



HM Prison &
Probation Service

Mental Health Casework Section

Guidance:

Section 42 Discharge

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1. Introduction

1.1 The Secretary of State for Justice (SoS) recognises that the aim of all treatment of restricted patients is to help prepare them for their eventual discharge into the community and to help manage the risks they may continue to present to the public whilst there. The SoS recognises that his ultimate obligation is to exercise his statutory powers so as to protect the public, whilst being mindful of the rights of patients to receive treatment in the least restrictive setting commensurate with their needs and risks. . This guidance sets out the SoS’s approach to applications for discharge under section 42(2) of the Mental Health Act 1983 (MHA).

1.2 The Mental Health Casework Section (MHCS) performance management framework sets out target timescales for decisions (see: [Performance Management Framework](#)). In order to meet those timescales MHCS requires applications on a standard template (see: [discharge application form](#))

2. Legal Provisions

2.1 Section 42(1) and (2) of the MHA enables the SoS to consider applications for the discharge of a restricted patient into the community. In practice, decisions are taken by officials from MHCS within HM Prison and Probation Service (HMPPS), an executive agency of the Ministry of Justice (MOJ), on behalf of the SoS under delegated arrangements.

2.2 Applications for confirmation of discharge under Section 23 will be considered as if they had been made under Section 42.

3. Types of Restricted Patients

3.1 Restricted patients are mentally disordered offenders who are detained in hospital for treatment and who are subject to special controls by the SoS. They include offenders diverted from the Courts into the hospital system, and those transferred to secure hospitals from prison (or Immigration Centre) and made subject to a restriction direction. For full details of the types of Restricted Patient see [Mentally disordered offenders - the restricted patient system](#).

4. Specific Categories of Patients

Patients Considered Unfit to Plead at their Trial

4.1 Patients identified by the Court as unfit to plead at the time of trial, and made subject to a Hospital Order made under section 5 of the Criminal Procedure (Insanity) Act 1964 (as substituted by s24 of the Domestic Violence Crime and Victims Act 2004), are subject to regular review by MHCS to establish whether they are now considered to be fit to plead (see guidance available [here](#)). In response to applications for discharge on behalf of these patients, however, MHCS case managers may ask Responsible Clinicians (RCs) again whether they think the patient is fit to plead to their offence prior to making a decision. Applications are treated on their merits and decisions made following risk assessment irrespective of the patient's fitness to plead at any time but the overall context is that if the patient has recovered to the extent that they are considered suitable to be discharged from hospital, then a question should also be asked about their suitability to stand trial for the offences for which they were originally considered unfit to plead.

Transferred Prisoners

4.2 As a matter of policy, SoS will only consider applications from s37/41 patients. Any application from serving prisoners (transferred under s47 or subject to a s45A direction) will be considered as application to the Secretary of State for executive release and considered under procedures which apply to serving prisoners. If the RC believes that a transferred prisoner (or s45A patients), has recovered sufficiently well to be suitable for discharge, consideration must be given as to whether they continue to meet the MHA detention criteria, and whether a return (remission) to prison should be sought.

Foreign National Patients

4.3 The Home Office may have an interest in patients who are nationals of countries outside the UK particularly those who meet the criteria for deportation or have an outstanding deportation order against them. In order to assist the Home Office in discharging its statutory obligations, RCs and hospitals should coordinate the patient's discharge well in advance with the Home Office. Contact should be made with the specialist Mentally Disordered Offenders Team in the Home Office (fnorcmdoenquiries@homeoffice.gov.uk) when a patient is on a discharge pathway and an application for discharge is likely within the next 6-12 months. This allows time for the Home Office to obtain reports from the RC and to consider the case in full, and to allow for any appeal process.

4.4 The Home Office will seek to coordinate with RCs so that the patient, if deported, is supported by their care team and this is better done with deportation direct from hospital to allow RCs to prepare the patient for deportation and where appropriate to make contact with counterparts in the receiving country. Where deportation action cannot be enacted in a reasonable timescale or is not appropriate, close liaison with the Home Office team will ensure all safeguarding and contact management measures are put in place prior to the patient's discharge in the UK, including working closely with other agencies within MAPPA processes (see below).

