



TRIBUNALS
JUDICIARY

**FIRST-TIER TRIBUNAL
HEALTH, EDUCATION & SOCIAL CARE CHAMBER (MENTAL HEALTH)
ENFORCEMENT PROCEDURE, DIRECTIONS AND SUMMONSES**

The Responsible Authority's duty to provide its written evidence within 3 weeks.

1. Except where the patient is detained for assessment under Section 2 Mental Health Act 1983, or is already subject to a Conditional Discharge, the Responsible Authority has a statutory duty to send or deliver the written evidence specified in the "Senior President's Practice Direction on the Contents of Statements and Reports in Mental Health Cases" to the tribunal office so that the documents are received by the tribunal within the period of 3 weeks after the Responsible Authority made the reference or received a copy of the application or reference.
2. Generally, the Responsible Authority will be the Hospital Managers. Thus, for an NHS hospital, this will be the relevant NHS Trust, and for a private hospital, this will be the managing or controlling company owning or running the hospital.
3. For patients who are already subject to a Conditional Discharge, it is the Responsible Clinician and any Social Supervisor named by the Secretary of State who must send or deliver the written evidence specified in the Senior President's Practice Direction to the tribunal office – again, within the period of 3 weeks after being notified by the tribunal of an application or reference being received in the tribunal office.
4. The full disclosure in writing (in advance of the hearing) of the Responsible Authority's evidence, or the evidence of the Responsible Clinician and Social Supervisor, is essential in the interests of fairness and natural justice, and the timely and prompt submission of this written evidence (including key information about the patient) is vital, not least because the freedom of patients subject to the Mental Health Act 1983 is involved in all tribunal cases, even if the patient is not currently detained in hospital.
5. For Section 2 patients, due to the importance of a speedy and effective hearing, the specified written evidence cannot usually be made available more than a short time in advance, but it must be made available in the tribunal hearing room, and to the patient's legal representative, at least one hour before the hearing is due to start.
6. The written evidence specified in the Senior President's Practice Direction depends upon the type of case. For detained patients, the written evidence comprises a Statement of Information about the Patient (formerly known as the "Part A Statement"), the Responsible Clinician's Report, a Nursing Report, and a Social Circumstances Report.
7. If the patient is not detained in hospital, the requirement for a Nursing Report is dispensed with, and if the patient is subject to a Conditional Discharge, the requirement for a Statement of Information is dispensed with.

8. Whether or not the patient is placed out of area, the Responsible Authority must ensure that all statements and reports, including the Social Circumstances report, contain all the information listed in the relevant part of the Senior President's Practice Direction.
9. The obligation to arrange for the writing and submission of the specified statements and reports, on time, lies with the Responsible Authority and their nominated statement and report-writers including the Responsible Clinician, Key Nurse, and Social Workers or Supervisor. It is totally unacceptable for social circumstances reports to be delayed or missing because of negotiations with the locality team about who will prepare the social circumstances report. The Responsible Authority may ask the locality team to prepare the report, but they cannot hand over the legal duty to provide it on time.

The Responsible Authority's duty to cooperate with the tribunal, and provide the full identity and secure contact details of its statement and report writers.

10. The Responsible Authority has a legal duty to cooperate with the tribunal. Where the tribunal advises the Responsible Authority that a case has been registered it also (amongst other things) asks the Responsible Authority to provide the personal secure contact details of its statement and report writers. A personal secure email address or a postal address is acceptable, but a non-secure email address is not acceptable because confidential patient details will always be included in any subsequent directions sent by the tribunal.
11. The tribunal directs the provision of this contact information so that, if a statement or a report is not submitted by the three-week deadline, it can promptly remind the person responsible for the document that their personal written evidence is urgently due, and (by Form MH5 sent personally to the named person in default) direct its immediate submission to the tribunal.
12. Most Responsible Authorities discharge their duties to the tribunal via their Mental Health Act Administrator (MHAA). Thus, except where the patient is subject to a Conditional Discharge, it usually falls to the Responsible Authority's MHAA to provide the Statement of Information about the Patient, and to identify the professionals who must provide the written and oral evidence on behalf of the Responsible Authority. The MHAA is expected to provide the names and secure contact details of the person who will prepare the Statement of Information about the Patient (usually the MHAA himself or herself), and of the report writers that the Responsible Authority has nominated to prepare the Responsible Authority's written evidence. This is because the Responsible Authority's MHAA will (or should) know the identity of the patient's Responsible Clinician, Key Nurse and Social Worker(s), and it is the Responsible Authority's MHAA that will ask for, or arrange for, the statement and reports to be prepared for the tribunal.
13. If, before the written evidence is submitted to the tribunal, the identity or personal secure contact details of the relevant witness changes, the Responsible Authority must immediately provide updated information to the tribunal.
14. If a direct secure email address cannot be provided for any named report or statement writer, a generic secure email address may be provided BUT the following undertaking must be given and complied with by the MHAA:

"If a generic email address is given above, I undertake that any directions or summonses addressed to the named report-writer and sent to that address WILL be forwarded direct to the named person within one working day, AND that proof of this will be retained and produced to the tribunal upon request."

