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## Introduction.

- The principles set out in this document are intended to provide clarification concerning the Mental Health Specification introduced in January 2008 and as such should be read in conjunction with the relevant sections of the Specification. These notes are set out with headings which correspond to the relevant section of the Specification to which they apply, being based on a number of frequently asked questions that the LSC has received from providers since the Fixed Fee scheme commenced. In all matters relating to the performance of Controlled Work the primary source for decision-making remains the Unified Contract.

## The Mental Health Fee Scheme MH 12.4 - 12.10

- You are entitled to claim all levels of fees relevant to the stages of work, which you undertake. For example in a Section 2 case in which you have been instructed on the day of the Tribunal hearing, you may claim Levels 1, 2 and 3 if work justifying the Level 2 has been undertaken. This would depend on whether thirty minutes of “substantive preparation” as defined by rule 5.9 of Part A of the Civil Specification had been carried out between the end of initial instructions and the start of representation. If it has then Levels 1,2 and 3 can be claimed.
- New fee rates take effect in July 2008. The new fees are set out in Appendix 10 of the Deed of Settlement and only apply to matters commencing on or after 1<sup>st</sup> July 2008 and during the lifetime of the current contract. Therefore any cases started prior to 1<sup>st</sup> July 2008 will continue at the old rates and fixed fees.

## Non- MHRT Fee MH 12.13 - 12.17

- If you have conducted a non- MHRT matter you are entitled to claim the non MHRT Fee of £275. If you subsequently give advice on a tribunal application but do not make the application you remain entitled to the non MHRT Fee and do not have to substitute it for a L1 MHRT Fee.

The L1 MHRT Fee would only replace the non MHRT Fee in circumstances where there was an application made to the tribunal and in those cases a L2 MHRT Fee would also usually become payable subject to having carried out at least 30mins substantial legal work. (See MH 12.21)

- Where a Manager's meeting is automatically convened UNDER SECTION 20 OF THE MHA, this will be classed as a renewal hearing and will 'roll back' into the period to which the RMO'S decision relates regardless of when the work is undertaken if it were to fall within the renewed eligibility period.

In any other circumstances, and particularly where the Manager's 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.

- For billing purposes all work done under the non MHRT Fee or the L1 MHRT Fee is carried out under Legal Help and as such Legal Help rates should be used when calculating costs. All work done under the L2 MHRT Fee and the L3 MHRT Fee is carried out under CLR and CLR rates should be used accordingly.
- Where a client receives a recommendation from the MHRT for deferred conditional discharge you may not open a non-MHRT matter to continue to advise the client. This would constitute aftercare advice and would therefore be covered by the MHRT Fees paid in the case.

Aftercare advice will not constitute a separate legal issue and MHRT files should not be billed until all such issues are dealt with.

Only one stand-alone non-MHRT matter may be opened in any period of eligibility unless a separate and distinct legal issue arises justifying a further matter start.

- Where a client has a number of different issues including e.g. treatment, s117 meeting etc and in addition has a tribunal application generally the MHRT Fees payable will include all the other non-MHRT issues. Only where there is a separate and distinct legal issue will it be allowable to open a non-MHRT matter.
- A manager's review of a barring order against the nearest relative on which the client (who is the patient) wishes advice and assistance does not constitute a separate and distinct legal issue and as such you may not claim a separate non MHRT Fee for this work if the client applies for a MHRT in the same period of eligibility.
- Where you advise a client generally and claim a non MHRT Fee this must roll-up into any subsequent MHRT Fees that are incurred even if the client makes the tribunal application independently and you only become involved at a late stage.

- The “**rolling-up**” principle also applies where the client is the nearest relative . Where a non MHRT matter is opened to advise the nearest relative generally on their rights and they subsequently make their own application to the tribunal the non MHRT Fee will be rolled-up into the MHRT Fees.
- In cases where the initial advice regards tribunal matters and the client is advised not to apply the non MHRT Fee should be claimed but no means assessment is required.

For the avoidance of doubt, if the client is not eligible to apply for a tribunal at the time of the initial attendance a means assessment must always be carried out, (e.g. first 6 months on a s37, already had tribunal in current period etc).

