Legal Aid Agency

CONTRACT MANAGEMENT - Mental Health Guidance

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2	3 April 2017	Amended following discussions with the MHLA and Law Society on frequently asked questions
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Contents

1. Overview

This guidance is intended to provide clarification regarding common queries about the 2018 Standard Civil Contract (Contract) Mental Health Category Specific Rules. It is based on the most frequently asked questions the Legal Aid Agency (LAA) has received since the implementation of the Standard Fee Scheme in 2008. The guidance is advisory only and should be read alongside the Contract, which continues to represent the "entire agreement and understanding between parties in connection with its subject matter" (see Clause 30.1 of the Contract Standard Terms.)

The provisions in the Mental Health Category Specific Rules are designed to be as clear and unambiguous 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 Contract that cover every type of mental health case. This document addresses concerns about decision-making by providing additional clarification on a number of key areas. However, the circumstances of every case are different and there may be a variety of factors that are relevant to individual decisions.

Providers are advised to be careful to fully evidence decisions on file in order to assist LAA to undertake audits, assessments and file reviews. 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 Mental Health Unit (MHU) for further guidance where a specific issue is not covered by this document: they may be able to provide advice on how the specific circumstances of a case influence the approach that should be taken.

Providers should be particularly mindful of the LAA's Civil Costs Assessment Guidance. That document sets out the general approach to assessment that will be taken by the LAA and providers must have regard to its contents when submitting a claim (see Clause 14.4 of the Contract Standard Terms).

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 Mental Health non-Tribunal fee without undertaking a means assessment (see also paragraph 9.34 of the Category Specific Rules):

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[1] (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, including the reason why an application was not lodged. 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.

Paragraph 9.35 of the Category Specific Rules makes it clear that the provision of general legal advice on a client's right to apply to the MHT would not be sufficient to allow a case that would otherwise be means-tested to be undertaken without a means test.

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. Regulation 22(4) of the *Civil Legal Aid (Procedure) Regulations 2013* permits a third party to make an application for Controlled Work on behalf of a client that lacks capacity. Regulation 22(5)

[1] 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.

indicates the “proposed provider” cannot be that person (noting, however, the rules in the paragraph below setting out when a Supervisor can sign the application form).

As stated at 9.59 of the Category Specific Rules: ‘***exceptionally**, where it is not appropriate to use any of the possibilities for the application for Controlled Work to be made on the Client’s behalf and the Client will not sign the application due to their condition, then you may annotate the Application Form to that effect and a Supervisor may sign it’.*

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 section 4 below), since only a reasonable attempt at gaining evidence of means is required. Providers should also note that ‘capital passporting’ was abolished on 1 April 2013 and all means assessments must therefore include an assessment of client capital.

3. Starting New MHT Matters

The Category Specific Rules set out the rules for commencing new matter starts for MHT cases. The boundaries of each matter start are aligned with the client’s “Period of Eligibility”. This period begins when the client becomes eligible to apply to the tribunal and ends at the point at which the client has a further right to apply (e.g. because their section is renewed under section 20 of the Mental Health Act 1983). In general, all work arising in this “Period of Eligibility” will roll-up into the single matter (see section 7 below).

There are, however, two circumstances where there may be two or more MHT cases in a single “Period of Eligibility”:

1. Firstly, because there are multiple MHT proceedings in that “Period of Eligibility” (e.g. because separate advice is required on an automatic referral by the hospital managers as well as an application by the client); or,

2. The client has withdrawn their application to the MHT, and, in the same “Period of Eligibility”, makes a further application to the MHT, in which case

there are specific criteria that need to be met before a new matter can be started (see below).

Paragraph 9.43 of the Category Specific Rules confirms that once the client has a further statutory entitlement to an MHT a new matter start must be opened for any subsequent new work that arises in relation to that client. This precludes, in particular, a series of MHT applications being dealt with under a single matter start. It does not, however, mean that the existing matter should come to end immediately when the new right to a tribunal arises. Any issues that have already arisen in the Period of Eligibility should be completed on the existing matter start, in particular:

1. Work on an application to the MHT that has yet to be concluded (even where the section under which the client is being detained have may have changed from section 2 to section 3); and
2. Work on a Hospital Managers' Review Hearing convened to consider the renewal of detention under section 20 and 20A of the Mental Health Act 1983 (even where this actually takes place in the next Period of Eligibility).

