

Civil Hearing Kit: Appeals Against Refusal to Discharge



Appeals against an Authorised Medical Officer's refusal to discharge

Information to help you deal with an appeal and prepare for a Tribunal hearing

Background Information

Note: Sections in brackets refer to the *Mental Health Act 2007*.

Who can apply to be discharged?

An involuntary patient or a person who is detained in a mental health facility may apply to an Authorised Medical Officer to be discharged (s42). This includes an involuntary patient or an assessable person (a patient who has not yet had a mental health inquiry), a patient detained on a Tribunal's adjournment, a patient admitted as a mentally disordered person, a person detained on a breach of a Community Treatment Order or subject to an order for deferred discharge.

Any designated carer or principal care provider may also apply to the authorised medical officer requesting that the patient be discharged (s43). The patient may be discharged if the designated carer(s) or principal care provider provides a written undertaking that the patient will be properly taken care of and the authorised medical officer is satisfied that adequate measures are in place to prevent the patient causing harm to himself or herself or others.

An involuntary patient or detained person may also appoint another person to apply for discharge from the mental health facility.

How to apply for discharge?

The application for discharge can be made to an Authorised Medical Officer either orally or in writing. Staff at the mental health facility should give the patient, designated carer, or principal care provider or other person appointed by the patient an appropriate form on which to apply in writing. If the request is made orally, then it should be recorded in the patient's file.

Once the request for discharge has been made, the Authorised Medical Officer has three working days in which to respond. The Authorised Medical Officer may discharge the patient (s42 (2)) or refuse the application for discharge. The request and response should be noted in the patient's file.

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When may a patient or a designated carer or principal care provider appeal against the Authorised Medical Officer's decision?

If the Authorised Medical Officer refuses to discharge the patient, or fails to determine the application for discharge within three working days, the patient, designated carer or principal care provider may appeal to the Mental Health Review Tribunal.

This appeal may be made either orally or in writing to the Tribunal, however patients and others are encouraged to complete an appeal form (**see Attachments 1 and 2 — Appeal forms**). The completed form can then be served on the Authorised Medical Officer or faxed to the Tribunal on 9817 4543.

If an appeal is made, the Authorised Medical Officer must provide a report to the Tribunal explaining the reasons for the refusal to discharge, or the failure to determine the request for discharge (s44 (3)).

The 3 step process for an appeal:

1. An application for discharge is made by the patient, their designated carer (s) or principal care provider, or other person appointed by the patient;
2. The application for discharge is considered by an Authorised Medical Officer, the decision explained to the patient, the designated carer(s) or principal care provider or other person appointed by the patient (if appropriate) and noted in the patients file;
3. The patient, the designated carer(s) or principal care provider, or other person appointed by the patient then decides if they wish to appeal, and if so lodges an appeal with the Tribunal.

NOTE: An appeal cannot be lodged until after the Authorised Medical Officer has considered the application for discharge OR 3 working days has elapsed.

The Authorised Medical Officer must provide the Tribunal with a report about the patient, including the reasons for refusing to discharge the patient or failing to determine the application.

What happens when the Tribunal receives notice of an appeal?

The Tribunal will confirm with the mental health facility that an application for discharge has been made and that the application has been refused or not determined in three working days. A hearing will be booked as soon as practicable. It is preferable to have a face-to-face hearing. However, if this is not possible, the Tribunal will arrange a video or telephone hearing.

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In cases where the patient has not yet been presented for a mental health inquiry the appeal will usually be listed with the mental health inquiry and heard by a single legal member of the Tribunal. The member may, in appropriate cases, refer both matters to a three member panel.

What legal issues will the Tribunal address at the hearing?

When it hears the appeal, the Tribunal will consider the evidence as to whether the patient is a 'mentally ill person'. In doing this, the Tribunal must consider whether the person is:

- suffering from a mental illness (as defined by the Act); and
- at risk of serious harm to themselves or others.

The Tribunal will:

- take into account the person's continuing condition, including any likely deterioration; and
- consider whether care of a less restrictive kind is appropriate and reasonably available to the person.

What is Mental Illness?

A condition that seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence of any one or more of the following symptoms:

- Delusions
- Hallucinations
- Serious disorder of thought form
- Severe disturbance of mood
- Sustained or repeated irrational behaviour indicating the presence of one or more of the above

What is Serious Harm?

