



Legal Aid  
Agency

# CONTRACT MANAGEMENT - Mental Health Guidance April 2014 v2.0

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## Version History

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1.3	12 <sup>th</sup> August 2013	Redrafted to incorporate business and MHLA comments
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## 1. Overview

This guidance is intended to provide clarification regarding common queries about the 2014 Standard Civil Contract Mental Health Specification and associated Standard Fee Scheme. Please note the Specification has been amended in order to accommodate the reforms to legal aid brought in under the Legal Aid, Sentencing and Punishment of Offenders Act (2012). It is our aim to ensure that contract documentation is as clear and undisputable as possible. However, the complexities of real-life scenarios and operational considerations mean it is not always possible to set out concise rules in the Specification which cover every type of mental health case.

This guidance document replaces the 'Principles of Mental Health Fees' document which we published in March 2009. The 'Principles of Mental Health Fees' were written soon after the introduction of the Mental Health Standard Fee Scheme. Many of the sections have become redundant as provider knowledge of the scheme has improved. However, there are other issues which have emerged and require additional guidance. For this reason, this is a new document that deals with new and repeat issues that have recently been raised with the Legal Aid Agency's (LAA) Mental Health Unit (MHU) and Service Development.

It is very important to be clear that this document does not create a set of hard-and-fast rules that can be applied to every single case. Concerns have previously been raised about the consistency of decision-making by the MHU in relation to the 'same' types of case. The circumstances of every case are different and investigation of consistency concerns has revealed that there were different factors to be taken into account leading to different decisions.

Providers are advised to be careful to fully evidence decisions on file in order to prevent disputes with the MHU about whether or not the LAA's approach is consistent. If there is no evidence on file, then costs may be disallowed, even if the provider's decision was justified. Providers are also advised to contact the MHU for further guidance where their issue is not covered by this document: they may be able to advise how the specific circumstances of the case influence the approach that should be taken.

Providers should be particularly mindful of the LAA's Civil Costs Assessment Guidance 2013. That document sets out in a generic way exactly what work is claimable by providers.

## 2. Means Assessment

The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 allow at 5. (1) (f) Legal Help to be undertaken without a determination with respect to the client's financial resource where a case involves contemplated proceedings before the MHT.

The following conditions must be met in order for a provider to claim a non-Tribunal fee without applying means assessment:

- a. The client must be eligible to apply to the MHT (or the supplier could not have reasonably discovered either before or during the first attendance that the client was ineligible to apply); and
- b. The advice given on the MHT application must satisfy the Sufficient Benefit test (i.e. a reasonable private paying client of moderate means would pay for the legal advice and assistance); and
- c. There must be a *reasonable expectation* on behalf of both the client *and* provider to pursue an application to the MHT<sup>1</sup> (notwithstanding where a client subsequently changes their mind and decide not to apply); and
- d. The circumstances in which the means assessment was disapplied and reasons for doing so must be fully evidenced on file. This will include circumstances whereby having been specifically requested to attend upon the client to pursue an application to the MHT, the provider advises the client not to proceed; and
- e. Where the client has capacity to do so, they must have instructed the provider to give Tribunal advice (in addition to instructing the substantive non-Tribunal advice). Regardless of the client's capacity, the Sufficient Benefit test will always apply.

If an advisor travels to see a client to take initial instructions but they then refuse to see the advisor and the forms are not completed, the provider will not be able to make a claim for costs. Furthermore, the declaration on the application for CLR (CW1/2 Form) must be signed and dated and does not act as a retrospective application.

Where a client lacks capacity to sign the forms, a means assessment must still be carried out and evidenced, as far as is practicable. As stated at 7.40 of the 2014 Standard Civil Contract Specification: '**exceptionally**, where it is not appropriate to use any of the possibilities for the application for Legal Help or for CLR to be made on the patient's behalf and the patient will not sign the application due to their

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<sup>1</sup> For example, decision to apply to MHT made at initial attendance or client says to provider 'I want a tribunal', 'I want to get out of hospital' or 'I am thinking about a tribunal application but want to discuss it' and the provider has a reasonable expectation at that time that such an application will be discussed and pursued. However, if a client says to provider 'I want to get out of hospital but I don't want a tribunal', the client's means must be assessed.