An example of the way the Matter Start rules operate is given in the contract:

> *A Client is detained under section 2 of the Mental Health Act 1983. A Matter Start is used to make an application to the tribunal. The Client is not discharged and then transferred to a section 3 prior to an MHT taking place.*
>
> *If the client was transferred on to the section 3 before the section 2 tribunal took place and the panel elect to proceed with the Client's original application (albeit under the section 3 criteria), then this will not create a new Matter Start. This is because the client already has a matter start open to deal with the original tribunal application and furthermore has not lost the right to submit a further application under section 3. Any such application must be subject to a new Matter Start.*

Withdrawals

As per paragraph 9.41(b) of the Category Specific Rules, the LAA may allow more than one MHT Matter Start to be opened during a Period of Eligibility where the client withdraws and reapplies within the same period, providing that the following conditions are met:

1. The withdrawal and subsequent re-application were carried out in good faith and were made with the Client's consent and/or in their best interests; and,

2. The reasons for both the withdrawal and reapplication are clearly noted on the case files, including details of any discussion with the Client on this decision.

The LAA will expect to see detailed reasons on the case file setting out why it was necessary to withdraw the original application at that particular time and why the circumstances of the case subsequently changed such that a further application was required. This should refer back to any relevant attendance note(s) setting out discussions with the Client on this point prior to the withdrawal, setting out the contents of the advice given. Copies of the application to the MHT requesting a withdrawal and the MHT's subsequent consent should also be clearly highlighted on this file as part of the justification for the new matter.

The LAA will closely scrutinise claims where the reapplication occurs shortly after the withdrawal or there is very little work on the second file, in particular where this represents a pattern of behaviour by the provider. In these circumstances, providers should (in addition to the guidance above) make sure that the minimum requirements for triggering the fee levels being claimed have been met and the bill does not include work claimed on a previous file. Providers are also reminded of their duty under Clause 2 of the Standard Terms to act in good faith and to work together with us in cooperation to achieve value for money.

Subject to the above, 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 (Mental Health Proceedings) 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 (Mental Health Proceedings) Fee for it (see paragraph 9.87 of the Category Specific Rules).

4. Evidence of Means

Paragraph 3.24 of the Specification states that "*You may assess the prospective Client's means without the accompanying evidence where:*

> *(a) it is not practicable to obtain it before commencing the Controlled Work;*
>
> *(b) pre signature telephone advice is given; or*
>
> *(c) exceptionally, the personal circumstances of the Client (such as the Client's age, mental disability or homelessness) make it impracticable for the evidence to be supplied at any point in the case.*

The document ‘Guide to Determining Financial Eligibility for Controlled Work and Family Mediation April 2013’ (which can be found on the LAA website) provides the following clarification on this provision:

> *’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.’*

The following information (as originally set out in Point of Principle 55) adds to the rules in the legal aid contracts, legislation and guidance::

> *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 3.25 of 2018 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.*

5. Level 1 and Level 2 (Mental Health Proceedings) Fees

Work falling within Level 1 and Level 2

Paragraph 9.77 of the Category Specific Rules states that the Level 1 (Mental Health Proceedings) Fee covers initial advice in any case where the Client is eligible and submits or has submitted an application to the MHT or the Client's case has been referred to the MHT. This fee covers work done in making an initial visit to the Client, including all advice and assistance provided to the Client at the first visit, and follow-up work such as:

1. Preparing and sending initial letters of instruction;
2. Making the application to the MHT if none has been made; and/or,

3. Applying to withdraw an existing MHT application if this is agreed as part of the initial advice (e.g. at the first attendance or as part of immediate follow-up work).

The Contract envisages that all work carried out by the provider on their first visit to the client will be covered by the Level 1 (Mental Health Proceedings) Fee. However, in some matters it will be necessary or beneficial for the provider to stay at the hospital and undertake work that would ordinarily be caught by the Level 2 (Mental Health Proceedings) Fee. The most common example of this is where the provider is only instructed on the same day as the tribunal hearing is due to take place.

In these circumstances, the LAA may allow time spent on the initial visit to the client to be included with the Level 2 (Mental Health Proceedings) Fee so long as the application or reference has already been made. The provider should clearly note on file any work conducted during the initial visit that they wish to be assessed in this way. The LAA will accept that the work falls within the Level 2 (Mental Health Proceedings) Fee where it is clear that in the absence of the factors that led to work being carried out onsite the work would ordinarily be undertaken from the office or on a subsequent visit to the client at a later date.