- When a client is informal only the non MHRT Fee is payable. If work is begun while a client is informal and continues after they are made formal the non MHRT fee can be claimed separately from any MHRT Fees that may also be payable in the period in which the non MHRT matter concludes,i.e there is no need to roll the informal work into the work undertaken once the client becomes subject to a section.
- The application to the MHRT is deemed to have been made, for the purposes of calculating the appropriate Fees, when the form is submitted to the MHRT
- If you open a non MHRT matter to advise on a tribunal application which is not subsequently made this does not require a means assessment to be carried out. If you go on to provide further advice under this matter there is no further requirement to carry out a means assessment.

### **Level 1 MHRT Fee    MH 12.18 – 12.19**

- This fee covers initial advice where the client is eligible to apply for, and subsequently makes, (or has already made), an application to the MHRT. All work at this level should be claimed at Legal Help rates.
- If the application has been made prior to you receiving instructions, the 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.

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**Level 2 MHRT Fee MH 12.20 – 12.23**

- The level 2 fee is payable once the 30 minute requirement for further work has been met. Please see Rule 5.9 in Part A of the Civil Specification and Rule 12.21 of the Mental Health Specification.
- The 30 minutes qualifying work should be claimed as part of the level 2 fee. Any work undertaken under the level 2 fee should be claimed at CLR rates

**Level 3 MHRT Fee MH 12.24**

- The level 3 fee is payable for representing the client before the MHRT and includes any aftercare work.
- The Level 3 fee will become payable for the hearing where a final decision is reached. “Decision” refers to a disposal at the point at which it becomes clear that there will be no further tribunal involvement relating to a period of detention.
- If an MHRT has adjourned on one or more occasions in circumstances which would entitle you to claim an Adjourned Hearing Fee, but no “final” hearing ever takes place, you may claim an MHRT level 3 fee in substitution for the last Adjourned Hearing Fee (Mental Health Specification 12.27).

**The Adjourned Hearing Fee MH 12.25 – 12.27**

- The adjourned hearing fee is payable in respect of adjourned Tribunal hearings only. It does not apply to any adjourned Hospital Managers meetings.
- You must have attended the place of hearing and demonstrate on file that you could not reasonably have known about the cancellation before making the journey to the place of the hearing (see Mental Health Specification 12.25). If the tribunal is adjourned at your request you must demonstrate that you could not have known about the necessity for an adjournment before travelling to the tribunal and that it could therefore not have been requested prior to the tribunal convening.
- The following are examples of where the adjourned hearing fee may be claimed:
  - No hearing can take place (i.e. it is cancelled) because some Tribunal members are not present.

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- The hearing is adjourned for other reasons outside of the provider's control (for example, medical reports which should have been available are not available).
  - The provider has to ask for an adjournment in order to act in the best interests of the client (for example because of the patient's presentation on the day).

### **Remote Travel Payments MH 12.28 – 12.33**

- The Commission is committed to providing access for all clients entitled to assistance under the Mental Health SQM category. You are encouraged to inform the Mental Health Lead at your Regional Office if you believe that you have identified a new location, which has insufficient access.

### **Exceptional Case Provisions MH 12.34 – 12.38**

- When calculating whether the case is exceptional travel costs, like all other profit costs, are included within the fees, and should be included in the profit costs. Travel costs covers travel time at hourly rates. Mileage and train fares are examples of disbursements and are therefore paid **outside** the fees.

### **Prior Authority for Counsel MH 12.40 – 12.44**

- You may not claim counsel CLR rates for work carried out by in-house counsel or solicitor advocates.
- You may not obtain prior authority for higher rates for in-house counsel or for solicitor advocates (whether in-house or external).

### **Financial Eligibility and Funding Code Criteria (incl form completion)**

#### **MH12.46 – 12.50**

- Matters conducted under Legal Help (eg those attracting the L1 non-MHRT Fee) will ordinarily require you to carry out a means assessment. However, if advice has been provided on an application to the tribunal at the outset and such an application is a realistic possibility, provided that this is clearly recorded on the file the means assessment need not be carried out. For the avoidance of doubt, if the client is not eligible to apply for a tribunal at the time of the initial attendance a means assessment must always be carried out.

