advocacy focus

Pathways Associates
Community Interest Company
TRAINING & DEVELOPMENT

Conditional Discharge

A guide for Independent Mental Health Advocates

Contents

What is a conditional discharge?

When someone has been in hospital as a restricted patient on a Section 37/41 hospital order they can be given a conditional discharge from hospital. Section 37 is a Court order to send someone to hospital for treatment instead of prison. Section 41 are restrictions that can be added by the Crown Court for the protection of the public.

Sections 37 and 41 are sometimes called forensic sections. Unlike civil sections (section 2 and 3), where people are detained in hospital by doctors and social workers without court involvement, forensic sections have a dual purpose, to provide the right treatment, care and support for the person and also to ensure protection of the public.

A conditional discharge means the person no longer needs to stay in hospital but there are conditions they are expected to follow. It also means there needs to be an arrangement to be able to return them to hospital and restart the section 37/41, this is referred to as the 'power of recall.' Decisions about recall are made by the Secretary of State, usually following a request by one of the supervisors in the community. A conditional discharge can be made either by the Secretary of State, the Tribunal, or the responsible clinician with the consent of the Secretary of State. Most are made by the Tribunal.

How long does a conditional discharge last?

A conditional discharge is not time limited. This means the conditions will stay in place unless the person is successful in being absolutely discharged (see section on absolute discharge below).

The person will continue to receive Mental Health Act S117 after-care free of charge even if they are absolutely discharged for as long as they need it.

Conditions

There are conditions that the person is expected to follow. These should be discussed with the person before they are discharged, and a copy of the conditions should have been given to them when they were discharged. If the person is discharged by the Secretary of State, they will have a warrant which lists the conditions.

There will be a condition that tells the person that they need to meet with their clinical and social supervisors and anyone else involved in their care and treatment.

The conditions of discharge will be unique to each person. The purpose of the conditions is to provide a framework to reduce the person's risk of committing further offences. Conditions are linked to monitoring the person's mental health, how effective their after-care arrangements are and to protect the public. As clinical and social supervisors are required to monitor and report on the person's mental health and the after-care arrangements, there are usually conditions about engaging with clinical and social supervisors, including allowing these professionals access to their homes. There may also be conditions about taking medication and engaging with other members of the Multi-Disciplinary Team (MDT).

Conditions linked to public protection will address factors that would have been present in relation to the person's previous offending. Public protection conditions could include conditions relating to alcohol and drugs, contact with children and/or vulnerable adults; access to the internet and social media; ownership and use of technology or travel to certain locations/geographical areas. Conditions are not statutory, however, if the person wants to move to a new house, start a new job or go on holiday they are encouraged to notify their clinical and social supervisors as soon as possible. This enables the supervisors to explain any concerns they may have on the person's plans and how these may negatively impact upon their risk levels and/or mental health.

In some cases, there will be active victim liaison in relation to the person's index offence. In these circumstances Victim Liaison Officers who are part of the Her Majesty's Prison and Probation Service will need sight of the conditions and may ask questions about other arrangements for the conditional discharge. They will liaise with the victims and share back any views. Invariably, this might link with geographical restrictions and/or contact arrangements. The clinical and social supervisors will be required to have contact with victim liaison officers in relation to any proposed changes to conditions.

Examples of conditions:

Clinical and social supervision:

- Engage with and meet the clinical team, as directed by the responsible clinician and social supervisor;
- Allow access to the accommodation, as reasonably required by the responsible clinician and social supervisor.

Housing:

- Reside at an address/type of accommodation as directed by the responsible clinician and social supervisor, and abide by any rules of the accommodation and obtain the prior agreement of the responsible clinician and social supervisor for any stay of one or more nights at a different address. The Secretary of State also has a clause whereby the Ministry of Justice should be informed of any change of address before the move.

Employment and education:

- Disclose all pending and current employment, whether paid or voluntary, all educational activities and those in the community to the responsible clinician and social supervisor.

Areas:

- Not enter the area(s) or general location as delineated by the zone(s) marked on the map(s) supplied by specify the name of person/organisation producing map, save as agreed in advance by the responsible clinician and social supervisor.