15. Where it can, the tribunal will send notifications and directions to the relevant MHAA and to named report writers. However, due process cannot be defeated by a willful or negligent failure by the Responsible Authority, the MHAA or report-writers to provide the information and evidence that the tribunal needs, at the time that the tribunal needs it.
16. Ultimately, it is the Responsible Authority's Chief Executive that personifies and represents the Responsible Authority. So, if the MHAA or other professionals employed by or working with the Responsible Authority do not sufficiently cooperate with the tribunal in any case, or generally, then it is likely that directions and summonses will thereafter be sent to the Chief Executive personally, and the Chief Executive will then have a personal and enforceable duty to provide the evidence, and attend the hearing.
17. Unfortunately, some Responsible Authorities (or MHAAs) do not provide the tribunal with accurate identity and contact details, or they fail to keep the tribunal up to date if the details change. This is extremely unhelpful and prevents the tribunal taking any workable steps to enforce compliance with the law. It is also inconsistent with the legal duty on the parties to cooperate with the tribunal. If the tribunal is not provided with the information required as to the identity and contact details of statement and report-writers, it will send just one reminder (Form MH9) to the MHAA. Thereafter, if necessary, the tribunal will send directions and summonses to the Responsible Authority's Chief Executive.
18. Whether or not those responsible for giving the Responsible Authority's written evidence are identified by name with contact details provided, the tribunal expects that the statements and reports will be submitted by the legally required three-week deadline.
19. If need be, and if there are good grounds for doing so, an application to extend the three-week deadline can be made to the tribunal and a judicial decision will be made as to whether (or not) to grant an extension. But the three-week deadline must not be ignored, and any extension granted must be adhered to without any additional delay.

The Responsible Authority's duty to arrange for the attendance of witnesses.

20. Once the Responsible Authority has provided its written evidence, as specified by law, the onus then falls upon the Responsible Authority, as a party to the proceedings, to ensure the attendance of such witnesses as it considers necessary to establish its case.
21. There is a convention and an expectation that all the report-writers will attend to give oral evidence. This is so that the report-writers can give the tribunal an update, and be questioned by or on behalf of the patient, and by the tribunal. Generally, there is no expectation that the MHAA will attend because the Statement of Information about the patient is likely to be factual, a matter of record, and uncontroversial. However, if the Statement of Information is not provided, the tribunal may have to formally direct a named MHAA to provide the Statement, and therefore the identity of the relevant MHAA is required. If the identity of the relevant MHAA is not provided, the tribunal will have to send any formal directions to the Responsible Authority's Chief Executive.
22. Despite the convention and expectation that the Responsible Authority will arrange for its report-writers to attend the tribunal hearing, the written evidence is ultimately the Responsible Authority's evidence, and it is for the Responsible Authority (and not the tribunal) to identify the required witnesses. It may also be necessary for a different professional to attend the hearing if the original report-writer is unavailable, and this is usually permissible to support the Responsible Authority's case so long as the alternative witness is suitable qualified and sufficiently aware of the patient's circumstances to substitute for the report-writer.

23. However, if the Responsible Authority is asked by the patient's legal representative to make a particular witness available at the hearing, then it should make arrangements to comply with the request, or advise the patient's legal representative why it will not, or cannot, do so.

The Legal Representative's Duties.