*condition, then you may annotate the form to that effect and a Supervisor may sign the form*. This would include a patient's lack of capacity to sign the form.

Whilst a client lacking capacity may be unable to provide instructions themselves, they may have a litigation friend or deputy instructing on their behalf. Clearly, a client who has a solicitor appointed by the MHT (for example if they lack capacity and are automatically referred) will not require means assessment since MHT proceedings have been initiated.

The LAA's position is that until CLR is granted, provision of means-free Legal Help advice should be the exception rather than the rule, and where granted, must be specifically justified by the provider on the case file. Providers should also bear in mind that the evidential requirements for means for this specific client group are understandably low (see s4.), since only a reasonable attempt at gaining evidence of means is required. Providers should also note that, as of 1<sup>st</sup> April 2013, 'capital passporting' has been abolished and all means assessments must include an assessment of client capital.

### **3. Starting New Matters**

The Specification sets out the circumstances in which the provider must start a new matter on a new legal issue:

7.23 *Upon the following events you must begin a new Matter Start for any subsequent work on a new legal issue:*

- (a) Owing to passage of time, a Client has a statutory entitlement to a further MHT.*
- (b) There is a change in the Client's section type.*
- (c) The Client is discharged from their section (including under a Community Treatment Order).*
- (d) The Client withdraws from a MHT and, within the same Period of Eligibility, applies again (in these cases the reason for withdrawal must be clearly noted on the file).*

There has been some confusion in relation to this clause, with some providers being unaware that a new matter *must* be started in these scenarios *only* where there is a new legal issue. There seems to be no widespread consensus for the definition of 'new legal issue'. However, for the purposes of this guidance, a new legal issue should be considered to be a change or modification to the legal arguments used to advance a client's case. In general, this will be a new legal argument presented to the MHT. When deciding whether or not to open a new matter start, providers should bear in mind that the aim of this clause is to prevent double payment (i.e. two sets of fixed fees) for the same work e.g. preparing for the MHT.

For example, if a client withdraws from an MHT application and a new legal issue emerges which triggers a further application to the MHT (for example a change in

their presentation causes an MHT application to be a reasonable course of action once more), an additional matter start must be opened.

For example, a change in section type *will always* result in a new legal issue *for a separate appeal in the new Period of Eligibility*, and the same is true for statutory referrals. However, in other examples it may be less clear-cut that there is a new legal issue justifying a new matter start and there must be clear evidence on file if any dispute over claims is to be avoided.

A number of complex queries relating to changing section type and changing MHT criteria have been raised with the MHU. For example, a client is detained under S2, applies for an MHT and they are then placed on a S3. The MHT goes ahead but in the S3 period of eligibility and under the S3 (rather than S2) criteria. Providers have queried whether they should claim two NMS, one dealing with the original application under S2 (Level 1 fee) and the second advising and representing the client under S3 criteria (Level 1, 2 & 3 fees).

Without any other complicating factors, and *despite* the change in section type, this is one legal issue, i.e. the client is seeking to challenge their detention under their current section. As before, the principle is that the LAA will not pay two sets of fees in relation to a single application to the MHT. Therefore, only one matter start attracting all 3 fee levels is claimable. However, the client doesn't lose their statutory entitlement to submit their own application to the MHT for the S3 period of eligibility. If they were to submit this additional application then a further matter start could be opened.

The scenario may be further complicated by a client being placed on a CTO. This may involve revocation (invoking a referral by the Hospital Manager to the MHT) and some examples have been given where a client repeatedly oscillates between a CTO and the underlying S3. This may give rise to repeated referrals to the MHT by the Hospital Manager and parallel applications by the patient, all of which may be to consider the same legal issues. It should not be assumed that two sets of fees are claimable unless there are separate hearings, separate legal issues and separate preparation work.

We advise providers to contact the MHU for guidance in these more complex scenarios, particularly given potentially overlapping periods of eligibility.