Medication:

- Comply with medication and other medical treatment and with monitoring as to medication levels, including…specify here any non-pharmacological medical treatment, as directed by the responsible clinician and social supervisor.

Contact

- Not seek to contact directly or indirectly specific people;
- Disclose to the responsible clinician and social supervisor any developing intimate relationship with any other person;
- Not to have contact with children or young people under the age of 18 except during an ordinary transaction (such as a purchase in a shop);
- Not to have contact with vulnerable adults except during an ordinary transaction (such as a purchase in a shop);
- All contact with (specific names or stated group of the population) to be supervised by a responsible adult.

Holidays

- Not leave England or Wales without the prior agreement of the responsible clinician and social supervisor (only England and Wales are under the jurisdiction of the Mental Health Act).

Other

- Abstain from alcohol save as directed by the responsible clinician and social supervisor;
- Abstain from illicit drugs and 'legal highs';
- Submit to random drugs and alcohol testing, as directed by the responsible clinician and social supervisor;
- Only to purchase technology with the knowledge and agreement of the responsible clinician and social supervisor;
- Only access the internet with full supervision of a staff member;
- Allow searches of the property for as directed by the responsible clinician and social supervisor.

People who might be involved:

Clinical Supervisor:
The person will have a clinical supervisor who is usually also their responsible clinician. This is usually an approved clinician who is also a consultant in their profession such as doctors, nurses, psychologists, or occupational therapists and who is responsible for the mental health treatment of the conditionally discharged patient. Often the clinical supervisor will ask other health professionals to do some of the supervision visits.

Social Supervisor:
The person will have a social supervisor, usually a social worker. In addition to their duty to protect the public, it is their job to support the person to reintegrate back into the community from hospital, especially if they have been in hospital for a long time.

Care Coordinator:
The person may have a care coordinator, such as a mental health or learning disability nurse, who supports them with their treatment in the community and arranges Care Programme Approach (CPA) and Multi-Disciplinary (MDT) meetings.

Independent Mental Health Advocate:
The person is entitled to free support from an Independent Advocate who is specially trained in the Mental Health Act. They are independent and do not work for social services, the NHS, the Ministry of Justice or Probation.

An Independent Advocate can help to:

- understand the conditional discharge;
- raise any concerns the person may have;
- support the person with any important meetings they may have;
- make complaints.

An IMHA does not:

- set the conditions of discharge;
- decide if the person has breached the conditions of discharge;
- tell the person what to do;
- give the person advice about things like whether they should take medication or apply for a Tribunal.

Solicitor:
The person is entitled to a solicitor free of charge to help them apply to vary any conditions or apply for an absolute discharge. They can get free legal advice from a solicitor if they are unsure about whether to apply for a Tribunal. They can look for a solicitor trained in the Mental Health Act on the Law Society website (www.lawsociety.org.uk/career-advice/individual-accreditations/mental-health-accreditation) or by calling the Law Society on 020 7320 5650 (Monday to Friday from 09:00 to 17:00 charged at local call rates).
An Independent Advocate can support the person to contact a suitably qualified solicitor in the local area if they need help with this. Sometimes the person might want to keep the same solicitor who represented them at Tribunals in hospital.

If the person is also subject to DoLS or an authorisation by the Court of Protection it may be practical, or in line with the person's views and wishes, to have a solicitor or solicitor firm, that can support them under both the Mental Health Act and the Mental Capacity Act. If someone lacks capacity to instruct a solicitor, the Tribunal can appoint a solicitor on their behalf (known as a Rule 11(7) solicitor). If the person is objecting to arrangements made under the DoLS/CoPDoL and the matter is before the Court of Protection, the person would have a Litigation Friend who would instruct the solicitor on the person's behalf.

Friends and family:
Friends and family do not have any legal rights for conditionally discharged patients; however, the person may wish to have friends and family supporting them with their conditional discharge. Friends and family can attend meetings and appointments to support the person, including Tribunals if the person wishes. The responsible clinician and social supervisor may wish to speak with the person's friends and family to find out more about how they are managing following their discharge from hospital. The responsible clinician would need the person's consent to do so, or their family and friends may be involved in the person's best interests if they have been deemed to lack capacity.