Serious harm is not defined in the Act. However, it is interpreted to include:

- Physical harm
- Financial harm
- Harm to reputation or relationships
- Neglect of self
- Neglect of others (including children)

The risk of harm must be both serious and related to the person's mental illness.

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What is Continuing Condition?

s14 (2) MHA 2007

In considering whether a person is a mentally ill person, the continuing condition of the person, including any likely deterioration in the person's condition and the likely effects of any such deterioration, are to be taken into account.

What may the Tribunal decide?

At the hearing the Tribunal may:

- discharge the patient;
- defer the discharge for up to 14 days if it is in the patient's best interest;
- dismiss the appeal (this means that the order detaining the patient remains in force);
- reclassify the patient as a voluntary patient;
- consider an application for a community treatment order, or
- adjourn the hearing (s155).

Is there any limit on the number of times a patient can appeal to be discharged?

There is no limit on the number of times an Involuntary Patient may request discharge. However, at an appeal hearing, the Tribunal may decide that no further right of appeal may be exercised before the next scheduled review by the Tribunal (s44 (5)). In so determining, the Tribunal is to have regard to:

- the interval between the last determination under the Act that the patient was a mentally ill person and the date of the appeal;
- the frequency of appeals;
- the last report of the authorised medical officer; and
- any other matter the Tribunal considers relevant.

How to assist a patient to appeal to the Tribunal

The patient, their designated carer(s) or principal care provider or a person appointed by the patient should either contact the Tribunal directly, or notify someone at the mental health facility that they wish to lodge an appeal.

If the appeal is to be lodged in writing, the relevant form should be completed and faxed to the Tribunal (**see Attachment 1**). Mental health facilities should assist the patient with faxing the necessary documentation to the Tribunal.

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Some of the larger mental health facilities have a Tribunal Clerk, or someone who is responsible for organising applications to the Tribunal. They may already have a procedure for notifying the Tribunal in relation to such appeals.

Patients may be entitled to legal aid through the Mental Health Advocacy Service (MHAS) subject to a merits and means test. Patients can contact the MHAS directly on 9745 4277 for free legal advice and to seek the assistance of Legal Aid for the hearing. Most of the larger mental health facilities liaise with MHAS directly. If in doubt, contact the Tribunal.

It is advisable to phone the Tribunal after faxing the appeal request/information and ask to speak to a Senior Registry Officer to confirm receipt of the fax so that a hearing can be organised quickly.

Tribunal Proceedings (s151)

Hearings are to be open to the public. However, the Tribunal can decide that a hearing be closed. An application can be made by the person or another person appearing at the proceedings. The Tribunal can make any one or more of the following orders:

- an order that the hearing be conducted wholly or partly in private,
- an order prohibiting or restricting the publication or broadcasting of any report of proceedings before the Tribunal,
- an order prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents lodged with the Tribunal or received in evidence before the Tribunal,
- an order prohibiting or restricting the disclosure to some or all of the parties to the proceedings of evidence given before the Tribunal, or of the contents of a document

What to do before the hearing

Preparation for the hearing

The appropriate clinician involved with the patient should:

- Organise and prepare reports and necessary documents (see below).
- Explain the hearing process to the person and inform them of the hearing date and time.
- Inform the patient's designated carer(s) and principal care provider, relatives and other key people of the hearing and encourage them to attend. If necessary, facilitate alternative means for them to participate in the hearing if necessary, e.g. by telephone.
- Organise an interpreter for the person or their family where necessary.

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- Ensure that an appropriate level of security is arranged, if necessary.
- Ensure that legal representation has been arranged, and make the hospital file available to the legal representative.

Reports and documents required

The Tribunal needs to see the following reports and documents before hearing the patient's appeal:

- Written appeal completed by the patient, the designated carer(s), principal care provider, or person appointed by the patient (where available).
- Documents establishing the Tribunal's jurisdiction, such as the Involuntary Patient Order made by the Tribunal.
- Report from the Authorised Medical Officer explaining the reasons for the refusal or the failure to consider the request for discharge.
- Reports from other health professionals (see below).
- Copy of recent hospital progress notes.

If the hearing is not being held in person at the mental health facility, all reports should be faxed to the Tribunal as soon as possible before the hearing date.

The Tribunal will refer to the reports during the hearing. For this reason, the authors of reports should be available to come to the hearing to answer any questions arising from the reports. Sometimes the Tribunal arranges for the authors of reports to talk with Tribunal members by telephone or over a video link.

The Tribunal may make reports available to the patient and his or her legal representative. See note below.