24. The patient is a party to the proceedings and, as in all legal cases before courts and tribunals, the parties' legal representatives must be prepared to take appropriate steps ahead of the hearing to obtain the written evidence and attendance of witnesses that they consider to be necessary, in order to properly prepare and present their client's case.
25. Consequently, in relation to the provision of evidence by the Responsible Authority, there is a clear duty on the patient's legal representative to chase up any missing written evidence directly with the Responsible Authority.
26. The tribunal considers that legal representatives cannot legitimately complain about a missing statement, report or witness if they have not taken all the necessary steps to ensure that the written evidence is made available to them in advance of the hearing, and that any witness that they deem necessary will attend at the hearing.
27. If all efforts to engage directly with the Responsible Authority fail, the patient's legal representative may then ask the tribunal to issue directions or summonses. However, it will always be necessary for legal representatives to explain what efforts they have themselves made to secure compliance and the submission of the statements and reports.
28. Similarly, legal representatives cannot expect to be granted an adjournment at a hearing just because written evidence is missing, or because a witness has not attended, if they have not taken all necessary steps to obtain the evidence or secure the witness's attendance in advance of the hearing, or if they have failed to apply for a postponement in good time, prior to the listed hearing, as soon as it became apparent that there was a problem that could not be resolved in time. Any request for a postponement (or to withdraw an application to the tribunal) must be made before 4.30pm on the working day before the hearing, otherwise it will be too late for it to be decided in the office, and the request will be left for the panel to decide after it has convened at the hearing venue.

What will the tribunal do to enforce compliance?

29. Although the tribunal has no duty laid down in the Act or the applicable procedure rules to chase-up the parties, it will generally try to take certain routine steps intended to advise and remind responsible professionals of their duties. However, these steps are inevitably standard procedures, require the full cooperation of the Responsible Authority and others, and do not and cannot replace the duty on all parties and their legal representatives to ensure that the required written and oral evidence is made available at the appropriate time. It is the parties' shared duty to avoid the upset and wastefulness of a panel convening - only then to be asked to adjourn because a report or witness is missing. If that happens, and all necessary steps have not been taken to secure the report or witness, the answer is likely to be a refusal to adjourn.

The MH5 direction to a named person to immediately provide written evidence.

30. If a statement or a report is not submitted by the three-week deadline, the tribunal may remind the person responsible that their written evidence is immediately due, and (by Form MH5 sent to the person in default) direct its immediate submission to the tribunal.

31. The purpose of the MH5 direction is to remind the person responsible, or the Chief Executive of the Responsible Authority, that the law has not been complied with and that the written evidence is immediately required. The tribunal needs, by law, to be able to send the MH5 direction to a named person, requiring that person immediately to give their written evidence to the tribunal in the form of a compliant report or statement.
32. For the MH5 direction to be of practical benefit and enforceable, it must be sent to the named person who has been nominated (by the Responsible Authority) to give the written evidence in question. This is why the MHAA is asked at an early stage to provide the identity and secure contact details of the Responsible Authority's statement and report writers. A personal secure email address or a postal address is acceptable, but a non-secure email address is not acceptable because patient details are confidential.
33. An MH5 will only be sent if a statement or report is overdue, and the MH5 will, therefore, direct the immediate submission of the late report or statement. It is not appropriate for professionals to wait until an MH5 is received before starting to think about the required written evidence. The tribunal does not believe that failure to comply with the three-week deadline should result in (or be rewarded by) extra time being automatically given. By the time an MH5 direction is sent, the report is already late.
34. If the recipient of an MH5 direction considers that he or she has been wrongly identified by the Responsible Authority as responsible for providing a written statement or report, or if they are no longer responsible, then they must apply to have the direction set aside, and reasons for the request must be given. Thereafter, the tribunal will send directions to the Responsible Authority's Chief Executive as the tribunal cannot spend time chasing up the Responsible Authority for the correct or updated details, and cannot get involved in a dispute as to who is responsible for giving the written evidence to the tribunal.

Failure to comply with a personal MH5 Direction to give written evidence.

35. Failure to give the specified written evidence when directed to do so can result in the failure being referred to the Upper Tribunal for consideration of penalty. Even if we decide not to refer the failure, we are very likely to seek both an explanation and a binding undertaking that it will not happen again. If the First-tier Tribunal does refer the default, then the Upper Tribunal has a wide range of powers to impose a punishment.

Summonses.

36. The tribunal may issue a summons of its own volition, or on the request of a party. Following failure to comply with a direction to give written evidence, the tribunal will not issue any more directions to the person in default. It will simply move to a possible referral to the Upper Tribunal and may also issue a summons to the person in default, requiring their personal attendance at the hearing. Where it has been left with no alternative, the tribunal will summons the Responsible Authority's Chief Executive. It must be understood, however, that the issue of a summons does not mean that the outstanding report is no longer required because, obviously, the requirement remains
37. Failure to comply with a summons is punishable by the Upper Tribunal as contempt. The tribunal will generally be reluctant to summons a MHAA but, if a MH5 direction addressed to the MHAA has not been complied with, the tribunal may refer the matter to the Upper Tribunal because the Statement of Information is legally required, and provides the tribunal with vital information about the patient's history and circumstances.

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