Care and support staff:
The person may live in residential care, supported accommodation, or receive care and support in their own home. The responsible clinician and social supervisor may speak with the person's care and support staff to see how they are managing following their discharge. If the person thinks they need more support with day-to-day tasks, they can talk to their social supervisor about this.

Secretary of State for Justice/Ministry of Justice (MOJ):
The MOJ must approve some things like whether any of the person's conditions can be changed and whether they should be recalled back to hospital. The decisions will be taken by people working in MOJ called case managers. The person can also apply to the Secretary of State to be absolutely discharged (as well as the Tribunal). Case managers also look at the reports sent in by the responsible clinician and social supervisor to see how well the person is doing and if there any problems with their health which may make the person a higher risk to other people.

Instructed vs non-instructed advocacy:

There are different ways in which an IMHA may work with someone who is conditionally discharged.

Instructed advocacy:
Instructed advocacy will take place if a person can state their own views and wishes and can instruct their advocate in what to say and do, the person can understand the role of their advocate and how they can be represented by them.

Capacity is decision specific and is defined as someone being able to understand, retain, use, weigh up the information relevant to the decision and who is able to communicate their views and wishes in relation to that decision. Capacity to instruct an advocate is a specific decision; as such, there may be occasions where a person may be deemed to not have capacity to make a particular decision but to have the capacity in relation to the advocacy role and be able to instruct an advocate.

Non-instructed advocacy:
Non-instructed advocacy takes place when a person lacks capacity to instruct an advocate. This might be because they have dementia, a learning disability, be acutely unwell (mentally or physically) or have a brain injury.

It is possible that an IMHA may need to act in both an instructed and non-instructed manner for a single person depending on whether the person has capacity for that specific decision at that point in time. A person's capacity may also fluctuate. This needs a level of involvement by the advocate to know the person and their circumstances, including their care and support arrangements, so the advocate can judge which approach to take.

The advocate will adopt non-instructed advocacy approaches such as a rights-based, person-centred and watching brief approaches to ensure that the rights of the person are protected and that decisions are taken in line with the Mental Capacity Act.

An advocate will consult with relevant and important people in the person's life to ensure all appropriate information has been gained. The advocate will try to ascertain what the person would have wanted if they had the capacity to make their own decision.

The advocate will not form their own views or share their opinions in any discussions or meetings.

Rights for conditionally discharged patients

The person should be given information about the conditional discharge and a copy of any discharge warrant that may have been issued by the Secretary of State. If discharged by the Tribunal, the person can be given a copy of their decision.

The person can have the support of an IMHA free of charge.

A request for conditions to be varied, or request for absolute discharge, can also be made by the person, or anyone else, by writing to the Mental Health Casework Service (MHCS) at the Ministry of Justice and making a request under S71(1) of the Mental Health Act. However, it is usually the responsible clinician that requests this on behalf of others where they agree with the variation. There are no limits on timings for applying to the Secretary of State. The Secretary of State will seek the views of the person's care team. There is a possibility that views from victims will be gathered if the person is applying to vary conditions relating to victim safety.

The person, their representative (such as an IMHA or solicitor) or responsible clinician can request an absolute discharge by writing to the MHCS at the Ministry of Justice to make a request directly to the Secretary of State for Justice for an absolute discharge, at any time. The Secretary of State must consider this, however, it is more likely to be successful when the individual has been stable in the community. A solicitor can give further advice specific to their circumstances.

The person can apply to a Tribunal to vary a condition or for an absolute discharge (see sections below on absolute discharge and Tribunal).

The person can make a complaint if they are unhappy with their care and/or treatment. Complaints would be made to the person undertaking that element of the care and treatment, or to the organisation that person works for. There is also a complaints procedure for decisions made by the Secretary of State. The correspondence address can be found here:
www.gov.uk/government/organisations/ministry-of-justice/about/complaints-procedure

There are no formal rights for nearest relatives to request discharge for conditionally discharged patients. Despite not having formal nearest relative rights, the guiding principles of the Mental Health Act require patients to be fully involved in decisions about care, support, and treatment. The views of families, carers and others, if appropriate, should be fully considered when making decisions.