- Means assessments must be carried out even where the client lacks capacity. This is because Legal Aid remains fundamentally a means tested service and as such, other than in certain specified matters, may only be provided to those who have been assessed as being eligible according to the relevant regulations.
- In cases where a means assessment has been carried out this must be done in accordance with the relevant Rules & Guidance and in particular evidence of eligibility must be obtained and retained on file.

Although the Contract requires that evidence is obtained at the outset in practice no reduction would be made if evidence was obtained at any time in the case as long as it demonstrates that the client was eligible at the time the Legal Help form was signed. It should be noted however that 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.

In circumstances where evidence is not obtained the following approach will be taken:

- 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.
- 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.
- 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.
- There is a combined Legal Help & CLR Form Version 2, which became mandatory from April 2008 for use only in Mental Health matters. The form contains boxes to denote whether a non-MHRT matter is means tested or not and the relevant box should be marked.
- If you travel to see a client to take initial instructions but they then refuse to see you and the forms are not completed then no Fee may be claimed.

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- If a non-MHRT issue subsequently becomes part of a matter attracting MHRT Fees only the original LH/CLR form is needed.
  - The CMRF client demography information is not mandatory however it is extremely useful in monitoring equitable access to services and as such we encourage suppliers to assist us by completing this wherever possible.

### **Controlled Work Matter Start Boundaries MH 12.51 – 12.63**

- Where there are more than 1 set of tribunal proceedings running concurrently within an eligibility period which can result in separate hearings for example where a patient and a nearest relative have separate applications or there is a referral and a patient application, then a different set of MHRT fees can be claimed for each individual proceeding.
- The term 'complaint arising out of the client's status as a patient' [para 12.15(b) of the Mental Health Specification] refers to their current status as a detained patient and therefore relates to complaints regarding issues or incidents, which occur in the current period of eligibility.

Accordingly, where the matter relates to a complaint regarding issues from a previous period of eligibility the non-MHRT costs will not roll-up into the MHRT Fees in the current period.

If the complaint does relate to a period in which MHRT Fees are also payable and as such is rolled-up, the matter, including the tribunal costs, should not be closed and billed until the complaint matter has been closed.

- If a tribunal is concluded and the relevant MHRT Fees paid any issues, which subsequently arise within the same period of eligibility, will not generally justify a new matter start. A further non MHRT Fee will not become payable unless any issues constitute separate and distinct legal issues. Examples may include matters arising under the Mental Capacity Act or potential JR of the hospital (as opposed to the tribunal).
- Where a tribunal reconvenes, as opposed to the constitution of a new tribunal due to a further application or referral, this does not constitute a new matter.
- If a client remains as a voluntary patient after the removal of a section a separate non-MHRT matter may be opened if a new legal issue arises requiring advice and assistance.

### **Community Treatment Orders.**



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The imposition of a CTO effectively gives rise to a new "section type"/ period of eligibility and a new set of MHRT fees may be claimed each time a new eligibility period is entered (ie first 6 months, second 6 months and thereafter annually).

The costs of any Manager's hearing including the CTO must be rolled up into any MHRT fees also claimed within an eligibility period.

If a client is recalled to hospital, then their underlying section type becomes the most relevant aspect of their detention. This could bring up quite distinct legal issues and can be treated as a new period of eligibility. Therefore a new set of MHRT fees may be claimed for if you are so instructed, separate from any ongoing issues arising from the CTO

### **Conditional Discharges**

These 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-mhrt fees. If a tribunal is applied for then a separate set of MHRT 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 MHRT fees may be claimed if appropriate

### **Applications by the Nearest Relative**

Applications brought by an NR before the MHRT under section 66 (1)(g) of the MHA 1983 (concerning a bar on the NR's order to discharge a patient) - or other such applications - should be treated as separate from a patient's own application to the MHRT. In these cases a new matter may be opened as and when the NR 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 NRs MHRT hearing. Funding for legal representation is available in these situations and is paid in accordance with the appropriate MHRT fees as a further separate matter (distinct from both the NR'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 12.68 of the Mental Health Specification and, further, 4.11 of the Funding Code Decision Making Guidance. Considerations that will dictate your decision to open a new matter will include the following:

- 1.) Whether the patient is presenting a new and significant legal argument to the Tribunal which would not otherwise be advanced;
- 2.) Whether there is a conflict of interest between the patient and NR; 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.