Medical records

The law allows patients and their representatives to inspect or have access to the patient's medical records (s156). However, it is possible to ask the Tribunal to order that medical records not be disclosed for some good cause. This might happen, for example, if the treating medical practitioner believes that disclosure of the information may be harmful.

If you consider that there is a need for a preliminary hearing to discuss the disclosure of medical records, you should phone the Tribunal to arrange this well before the scheduled hearing.

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Report style

Reports should:

- Be written in plain and simple English and avoid where possible the use of medical or technical jargon.
- Provide, as appropriate, a full and frank description of the patient's circumstances (see note above).
- Avoid comments that could be interpreted as judgmental.
- Address the legal issues that the Tribunal will consider (**see the information on page 2**).
- Identify clearly the sources of the author's information. These sources may be direct personal observations of the author of the report, or may be information obtained from file notes or other professionals involved in the person's care.

What should the reports contain?

The reports should contain the following:

Authorised Medical Officer's Report (preferably by the treating psychiatrist)

- Details of the application for discharge by patient and reasons for refusal or failure to consider.
- Basis for the opinion that the patient continues to be suffering from a mental illness, including details of delusions, hallucinations, serious disorder of thought form, severe disturbance of mood, sustained or repeated irrational behaviour.
- Details as to why the patient requires inpatient treatment, addressing issues of serious harm to self or others and the patient's continuing condition.
- Details as to how inpatient care will benefit the patient as the least restrictive alternative consistent with safe and effective care.
- Brief background of the patient's history and events leading to current hospitalisation, including co-morbid conditions, for example substance abuse, intellectual disability or other relevant medical conditions.
- Details as to current treatment, medication, response to treatment and support to pursue their recovery.
- Details as to the efforts made to obtain the patient's informed consent to their treatment and recovery plans; the ongoing monitoring of their capacity to consent and efforts to support them to understand those plans, if they lack capacity.
- Progress in the mental health facility, including current diagnosis, medication and response to medication.
- Plans for the patient's long term recovery, treatment, management and care.

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- Views of designated carer(s) and principal care provider, relative or friends concerning ongoing hospitalisation.
- Guidance as to whether in all the circumstances the Tribunal should exercise the power to refuse the patient a further right of appeal. Please give details of the number and frequency of appeals, and their effect on the patient.

Other reports

Additional reports can be provided by health care professionals involved in the care of the patient, for example, primary nurses, social worker or occupational therapist.

These reports should include:

- Brief background of the person's history and contact with the person.
- Information addressing the question of whether the person remains a 'mentally ill person' as defined in the Act and requires ongoing detention.
- Other information relevant to the health professional's involvement with the person.

Who should come to the hearing?

- The patient (wearing street clothes if possible).
- The designated carer(s) and principal care provider, and /or person appointed by the patient to lodge the appeal.
- The patient's family, friends and support persons.
- Everyone who has prepared a written report for the Tribunal.
- The treating psychiatrist/doctor.
- Other involved professionals, for example the primary nurse, social worker.

If family or friends are unable to come to the hearing, they may still make their views known by writing to the Tribunal before the hearing. It might also be practicable for the Tribunal to hear their views by telephone or video.

What to do after the hearing

It is helpful if clinical staff are available to answer any questions the patient, designated carer(s), principal care providers or family members or friends might have about the Tribunal's decision.

If the appeal is unsuccessful, the patient often asks about how long they have to stay in the mental health facility. If the Tribunal has dismissed the appeal, the current order for detention continues. The length of the stay is determined by that order. The Tribunal does not make a fresh order or set a new 'time limit' if an appeal is dismissed.

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The Authorised Medical Officer is under an ongoing obligation under section 39 of the Act to “examine each involuntary patient to determine whether the patient’s continued detention in the facility is necessary”. A patient must be discharged if they no longer require care and treatment on an involuntary basis in a mental health facility; or there is a less restrictive option, consistent with safe and effective care.

You might find it helpful to refer the patient to the Mental Health Advocacy Service for further information (phone 9745 4277).

Attachments

The following attachments are available by clicking on the following links:

1. [Application by patient for discharge from a mental health facility](#)
2. [Application from designated carer or principal care provider for discharge of the patient](#)
3. [Form for detained patient to appeal to the Tribunal following refusal to discharge](#)
4. [Form for the designated carer\(s\), principal care provider or person appointed by the patient to appeal to the Tribunal following refusal to discharge.](#)