Some decisions require the clinical and social supervisors to also follow the Mental Capacity Act as well as the Mental Health Act. If someone has an authority such as a Lasting Power of Attorney or Court Appointed Deputyship, then their role in decision making will be defined by the Mental Capacity Act.

Meetings and reports for the Ministry of Justice

Care Programme Approach (CPA) meetings:
Care Programme Approach (CPA) meetings discuss care, treatment, and discharge plans with the person directly, reviewing needs and the plan that is currently in place for meeting these needs. The responsible clinician and social supervisor would attend this meeting along with other people involved in the person's care and treatment. The person is entitled to have family, friends and an IMHA attend the meeting for support. Care and support staff who help with day-to-day tasks may also attend these meetings.

Reports:
The responsible clinician and social supervisor need to send regular reports to the Ministry of Justice no less than every 3 months. The reports give information on a range of matters related to their progress in the community, including feedback on their mental health and whether they are complying with the conditions of their discharge. Also included is:

- Demographics including index offence; section dates; conditions; all other legal frameworks and full contact details of people involved;
- Supervision arrangements;
- Accommodation;
- Care, support, and treatment;
- Relationships;
- Activities & achievements;
- Finances;
- Victim/victim group exposure;
- Behaviours and risks;
- Drugs and alcohol;
- Criminal activity;
- Diagnosis;
- Treatment;
- Physical health;
- Suicide and self-harm;
- Admissions.

The first report will be sent one month after discharge, then they will be sent every three months after that. The Ministry of Justice can request more frequent reports if the risks, needs, or situation indicates.

The responsible clinician and social supervisor may speak with the Ministry of Justice between these reporting times.

Recall

The clinical or social supervisors can ask the Ministry of Justice to return the person to hospital for treatment. This is described as being recalled to hospital. The clinical or social supervisor might ask for recall if they think the person is mentally unwell and needs to be detained for treatment in hospital or if the person is an increased risk to themselves or others, including concerns that they may be at higher risk of committing a crime that would harm someone else.

Breaching a condition will not automatically lead to recall. It is more likely to happen if the professionals supervising are concerned that the breach of conditions is happening because the person is becoming unwell, they are concerned that the person is more likely to commit a crime that harms someone else as a result of breaching their conditions, or the person has left the country without informing supervisors. However, the Secretary of State may not issue a recall if the person chooses to voluntarily go into hospital or agree to take additional medications, depending on the risks and likely length of time in hospital.

The person should be told about the reasons for recall at the time the recall happens unless there are exceptional circumstances. This is called a recall warrant which will say which hospital they should go to, and the person should receive a copy of this. The person should always be told the reasons for recall within 72 hours of their return to hospital.

If the person is recalled, their case must be referred to the Tribunal within one month of their return to hospital. They would be entitled to free help from a solicitor in this Tribunal. If they are not discharged by this Tribunal, or by the Secretary of State for Justice, then they will remain detained in hospital under the terms of the original s37/41 hospital order as a restricted patient.

The person's length of stay in hospital following recall by warrant will be for a sufficient period to respond to treatment and demonstrate through reports to the Ministry of Justice that they can once again be conditionally discharged. There is no defined period of time that the recall will last for. After the initial Tribunal, they can apply to the Tribunal 6-12 months after recall and then once in each 12-month period thereafter.

If the person is mentally unwell, the responsible clinician may choose to request admission under a civil section of the Mental Health Act (section 2 or 3) or if the person has capacity to decide to arrange an informal admission in order to secure the necessary assessment or treatment for mental disorder in hospital. This would not constitute a recall as described in connection with a conditional discharge. Admission through these routes gives the responsible clinician the ability to discharge the person from hospital when assessment or treatment is complete. The rights in relation to those sections would apply.The person remains conditionally discharged throughout this time and can still be recalled into secure hospital on s37/41 if deemed appropriate.