Patients who Lack Capacity (and who may be subject to a DOLS Order following discharge)

4.5 There are a number of patients who, following assessment, are thought to lack capacity and who, if they were to be discharged into the community, would need, in their best interests, to be constantly supervised in a residential care home (or similar) under a Deprivation of Liberty Safeguards (DOLS) Order ([Liberty Protection Safeguards](#)) made under the Mental Capacity Act 2005, as they are not able to live independently without the support such arrangements provide. When considering applications for discharge for these patients the SoS will carefully consider the circumstances and assess the level of risk presented by the patient alongside the proposal to make a DOLS Order. Further details of the options available to patients who lack capacity can be found [here](#).

Extremists

4.6 There are some restricted patients who have either been convicted of a terrorist (TACT) offence or who have come to the attention of agencies involved with the Prevent strategy or for some other reason. In these cases the RC will have been provided with a letter with a disclosable 'Form of Words' which will have outlined the nature of the concerns and will have identified the responsibilities of agencies under MAPPA and Prevent in the management of these cases. MHCS will take into account the risks presented by such offending and how it relates to the patient's mental disorder when making any decision on discharge and may notify Counter-Terrorism policing colleagues and partner agencies of the application.

5. Applications for Discharge

5.1 The SoS accepts that the mental health of the majority of patients will, at some stage in their treatment, improve to the point where the risk they pose is considered sufficiently low to enable them to be discharged safely into the community (with conditions in place).

The Standard Application Form

5.2 To help ensure that the SoS receives all of the information necessary to take a decision, an [application form](#) for discharge is available to RCs to use.

Risk Assessment

5.3 Officials within MHCS take decisions on applications following a risk assessment of the proposal. This system helps ensure that the SoS makes decisions which reflect the need to protect the public, whilst recognising the rights of patients to receive treatment for their mental disorders under the MHA.

6. Types of Discharge

6.1 The power of the Secretary of State to discharge contained in section 42 of the MHA is very broad. Section 42(2) permits discretionary absolute or conditional discharge where the SoS thinks fit. As explained above, these powers must only be exercised with regard to a range of factors which are set out in this policy, but these criteria are not exhaustive. It should initially be noted that the SoS is not bound by the criteria set out in section 72 or 73 of the MHA (Tribunal powers to discharge restricted patients) when exercising the power under section 42, however, due regard to those criteria will be given when considering applications. It should be noted that applications or referrals to the Tribunal can run in parallel but the first decision, if to discharge, will take priority and the other application will automatically lapse. The SoS will also consider other circumstances where they may think fit to discharge a patient.

Conditional

6.2 In order to agree discharge with conditions, the SoS must normally be satisfied that the patient within the last 6-12 months:

- Has presented as stable in hospital with no recent violent, aggressive or threatening conduct; consumption of alcohol or illicit drugs; sexually inappropriate behaviour; instances of self-harm; escaping from hospital or absconding whilst on community leave; criminal activity including any charges and/or subsequent, convictions sentences; trafficking of contraband items with other patients;

- Has willingly engaged with treatment and complied with the need to take any medication so as to have some level of insight into the importance of managing their disorder;
- Have completed work addressing their index offence and the part played by their disorder in it, either on this admission or on previous admissions;
- Has used leave appropriately including spells involving overnight stays in the community;
- Has not attempted to contact any registered victims and understands and appreciates conditions of discharge which may be imposed to protect their interests;
- Appreciates that any change in the nature or degree of their condition which increases their risk to others may result in them being recalled to hospital;
- Has not self-harmed or has addressed the reasons for this in treatment;
- Has, if recalled to hospital, addressed the circumstances behind that decision; and
- Understands the reasons for the proposed discharge conditions.

6.3 In addition, the SoS will need to be satisfied that the arrangements for the safe management and aftercare are in place including appointed RC and other Team members and a level of professional support commensurate with the patient's needs. This should include the level of management under MAPPA where appropriate.

6.4 In setting the conditions of discharge, the SoS will ensure that they are reasoned and proportionate and address the risk the patient still presents because of their disorder to the public including, specifically, any victims of their offending (see annex B).