**The following examples DO NOT constitute separate matters:**

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-MHRT fee rolling up into the MHRT fees.

Where the client is a patient, a managers hearing which is convened to consider an appeal against a barring order is not considered to be a distinct and separate legal issue if it arises during the same period of eligibility in which the client has requested assistance with a MHRT.

A forensic client is advised and represented at MHRT, and is not discharged. The client wishes the provider to attend a subsequent CPA meeting falling within the same period of eligibility. The advice given and support provided at the CPA meeting relate in part to issues, which may be relevant to a future Tribunal, or period of eligibility. This is not a 'separate and distinct' matter and should be rolled up with the MHRT fees being claimed within the existing period of eligibility

**The following examples DO constitute separate matters:**

A Tribunal decides not to discharge a patient and the section is subsequently renewed. The patient then enters a new period in which they are eligible for a Tribunal hearing. If a new application is immediately made two matters are claimable because a NMS can be started once a client enters a new period of eligibility. See MH12.55

Exceptionally a client may be transferred twice within same period of eligibility, e.g. a client has a Tribunal hearing booked in Bristol hospital. They are then transferred to London and the case transfers to another provider at the same time. The client is transferred back to Bristol (and to the original provider) before the Tribunal hearing has been re-arranged, and within same period of eligibility. The original file will have been closed upon the first transfer/referral. This example would constitute three separate matters.

**Granting an Application for Controlled Legal Representation**

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- CLR is not available for a nearest relative to be represented at a tribunal unless the tribunal is to consider an application made by the nearest relative.

*For all queries relating to Mental Health cost assessment or the Mental Health Specification you should contact the Mental Health Unit. For all other queries you should contact your regional Mental Health Lead who is based at your Regional Office.*

## **Guidance on Public Funding Certificate applications including Devolved Powers**

### **Emergency Representation**

The majority of certificated matters received are for proceedings in relation to judicial review, court of protection, and habeas corpus. It is important to establish in what circumstances, and at what point the use of devolved powers is appropriate. The guidance for emergency representation is contained in section 12, volume 3 of the LSC Manual, Decision Making Guidance. I have selected the points I think are most relevant to the specific categories of application and whilst some of the information is paraphrased I have provided the relevant funding code reference details where appropriate. The basic principles underpinning the use of devolved powers are that work must be imminent, the case must have sufficient merit and the client must be financially eligible.

Consistent, inappropriate use of devolved powers may result in the removal of devolved powers from your firm and would apply across all categories 3C-095.

### **Informing the client**

It is important that where possible the potential consequences of issuing an emergency certificate are explained to a client. If a client fails to co-operate with request for further information or fails to accept an offer on a substantive certificate then this will result in the revocation of the certificate and will render the client liable for all the costs incurred under the emergency certificate. Whilst it is appreciated that clients with mental health issues may not be entirely receptive to this information, it is vital nonetheless that an attempt is made to provide it and you may wish to consider whether the independent advocate could assist in this respect **3C – 088 (9)**.

### **Wider Public Interest**

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Devolved powers should not be used on the basis that it is considered the case has a significant wider public interest. Decisions with respect to wider public interest will be taken by the commission and where appropriate will be referred to the Public Interest Advisory body **3C – 088 (11)**.

### **Urgency/Interest of Justice**

There are specific circumstances where the use of devolved powers will be more likely to be appropriate. These are when seeking interim injunctive relief, representation at an imminent hearing or where a limitation is due to expire.

The use of devolved powers will be deemed inappropriate if the work considered imminent can in fact wait until the issue of a substantive certificate **3C – 089**.