Absolute Discharge

If someone is absolutely discharged, they do not have any conditions to follow. They will continue to be eligible for free after-care under S117 of the Mental Health Act for as long as they need it. Any contact with the mental health team is voluntary, or for those that lack capacity, in their best interests and they cannot be recalled. If there were concerns about their mental health after they have been absolutely discharged, there would need to be a new assessment under the Mental Health Act.

A patient can apply to the Mental Health Tribunal for absolute discharge once within 12-24 months after being conditionally discharged and, if unsuccessful, again every two years. The person can also make a request to the Secretary of State for an absolute discharge at any time, but usually the Secretary of State would only consider this after the person has been stable in the community for some years.

They can also apply directly to the Secretary of State through the Mental Health casework section of the Ministry of Justice. There are no limitations on the number of applications that can be made to the Secretary of State. Their contact details are here:
www.gov.uk/guidance/noms-mental-health-casework-section-contact-list

The First Tier Tribunal (Mental Health)

Usually referred to within health and social care services as the Tribunal or the Mental Health Tribunal, this is a special court that hears cases for people who are subject to the Mental Health Act. The Tribunal can hear cases from conditionally discharged patients who wish to ask for a condition to be varied or ask for an absolute discharge. The person can apply to the Mental Health Tribunal once within 12 – 24 months after the conditional discharge and again every two years.

Currently, only the person can apply to the Tribunal for absolute discharge. There is a process for other parties to request that the Secretary of State refers to the Mental Health Tribunal. This is called a discretionary referral under Section 71(1). The person is entitled to a solicitor to help them apply for a Tribunal and to represent them in the Tribunal. They do not have to pay for this solicitor as costs are covered under legal aid.

The person's care team, including their responsible clinician and social supervisor, will need to provide reports to the Tribunal about their progress in the community. The person will be able to read these reports before the meeting.

The Tribunal panel is made up of a judge, a lay person, and a medical person. Only certain Tribunal judges can hear cases related to conditionally discharged people. All Tribunal panel members will be independent of the hospital responsible. For conditionally discharged patients this is the hospital that holds the conditional discharge warrant and is usually within the organisation that the responsible clinician works for. During the Tribunal, the panel will ask the people involved in the person's care questions. The solicitor can also question professionals.

The person will have the chance to explain their views and wishes to the panel. This can be done through their solicitor or on their own. They can ask the other people to leave the room if they want them to.

The person is entitled to have the support of family, friends, and/or an Independent Advocate at the Tribunal.

The responsible clinician's and social circumstances reports must set out any specific circumstances that would suggest a need to make reasonable adjustments to the Tribunal process. The IMHA may wish to provide information to the clinical and social supervisors to ensure such adjustments are reflected.

Capacity to apply to the Tribunal:

A person has capacity to apply to the Tribunal if they can understand that they are subject to restrictions under the Mental Health Act and are able to ask the Tribunal if they can be discharged. If the person lacks such capacity, a request needs to be made to the Secretary of State to refer the case so the Tribunal can consider it. Guidance was given in SM v Livewell Southwest CIC at paragraphs 86-88.

If a valid application has been made but the person lacks capacity to appoint a solicitor, the Tribunal can appoint a solicitor for free in the person's best interests; this is often known as a Rule 11 (7) solicitor. This states that:

In a mental health case, if the patient has not appointed a representative, the Tribunal may appoint a legal representative for the patient where:

(a) the patient has stated that they do not wish to conduct their own case or that they wish to be represented; or

(b) the patient lacks the capacity to appoint a representative, but the Tribunal believes that it is in the patient's best interests for the patient to be represented.
The Responsible Clinician will need to confirm in writing on the appropriate form that the person lacks capacity to appoint a representative.

IMHAs can support in the identification of a solicitor if there is one that has had previous contact with the person or who has been consulted in relation to the person's situation. The Responsible Clinician cannot recommend a solicitor but can share through the form that a specific solicitor has either been previously involved or been consulted with which may assist the Tribunal's office in their decision to appoint.

When will an absolute discharge be granted?

