrictions put in place during 2020, all Tribunals were convened using remote technology, and most mental health settings now have the ability to convene remote hearings.

If considering convening a remote parole hearing then a view should be sought from the RC as to the suitability for this, and the ability of the restricted patient to meaningfully and fairly participate in their hearing, using such arrangements.

Practice Tips for Parole Board panels sitting in Mental Health Settings

13.1 Panels should be aware that Parole Board oral hearings may be unusual for mental health professionals and so there may be a lack of familiarity among the professionals as to procedural and other requirements, including the content of reports. Good practice should include directions concerning the areas to be addressed in reports and oral evidence to be clearly specified in plain language.

⁷ This guidance reflects business as usual. During the coronavirus pandemic members should refer to the Parole Board Covid-19 Member Guidance for information around remote hearings for vulnerable prisoners, especially whilst face to face hearings are impacted.

- 13.2 Hospital administrative staff may also be unfamiliar with the practicalities and processes of oral hearings and may not immediately understand what is needed because only a small proportion of the total MHT cases each year result in a referral to the Parole Board.
- 13.3 A common finding in these oral hearings is that the discharge plan proposed by the clinical team in the hospital is focussed on the mental health aspects and does not address the effect of supervision on licence and licence conditions. One of the key issues is to ensure that there has been good liaison between the community offender manager and the proposed community Mental Health Team. MHCS has been working to ensure that RCs involve community offender managers much earlier in the process (at least by the stage unescorted community leave is being considered, if not earlier), although this is not always successful. The community offender manager should be included in the section 117 MHA pre-discharge meeting along with the community Mental Health Team. In effect, the offender will be treated informally in the community, as they will not be subject to the MHA. Best practice is that a joint discharge plan/risk management plan is developed between the community care coordinator and community offender manager which addresses the following questions:
- What will happen if their mental disorder relapses, so that recall to prison can be avoided where possible and more appropriate treatment in hospital can be arranged?
 - If they break the licence conditions, how will their mental health be assessed before recall to prison?

Prisoners with diagnoses of a mental disorder within the prison estate

- 14.1 Not all prisoners with a mental disorder who are eligible for a parole review will be in a mental health setting. A significant number are in the prison estate. It is not unusual to find that a prisoner has been transferred from prison to hospital under section 47/49 previously (sometimes more than once) and subsequently remitted to prison. The reason for this is usually that the hospital RC decided that the prisoner no longer required treatment for their mental disorder in hospital and applied to the Secretary of State for their remission to prison. Sometimes it will be because the prisoner has challenged the security of the mental health setting, including absconding from leave and is refusing to engage with treatment. It is not uncommon, especially in the case of personality disordered prisoners, for them to have disengaged from treatment in hospital and requested remission to prison.
- 14.2 Directions should be considered at the MCA stage for reports or historical records from any admissions to secure mental health settings during this sentence, including the reports listed above (Section 8.1). Best practice

would include a direction at the MCA stage for a psychiatrist member on the panel or possibly (depending on the diagnoses) a psychologist as well.

- 14.3 As an MCA member or panel chair making directions, you may also wish to consult a psychiatrist member for advice in setting appropriate directions where current or recent mental disorder are or may be relevant to risk.

Hospital transfers during a Parole review

- 15.1 Once a prisoner is transferred to hospital, they become a restricted patient under the MHA and the Parole process is suspended. If their case had previously been referred to the Parole Board, but had not been concluded, the following should happen:
- a. PPCS should send a formal notification to the Parole Board case manager to confirm that the parole review has been suspended.
 - b. The parole review is suspended (the referral is not withdrawn but suspended) and will be on hold until an MHT decides that, had they been detained under section 37/41, they would have conditionally discharged them, at which point the review is activated again.
 - c. Once it has been confirmed that the parole review has been suspended, no further action should be taken by Parole Board until the review has been activated again. While the review is suspended, the Parole Board does not have the jurisdiction to conduct the review. Accordingly, if a hearing has been listed, all of the witnesses should be stood down and the hearing cancelled. Equally, an adjournment / deferral should not take place and a decision should not be made.