Absolute

6.5 The SoS considers the restriction placed upon a conditionally discharged patient to be minimal and as such there should be no expectation that any conditionally discharged patient will eventually be absolutely discharged.

6.6 As explained above in paragraph 6.1, discretion to discharge absolutely under section 42(2) is very broad but must only be exercised having regard to all the matters outlined in this policy. The SoS will normally only grant absolute discharge under section 42(2) in circumstances where it is clear that restrictions are no longer required to ensure the patient's safe management and where the patient no longer requires the provision of recall. The below criteria are not definitive or exhaustive but will form the basis of most assessments. Other circumstances will also be considered where the SoS thinks fit.

6.7 Applications for absolute discharge normally fall into two broad categories:

a. Compassionate Grounds

- (i) Applications where the patient has a terminal illness

An application must contain evidence from a relevant medical practitioner (usually a Consultant) that the patient has a terminal illness.

To approve an application from a patient, the SoS would need to be satisfied that the patient:

- has a short life expectancy. There is no hard and fast time frame, but by short it would generally mean a life expectancy of weeks, ie, less than 3months; and
- is highly unlikely to offend or cause serious harm in the community because they are so severely incapacitated as to be unable to cause harm taking into account that a withdrawal of medication and support intended to control and manage their mental disorder (if applicable)

may lead to a relapse and to displays of aggressive behaviour which may cause distress to others.

- Whether those responsible for aftercare have the full knowledge of, and are able to manage, any risks the patient may present because of their mental disorder.
- For detained patients, that they cannot be conditionally discharged instead (the first question for the applicant would be why a conditional discharge from hospital is not being sought)

Applications for absolute discharge based solely on a patient's wish to die 'with dignity' or 'a clear conscience' will not be approved. Such a wish be the basis for approving absolute discharge, only if the patient's risk does not need conditions to enable the RC to manage it effectively.

(ii) Applications where the patient is suffering from another condition (often a progressive condition) which will impair their everyday functioning so seriously for the rest of their lives, that the risks associated with their mental disorder are assessed as negligible.

An application must contain evidence from a relevant medical practitioner (usually a Consultant) that the patient has such a condition and will have it for the rest of their lives and which is considered to be 'incurable' at this time.

To approve an application from a patient, the SoS would need to be satisfied that the patient:

- Suffers from a level of physical or mental impairment or functioning which would prevent the patient causing significant harm to others by violent conduct or overtly aggressive behaviour;
- Will need treatment or management for the rest of their life and there is currently no known cure for the condition or may be a degenerative illness such as multiple sclerosis, Parkinson's disease, or Alzheimer's disease;
- Was not suffering from this condition, or was undiagnosed, at the time of the index offence and subsequent trial;
- Does not pose an unacceptable risk to others in spite of their illness or condition including whether they are, or will be, so severely incapacitated as to be unable to cause physical harm
- If medication intended to control their mental disorder is withdrawn (if applicable), that this will not lead to a relapse and displays of aggressive or violent behaviour which may cause distress to others;
- Whether those responsible for aftercare have the full knowledge of the risks the patient may present; and
- Cannot be conditionally discharged (see above).

b. Other Applications

If the Secretary of State is satisfied that the patient is no longer suffering from a mental disorder, he should discharge the patient, but the discharge can be conditional or absolute. Alongside the individual needs of the patient, the SoS will continue to give due consideration to risk and the duty of public protection.

The following is not an exhaustive list, however it is indicative of the evidence the Secretary of State will consider positively when making an assessment of an application for absolute discharge.

There must be evidence that the *discharged* patient:

- Has willingly engaged with treatment and demonstrated an ability to successfully manage the disorder (accepting that most patients remain mentally disordered to some extent) whilst in hospital and in the community;
- Accepts that s/he does not need to be subject to the (Hospital and) Restriction Order to receive treatment;
- Has not recently been disruptive because of their disorder;
- Understands how the disorder(s) affects them and the sort of risks it creates when control measures are removed;
- Understands and appreciates the seriousness of the index offence and the link between the disorder and offending;
- Understands and accepts the need to avoid future offending behaviour and has, in the past, accepted treatment designed to address the circumstances of the index offence);
- Recognises the harm they caused to victims of the crime and has shown some recognition, remorse or regret;
- Has not attempted to contact the victim(s) of their index offence, or enter exclusion zones where expressly forbidden to do so;
- Is not subject to another form of legal Order or control (SOPO, DOLS, Restraining etc) where the mental disorder featured as part of the reasoning behind its implementation; and
- Has not been recalled to hospital following conditional discharge, within the last five years.