The Mental Health Act says that the Tribunal must grant an absolute discharge if it has not been proven that:

- the person's mental disorder makes it appropriate for them to be liable to be detained in hospital for treatment;
- it is necessary for their health or safety or the protection of others that they should receive that treatment;
- appropriate medical treatment is available;
- it is appropriate to have a recall power.

Before granting an absolute discharge, the Tribunal will have to consider whether a conditional discharge is needed – whether they feel there still needs to be the ability to recall the person to hospital (see case law, Grey v UK and R (SSHD) v MHT, re Wilson). If they feel that absolute discharge should be granted, the Tribunal will need to set out the reasons why this is the case and why a conditional discharge is not needed. They will consider things including:

- what mental disorder the person had, what it was like when they offended, what it is like now and what it may progress to in the future;
- what happened when the original offence was committed - they will consider the seriousness of the past offences, who was harmed and how much harm was caused;
- how likely they think the person is to commit a crime in the future;
- if they think the person is likely to commit a crime in the future and how much harm it may do to another person;
- how likely they think the person is to become unwell in the future;
- whether they believe the person needs to be recalled to hospital for treatment in the future;
- whether admission under Part 2 of the Mental Health Act (i.e., sections 2 and 3) could instead be used in the future.

Case law has established that it is possible for the conditions to be removed from a conditional discharge but retain the ability to recall to hospital. This would allow the opportunity to see how the patient manages without conditions in the community, but the ability to recall remains as a 'safety net.' If this approach is used, the Tribunal would have to give adequate reasons as to why recall is needed and why an absolute discharge could not be granted – DA v Central and North West London NHS Foundation Trust.

Secretary of State and absolute discharge

The Secretary of State does not have the same constraints as a Tribunal in their decision making for applications for absolute discharge, so they will grant an absolute discharge 'if they think fit.' In practice, the case law is likely to be considered along with the mental health casework section risk assessment and other information held on file from the clinical and social supervisors reports. They may request additional information from the clinical and social supervisor or others to arrive at their decision.

The Secretary of State will normally only grant an absolute discharge 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. There should be no expectation that any conditionally discharged patient will eventually be absolutely discharged.

Section 117 after-care

A person who is conditionally discharged from hospital is entitled to Section 117 (S117) after-care. This means that any support and treatment required for their mental health is free while they are living in the community. The goal of S117 after-care is to give the person the right amount of support to stay well enough to continue living in the community.

Examples of things that may be part of an after-care package include:

- Care and/or support: if the person is living in their own home, any care and support needed at home for their mental health would be covered by S117 after-care. This can include services for social and cultural needs, social care, and employment services.

- Medication: any prescriptions for their mental health should be free under S117, even if they pay for prescriptions for any physical health needs.

- Accommodation: this is not usually covered by S117 so the cost of renting, council accommodation, or buying their own home would not be included. Sometimes people's mental disorder requires specialist accommodation which might be covered by S117.

The person may be entitled to receive direct payments for their after-care. This means that instead of the services providing support being paid directly, the person or someone who helps them with their finances are given the money to pay for services themselves. The person's social supervisor can explain more about this and see if the person would qualify for direct payments.

S117 lasts for as long as the person needs the services in place to support them to stay well enough to continue living in the community. After-care packages should be regularly reviewed by the professionals and this may happen as part of the Care Programme Approach (CPA). Friends, family and/or an IMHA can support the person during S117 after-care reviews.

Relevant case law

Following the judgment of the Supreme Court in Secretary of State for Justice v MM, it is not lawful to have conditions which expect the person to be subject to the constant supervision and control of others where they are not free to leave their placement to live elsewhere (this is referred to as a "deprivation of liberty"). Whether the person has capacity to make decisions about their accommodation, care and support is irrelevant.

If the person lacks capacity to make the relevant decision, it is possible to authorise their deprivation of liberty under the Mental Capacity Act 2005, rather than the Mental Health Act 1983, using DoLS/CoPDoL (depending on the setting). This can be done even if there is an element of public protection when promoting the person's best interests: Birmingham CC v SR; Lancashire CC v JTA.