The Mental Health Unit has provided a commitment to process applications within one week of receipt though in practice it is likely that applications will be processed within 48 hours. Imperative to the success of such a commitment is that applications are submitted directly to the unit. It is advised that all application should be submitted using the cover-sheet marked "URGENT, for the attention of the Mental Health Unit ", including any hand delivered documents.

When devolved powers have been exercised the LSC must receive the substantive application within five working days of the date that you exercised devolved powers **3C – 091 (20)**. Applications received outside this period without sufficient explanation will be date limited to the date the application is processed. This will only materially affect applications with full means assessments to the extent that from the date limit, the emergency certificate will provide no further cover until the substantive certificate has been issued. This should be borne in mind when a client is requested to accept an offer of funding, or where further information is requested in order to complete the means assessment.

In practice, an emergency certificate should not be required in the Mental Health category unless the work concerned must be completed before a substantive certificate could be issued. Circumstances where devolved powers may be appropriate are limited in the mental health category. As previously identified such circumstances would be when seeking injunctive relief, issuing protective proceedings or urgent representation.

It should also be noted that emergency certificates should be appropriately limited. In the examples provided appropriate limitations would be obtaining an interim injunction (CV026), paper application (JR004) and an initial hearing respectively (CV001).

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## Interest of Justice

In circumstances where representation is urgent the interest of justice criteria are unlikely to be satisfied if it cannot be demonstrated that there is a risk to life, liberty, personal safety or roof over the client's head; or the delay will cause miscarriage of justice, unreasonable hardship, or irretrievable problems handling the case. As such it must be that the consequences of not completing the work urgently are serious **3C – 089 (6)**.

## Prospects of Success

Prospects of success should consider the merits of the application to final disposal and not just the work to be completed under the emergency **3C – 090**.

## Scope Limitations

Appropriate limitations must be applied to an emergency certificate. For example, where a limitation is due to expire then an emergency certificate would be limited to the issue of the protective proceedings. An emergency certificate must not cover more work than that which must be completed immediately.

Scope limitations must always be specific and cannot be open ended. Leaving an emergency certificate open ended would contradict the purpose of an emergency certificate **3C – 091**.

Devolved powers should not be exercised as a matter of course, and should be reserved for situations demonstrating genuine urgency. Where a fee earner has concerns about exercising devolved powers, whether those concerns relate to means or merits, then guidance can be sought directly from the Mental Health Unit. Alternatively, it is possible to submit form CLS app6 by facsimile and both means and merits will be assessed as a matter of urgency.

## Tribunal Court and Enforcement Act.

### First Tier.

When applying to the first tier for a client where you have provided representation at the originating MHRT hearing you can claim;

- Adjourment fee if application has a successful outcome (where the tribunal sets aside its decision) (Spec 12.74) OR
- Exceptional case claim can be made if the additional case costs of the first tier work billed at the hourly rate makes the case qualify (Level 1, 2

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and 3 combined) - adjourned hearing fee cannot be claimed in addition.(Spec 12.75/76)

- Costs incurred should be claimed at CLR rates.
- If another party applies for a review (i.e. the hospital) and you are instructed by your client you are entitled to an adjourned hearing fee regardless of outcome, or you can claim the case as exceptional should it qualify as such.

## **Upper Tier.**

All work at upper tier is completed under public funding certificate and is therefore merits and means tested and granted upon application to the Mental Health Unit.

*In respect of the merits criteria to be applied, please refer to the guidance in Chapter 22 of the Funding Code Decision Making Guidance (LSC Manual Volume 3 Section C) and Chapter 7 of the General Funding Code (LSC manual Volume 3 section A)*

The Standard Wording to use when applying for a public funding certificate to appeal to the Upper Tribunal is;

*MH023 – Upper Tribunal Appeal – to be represented on an appeal or review to the Upper Tribunal against a decision of the First-Tier Tribunal*

- If a certificate is issued to pursue a review or appeal in the Upper Tier, from a decision arising from the First Tier, all work at the lower and upper tier may be claimed (including retrospectively) on that certificate but must not also be included as part of any controlled work claim. (Please see MH Spec 12.79)