In addition for a detained patient:

- That they cannot be conditionally discharged instead as a first consideration;
- Has used community leave without concern;
- Displays a very low risk of harming others in the future because of their disorder and appreciates what will happen when there is no longer a legal requirement for treatment, supervision and support (including the need to continue with any medication prescribed for the disorder); and
- Cannot have their Restriction Order lifted.

7. Lifting the Restriction Order (RO)

7.1 Section 42(1) permits the lifting of a RO where the SoS is satisfied the restriction order is no longer required for the protection of the public from serious harm. Applications to lift the s41 Restriction Order in accordance with section 42(1) will therefore only be considered where it is clear that restrictions are no longer required to ensure the patient's safe management and where the patient no longer requires the provision of recall. The effect of lifting the RO for a detained patient is that they would remain detained in hospital as if their original Order was a under s37 only. It would remove the SoS's interest and powers over a patient. For a patient subject to an existing conditional discharge, lifting the RO would have the effect of absolutely discharging the patient.

8. Patient Management

8.1 In considering an application for discharge, MHCS will take into account the plans for the future management and supervision of the patient in the community. The SoS will need to be assured that, if conditionally discharged, the patient will have an appointed multi-disciplinary team led by a RC able to effectively and safely supervise them in the community.

9. Victim Involvement

9.1 When considering an application for conditional discharge, the risk assessment will take into account any known victim considerations concerning measures which will help set the conditions of discharge. If the victim(s) has engaged with the Victim Contact Scheme (VCS), MHCS will seek

representations from the victim's Victim Liaison Officer (VLO) when considering an application. It is anticipated that, where a victim has registered with the VCS, then conversations between the RC and the VLO will already have taken place and recorded on the application form. MHCS will also notify the VLO where discharge is granted (although the VLO may be aware of this through contact with the clinical team). If the VLO is notified that a patient has been discharged, it will be on the understanding that patient's location will not be disclosed to the victim.

9.2 When considering an application for absolute discharge or the lifting of the Restriction Order, MHCS will notify victims through their VLO before a final decision is taken.

9.3 RCs are encouraged to develop and maintain their own contacts with the VLO and inform or consult them at important points during the patient's journey towards discharge notably any conditions the victims would wish to attach to any authorisation (see [guidance for clinicians](#) and [The Victims Code](#)).

9.4 If conditions requested by victims cannot be incorporated into the discharge as proposed, then MHCS will explain the reasons why these have been rejected or amended to the VLO.

10. Multi-Agency Public Protection Arrangements (MAPPA)

10.1 MAPPA is the set of arrangements through which the Police, Probation and Prison Services work together with other agencies to manage the risks posed by violent and sexual offenders and other offenders deemed dangerous living in the community in order to protect the public. The arrangements for Mentally Disordered Offenders are set out in chapter 26 of the [MAPPA guidance](#). In addition, MHCS has issued dedicated guidance on MAPPA which can be found [here](#). Due to the type and nature of the offences committed by restricted patients, it is likely that almost all s37/41 and s45A patients will be MAPPA eligible though, depending on the age of the offence, they may not all be covered. However, offenders who have committed an offence murder or an offence under s.327(4A) or sch.15 of the Criminal Justice Act 2003 are automatically eligible for MAPPA management. Others may be referred on a discretionary basis if the level of risk and need requires multi agency panel oversight. It is the responsibility of the hospital to ensure their records are accurate as there is no central list of MAPPA registered offenders. Some s47/49 transferred prisoners may also be MAPPA eligible and registered.

10.2 In all cases where discharge has been granted by the SoS, the MAPPA coordinator should be notified by the hospital so they are aware of the position.