There is no similar option though for those with capacity. Therefore, the Ministry of Justice published guidance (www.gov.uk/government/publications/discharge-conditions-that-amount-to-a-deprivation-of-liberty) indicating the use of s17(3) long term escorted leave as an alternative for patients with capacity. This permits the responsible clinician (with MOJ approval) to direct that the person remains in custody (i.e. deprived of liberty) whilst on leave of absence. If the hospital managers also agree, the person can be in the custody of non-hospital staff, such as a care provider or care home manager if they too agree to share the responsibility. However, this is not a conditional discharge; it is leave of absence from hospital detention. The person remains "liable to be detained" for treatment, albeit treatment in the community, as long as it could lawfully be provided in hospital: Cumbria, Northumberland Tyne & Wear NHS Foundation Trust & Anor v EG.

The review of the Mental Health Act for England and Wales has made a proposal for supervised discharge which will seek to plug this gap in the law and permit Mental Health Tribunals to authorise a deprivation of liberty in the community for a restricted patient's supervised discharge.It is not clear whether this recommendation will be fully adopted in the redrafting of the legislation.

Other useful information

The person may be subject to other orders and/or restrictions along with their conditional discharge. It's important that they know which legal frameworks authorise the different parts of the care plan so that they know who to appeal to if they do not agree with it.

In some instances, their legal representative may be able to help them and represent them for free through legal aid.

For anything else, they might have to pay for legal representation to support.

Some other common legal frameworks include:

- Sex Offender Register requirements (SOR);
- Sexual Harm Prevention Order requirements. (SHPO);
- Multi Agency Public Protection Arrangements (MAPPA) requirements;
- Probation license requirements.

Organisations such as Nacro and Unlock may be helpful if the conditionally discharged person has questions about these.

Deprivation of Liberty/Liberty Protection Safeguards

As explained above, following the judgment of MM in the Supreme Court, a conditional discharge cannot deprive someone of their liberty. If a care plan needs to be in place that deprives someone of their liberty, and they lack capacity to decide about their care and support, this will need to be authorised using other legal processes and safeguards.

If someone lacks capacity to make decisions about where they live and their care arrangements, and they are under 'continuous supervision and control' (i.e. have constant care), they may be deprived of their liberty. If this is the case, there will be some safeguards in place to make sure they are looked after properly. These are safeguards to protect the person's liberty and provided either by the local authority (if the person is in a care home) or the Court of Protection (if the person is in any other living situation in the community).

If after the conditional discharge the person regains capacity and is deprived of their liberty, the Secretary of State will review the situation and decide whether the person will need to be recalled to hospital. In these circumstances if their rationale is not linked to the individual's deteriorating mental state or risk this is referred to as a 'technical recall' as it is to make the arrangements lawful. The person is likely in this situation to be granted 24/7 section 17(3) leave at the same time as being technically recalled enabling their arrangements to continue.

The person will have a representative (if the person's arrangements are authorised under DoLS, the representative is called a Relevant Person's Representative, and if the person's arrangements are authorised by the Court of Protection the person is called a Rule 1.2 Representative). The representative may be an Independent Advocate or could be a family member or friend. The representative supports the person and makes sure their rights are upheld and their views are listened to – they can support the person to challenge the authorisation in the Court of Protection if they are unhappy. The representative could act as Litigation Friend for the person during any Court of Protection proceedings, which would include instructing a suitably qualified solicitor on the person's behalf.

Currently, these safeguards are provided by a framework called 'Deprivation of Liberty Safeguards'. This will be replaced by the 'Liberty Protection Safeguards' soon.

For more information see:
www.scie.org.uk/mca/dols/at-a-glance
www.ageuk.org.uk/globalassets/age-uk/documents/factsheets/fs62_deprivation_of_liberty_safeguards_fcs.pdf

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Neil Allen - Barrister at 39 Essex Chambers and a Senior Lecturer at the University of Manchester.

Pathways Associates.

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Those who are family members and friends of those who are conditionally discharged who participated in focus groups aiding in the development of the materials.

advocacy focus

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TRAINING & DEVELOPMENT

*This document was published in May 2022, please be aware that there may have been legislative changes since publication.