Finally, a Point of Principle of General Importance (57) from the LAA Costs Appeals Committee is also relevant here:

*If a third party signs a Legal Help form at the direction of the client (the client being unable so to do in person for reasons of health or disability), either in his own name or that of the client, that does not invalidate the form as long as there is sufficient evidence on the file (such as an attendance note) to demonstrate that the form was properly executed by that third party with the client's approval.*

## 4. Evidence of Means

The following Point of Principle (55) adds to the information set out in the Civil Legal Service (Financial Resources and Payment for Services) Regulations 2013 and 2014 Standard Civil Contract Specification:

*1. Where it is not practicable to obtain evidence of eligibility before commencing work, there must be an assessment of means on the basis of whatever information is available from the client, and that assessment must be recorded on the form which is signed by the client as his or her affirmation of eligibility.*

*2. Section 3.36 of 2010 Standard Civil Contract Specification also states that, in these circumstances, it is necessary for the provider to require the client to provide evidence of means as soon as practicable. This is an on-going contractual duty until it has been fulfilled and a claim for payment should not be made to the LAA without such evidence having been obtained and retained on the file.*

*3. In any case which, on audit, is found to have no such evidence on file, the preliminary decision will be to nil assess. A provider appealing or seeking review of such decision will have to provide evidence of eligibility at the time the form was signed and a satisfactory explanation as to why a claim was submitted for payment without such evidence being on file. If these two requirements are fulfilled, the reviewer/Independent Costs Assessor will be able to exercise discretion to allow payment in appropriate circumstances.*

*In cases where a means assessment has been carried out this must be done in accordance with the relevant Regulations & Guidance and in particular evidence of eligibility must be obtained and retained on file. Whilst our approach to costs assessment is retrospective and therefore it is unlikely costs would be disallowed if a provider did not obtain evidence of means at the outset, this approach would put costs at risk should the evidence never be obtained or if it subsequently does not support the means assessment carried out.*

*If a provider references a social circumstances report as proof of means it is important that both the nature of the benefit (i.e. is it passported?), the entitlement, the amount and the computation period must be considered and this is cross referenced to the CW1/2. In circumstances where evidence is not obtained the following approach will be taken:*

- 1. If the criteria for providing urgent advice are met (Rule 2.5) and reasonable attempts have been made to subsequently obtain the evidence no more than 2 hours work will be allowed. This effectively means that a Fixed Fee will be payable but that the matter will not be allowed as an exceptional claim.*

2. *If the criteria for providing urgent advice are met (Rule 2.5) but reasonable attempts have not been made to subsequently obtain the evidence no costs will be allowed.*
3. *If the criteria for providing urgent advice are not met no costs will be allowed in any cases where there is no evidence on file.*

The document 'Guide to Determining Financial Eligibility for Controlled Work and Family Mediation April 2013 v1' (which can be found on the LAA website) provides the following clarification on obtaining evidence of means:

*'12.2.10 - Exceptionally, the personal circumstances of the client (such as age, mental disability or homelessness) may make it impracticable for any evidence to be supplied. In such cases, eligibility can be assessed without evidence. However, the attendance note must give the reason why evidence could not be obtained and providers must be prepared to justify this on audit if necessary.*

*12.2.11 - Whether or not it is impracticable to obtain evidence will depend on the circumstances of the case. Those who are homeless, or who are in detention will have particular difficulty in supplying evidence. For asylum seekers, there may be a difference between those who apply for Legal Help when they have just arrived in the country and cannot be expected to provide evidence, and those who apply when they have been in the country long enough to receive benefits/vouchers or to work, who can provide evidence. It will often be impracticable to obtain evidence of income from patients with mental health problems who are in hospital (for example, those detained under the Mental Health Act). Providers should however attempt to obtain oral or written confirmation of the position (e.g. type of benefit received) from the ward manager or social worker where practicable. It may on occasion prove impracticable to obtain evidence of a partner's income, for example where the partner refuses to provide the information despite repeated requests. In such circumstances the provider will rely on the best estimate that the client can give of their partner's means for the purposes of aggregation.'*

Finally, there is specific guidance in relation to evidence of means on the Mental Health CW1/2 form:

*'If no [evidence of means provided with application], please record justification or exceptional circumstance. In relation to clients detained under the Mental Health Act, you are required to attempt to obtain oral or written confirmation of the position (e.g. type of benefit received) from the ward manager or social worker where practicable. For further information please refer to Section 3 of the 2013 Standard Civil Contract Specification and the Financial Eligibility guidance available on the website.'*

## **5. Hospital Managers**

Where a Manager's Renewal Meeting is convened under Section 20 of the Mental Health Act, this will 'roll back' into the period to which the RMO's decision relates regardless of when the work is undertaken. In any other circumstances, including where the Managers are meeting to consider an application made by the patient, this

will not be classed as a renewal meeting and the matter will sit within the same period of eligibility in which the application to the Managers was made.

## 6. 'Rolling Up' Matters

Where a client receives a recommendation from the MHT for deferred conditional discharge the provider may not open a Non-tribunal matter to continue to advise the client. This would constitute aftercare advice and would therefore be covered by the Mental Health Proceedings fees paid in the case. Aftercare advice will not constitute a separate legal issue and Mental Health Proceedings files should not be billed until all such issues are dealt with. Only one standalone Non-tribunal matter may be opened in any period of eligibility unless a separate and distinct legal issue arises justifying a further matter start as covered in Section 3. above.

Where the provider advises a client generally and claim a Mental Health (Non-tribunal) fee this must roll up into any subsequent Mental Health Proceedings fees that are incurred even if the client makes the tribunal application independently and the provider only becomes involved at a late stage.

The 'rolling up' principle also applies where the client is the Nearest Relative. Where a Non-Tribunal matter is opened to advise the Nearest Relative generally on their rights and they may subsequently make their own application to the MHT, the Mental Health (Non-Tribunal fee) will be rolled up into the Mental Health Proceedings fees.

The Specification sets out at 7.20 and 7.57 that any Non-tribunal issues arising during the period of eligibility in which an automatic referral to the MHT is made will be rolled up into the Mental Health Proceedings fees claimed. However, since automatic referrals do not have a period of eligibility, they will always be standalone cases, not subject to rolling-up with either a concurrent application from the client or Nearest Relative.

Conditional Discharge clients may be subject to a 2-year eligibility period and concerns have been raised about how long a file would need to be kept open. The client in such circumstances is not a 'detained patient'. As such, the usual rolling up principle will not apply and separate legal matters attract Non-tribunal fees. If an MHT is applied for then a separate set of Mental Health Proceedings fees can be claimed in respect of that work. If the client is recalled to hospital and placed under a different section a new eligibility period is effectively entered into and a new set of Mental Health Proceedings fees may be claimed if appropriate.

Applications brought by a Nearest Relative before the MHT under section 66 (1) (g) of the MHA 1983 (concerning a bar on the Nearest Relative's order to discharge a patient) – or other such applications - should be treated as separate from a patient's own application to the MHT. In these cases a new matter may be opened as and

when the Nearest Relative is eligible to apply to the tribunal, and will be remunerated in accordance with the Mental Health Specification.

In some circumstances, a patient may wish to be represented at the Nearest Relative's MHT hearing. Funding for legal representation is available in these situations and is paid in accordance with the appropriate Mental Health Proceedings fees as a further separate matter (distinct from both the Nearest Relative's application and the patient's potential further application).

Before undertaking such representation, due consideration should be given as to whether it is reasonably required in these cases. Specific attention should be paid to paragraph 7.33 of the Mental Health Specification and, further, the Sufficient Benefit Test of the Civil Legal Services (Merits) Regulations 2012. Considerations influencing the provider's decision to open a new matter will include the following:

1. Whether the patient is presenting a new and significant legal argument to the MHT which would not otherwise be advanced;
2. Whether there is a conflict of interest between the patient and Nearest Relative; and
3. Whether there are any other parties suitable and willing to provide assistance on behalf of the patient (such as an Advocate) should the need for specialist legal advice not be necessary.