Annex A: Glossary of Terms

MHA	Mental Health Act 1983	The primary legislation appertaining to the detention and treatment of mentally disordered people. Part 3 covers mentally disordered offenders (MDOs). See Mental Health Act 1983 and its associated Code of Practice
RC	Responsible Clinician	The RC has overall responsibility for care and treatment for restricted patients under the MHA
SoS	Secretary of State for Justice	The member of the Cabinet with responsibilities under Part III of the MHA (transferred from the Home Secretary in 2007). Day to day decisions are delegated to officials within the MOJ (HMPPS) under the Carltona principle .
MOJ	Ministry of Justice	The MOJ is the government department responsible for the discharging the SoS's functions under the MHA. Many clinicians, social supervisors and other staff involved with patient care refer to the MOJ as shorthand for MHCS.
HMPPS	His Majesty's Prison and Probation Service	HMPPS is an Executive Agency of the MOJ.
MHCS	Mental Health Casework Section	MHCS is the section within HMPPS Public Protection Group which oversees the practical management of Restricted Patients including making decisions on behalf of the SoS
Tribunal	The First-Tier (Mental Health) Tribunal and the Mental Health Review Tribunal for Wales	The Tribunals are the independent judicial bodies charged with reviewing patients' detention in hospital.
DA	Detention Authority	The DA means the Hospital Order (set by the Court), Hospital Direction, Transfer Direction, Recall Warrant or letter agreeing to trial leave or transfer to another hospital (set by the SoS).
VCS	Victim Contact Scheme	Under the Domestic Violence, Crime and Victims Act 2004 (DVCVA), where a restricted patient was sentenced on or after 1 July 2005, victims of serious violent and sexual offences have the right to information on key developments in a patient's progress and to make representations about discharge conditions, from the National Probation Service (NPS) under the Victim Contact Scheme (VCS) . Victims do not statutorily qualify may be accepted on to the scheme on a discretionary basis.
MCA	Mental Capacity Act	The Mental Capacity Act 2005, covering England and Wales, provides a statutory framework for people who lack capacity to make decisions for themselves, or who have capacity and want to make preparations for a time when they may lack capacity in the future. It sets out who can take decisions, in which situations, and how they should go about this. The MCA Code of Practice can be found here .

DOLS	Deprivation of Liberty Safeguarding (Order)	Deprivation of Liberty Safeguards is the procedure prescribed in law when it is necessary to deprive the liberty of a patient who lacks capacity to consent to their care and treatment in order to keep them safe from harm. Further information is available here
MAPPA	Multi Agency Public Protection Arrangements	It is the set of arrangements through which the Police, Probation and Prison Services work together with other agencies to manage the risks posed by violent and sexual offenders living in the community in order to protect the public

Annex B: Standard Conditions of Discharge

The following are examples of conditions which Responsible Clinicians *may* wish to consider when applying for conditional discharge for their patient.

- Reside at [specify address] [24 hour supported/supported/residential accommodation as directed by the RC and social supervisor] [and abide by any rules of the accommodation], and consult with the responsible clinician and social supervisor for any stay of one or more nights at a different address.
- **NB: The Secretary of State also requires a clause whereby the Ministry of Justice and MAPPA should be informed of any change of address at least 14 days prior to the move taking place**
- Allow access to the accommodation, as reasonably required by the responsible clinician and social supervisor.
- Comply with medication and other medical treatment [and with monitoring as to medication levels] [including... [Specify here any particular non-pharmacological medical treatment]], as directed by the responsible clinician and social supervisor.
- Engage with and meet the clinical team, as directed by the responsible clinician and social supervisor.
- Abstain from alcohol [save as directed by the responsible clinician and social supervisor].
- Abstain from illicit drugs.
- Submit to random drugs and alcohol testing, as directed by the responsible clinician and social supervisor.
- Not to enter the area[s] of [specify general location] as delineated by the zone[s] marked on the map[s] supplied by [specify name of person/organisation producing map] [save as agreed in advance by the responsible clinician and social supervisor].
- Not seek to contact directly or indirectly [specify names or use 'victim(s) of the index offence'].
- Disclose to the responsible clinician and social supervisor any developing intimate relationship with any other person.
- Disclose all pending and current [employment, whether paid or voluntary] [all educational activities] [all community activities] to the responsible clinician and social supervisor.
- Not leave the UK without consulting the responsible clinician and social supervisor.