Where the client is the Nearest Relative who receives advice under legal help regarding their responsibilities and subsequently applies for a tribunal in their own right, then this should be treated as one matter with the Non-tribunal fee rolling up into the Mental Health Proceedings fees. On the other hand, where a provider is advising the patient and also a potential Nearest Relative (e.g. on delegation or displacement proceedings against the existing Nearest Relative), they may open two separate NMS for the two different clients.

## **7. Community Treatment Orders**

The imposition of a Community Treatment Order (CTO) effectively gives rise to a new 'section type' / period of eligibility and a new set of Mental Health Proceedings fees may be claimed each time a new eligibility period is entered (i.e. first 6 months, second 6 months and thereafter annually) and work on an associated MHT is carried out.

The costs of any Manager's Hearing including the CTO must be rolled up into any Mental Health Proceedings fees also claimed within an eligibility period.

Consideration of what constitutes a 'new legal issue' when a client's CTO is revoked can be found in Section 3 'Starting new matters'.

## 8. Billing

For billing purposes all work done under the Mental Health (Non-tribunal) fee or the Mental Health Proceedings (Level 1) fee is carried out under Legal Help and as such Legal Help rates should be used when calculating costs. All work done under the Mental Health Proceedings (Level 2) and (Level 3) fees is carried out under CLR and CLR rates should be used accordingly. For the purposes of calculating the appropriate fees, the application to the MHT is deemed to have been made when the form is submitted to the MHT. The Level 2 fee is only claimable once not only the application to the MHT has been submitted, but an additional 30 minutes further work on the case has also been carried out.

If an application to the MHT has been made prior to the provider receiving instructions, the Mental Health Proceedings (Level 1) fee is claimable once initial instructions have been taken and a decision to proceed has been taken. This includes those situations where instructions are received at the last minute.

Finally, if a provider appears before the MHT to request a withdrawal that could not reasonably have been anticipated in advance of the hearing day, the Level 3 fee may be claimed. As with other cases of adjournments and postponements on the day of the hearing where there is no final substantive hearing (which will always be the case in this example) the provider has a choice of whether to claim the Adjourned Hearing Fee or substitute the Level 3 fee for it.

## 9. The Court of Protection

All applications for Legal Representation before the Court of Protection should be made to the Legal Aid Agency's Mental Health Unit, which is based in the Liverpool office. This includes both cases falling within the scope of Court of Protection Rules 2007, Regulation 52 and cases appealing from that Court to the Court of Appeal or Supreme Court which would, in any event, be within the scope of Civil Legal Aid funding.

Cases before the Court of Protection are generally subject to the usual financial eligibility rules for CLS funding. The Legal Aid Agency does not have any powers to waive eligibility levels or contributions in such cases. However, there is a specific type of case that can be funded means-free, according to The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013, set out as follows at Regulation 5 (g):

*5.—(1) The following forms of civil legal services may be provided without a determination in respect of an individual's financial resources—*

*(g) legal representation in relation to a matter described in paragraph 5(1)(c) (mental capacity) of Part 1 of Schedule 1 to the Act to the extent that—*

*(i) the legal representation is in proceedings in the Court of Protection under section 21A of the Mental Capacity Act 2005(4); and*

*(ii) the individual to whom legal representation may be provided is—*

*(aa) the individual in respect of whom an authorisation is in force under paragraph 2 of Schedule A1 to the Mental Capacity Act 2005; or*

*(bb) a representative of that individual appointed as such in accordance with Part 10 of that Schedule;*

Providers should note that an authorisation must always be *currently* in force and the *only* proceedings for which legal representation is available without reference to means are specifically the challenge of the authorisation under s21A of the MCA. Other work, even if considered at the same hearing, will require means assessment.

## **10. Work in Prisons**

For the avoidance of doubt, advice and assistance regarding Sections 47 and 48 of the Mental Health Act (i.e. transfer of sentenced and unsentenced prisoners to hospital) can be carried out by providers with Mental Health schedule authorisation. This includes negotiation with and proceedings against prison authorities that may be required to secure the client's detention under these sections. However, care should be taken that the advice does not extend to Prison Law matters which should only be undertaken by Crime providers, for example discussion of such matters before the Parole Board.

# **End of Document**