The Level 2 (Mental Health Proceedings) Fee begins once the initial advice has been given and an application has been submitted to the MHT (or a reference has been made). It includes all negotiation with third parties (such as doctors and hospital managers) and all preparation for the MHT hearing. Any legitimate Contract Work carried out following completion of work claimable within the Level 1 (Mental Health Proceedings) Fee would be included in the Level 2 (Mental Health Proceedings) Fee.

For new cases started on or after 1 September 2018, the Contract now specifically states that the Level 1 (Mental Health Proceedings) Fee covers any work on applying to withdraw an MHT application where this action was agreed at the first attendance or as part of the immediate follow-up work, and, therefore, such work cannot therefore fall under the Level 2 (Mental Health Proceedings) Fee. This rule is intended to capture cases where you are instructed by a client who has already made an application to the MHT and it is determined at the first stage of the case to withdraw that application.

It should be noted that this rule does not preclude the following work on a withdrawal being claimed as part of the Level 2 (Mental Health Proceedings) Fee:

1. Any work where it is initially determined to continue with the MHT application but it is later decided a withdrawal is in the Client's best interests (unless it is clear that this delay was simply to avoid the general rule); and,

2. Any work after the initial application for a withdrawal has been made where the MHT refuses in the first instance to accept that request and further representations are required to facilitate the withdrawal.

It is important to note that paragraph 9.44 of the Category Specific Rules highlights that advice on aftercare services is covered by the fee(s) payable at the time the MHT hearing takes place or the client's case is otherwise concluded. If, for example, the client is discharged before the MHT hearing any advice to the client required to close the matter would form part of Level 1 (Mental Health Proceeding) Fee or the Level 2 (Mental Health Proceeding) Fee, depending on the stage the case has reached at the point of discharge.

Triggering the Level 2 (Mental Health Proceedings) Fee

Paragraph 9.80 of the Category Specific Rules states that the Level 2 (Mental Health Proceedings) Fee can only be claimed where "substantial legal work has been carried out on the Client's application or reference to the MHT or any Non-MHT issues that are payable under this fee." Paragraph 9.81 goes on to clarify that "substantial legal work" means one of the following:

1. An additional 30 minutes of preparation or advice; OR
2. separate communication with other parties on legal issues.

Accordingly, there are two ways that the Level 2 (Mental Health Proceedings) Fee can be triggered. Firstly, the provider can have carried out separate communication with other parties on legal issues (which would not include purely administrative or non-legal matters but would require substantive legal issues to be addressed). Otherwise, the provider must carry out 30 minutes of "preparation or advice" at Level 2 before the fee can be claimed.

Any legitimate Contract Work carried out after initial advice has been given and an application to the tribunal has been issued can be used to meet this threshold, including routine letters and telephone calls. As above, however, this does not include letters that are to be billed under the Level 1 (Mental Health Proceedings) Fee (e.g. instructions, advice and action letters, cover letters to the tribunal application etc.)

The 30 minutes threshold is to be calculated according to the *actual time* spent on any Contract Work even where that work is remunerated on a per item basis. In other words, the LAA will take into account the actual number of minutes taken for a fee earner to prepare a routine letter or make a routine phone call when auditing against this requirement. The LAA's starting point will be that a routine letter/call is usually equated to six minutes (1 unit) for billing purposes. In many standard letters/calls, however, it may be clear that more or less time than this was required to complete the work. For example, where a client's details have just been added to a simple pro forma this is unlikely to have taken six minutes to produce.

The LAA will assess compliance against the 30 minutes threshold in paragraph 9.81 by looking at the work billed as part of the Level 2 (Mental Health Proceedings) Fee as a whole. Assuming that the work done was permissible on usual cost assessment principles, the test will be whether it is reasonable from the evidence presented on file to assume that 30 minutes threshold has been met. In claims where the work claimed under the Level 2 (Mental Health Proceedings) Fee only just exceeds this threshold, providers should set out the actual time taken to complete each item and justification for the time claimed.

Rates payable

For billing purposes all work done under the Mental Health (non-Tribunal) Fee or the Level 1 (Mental Health Proceedings) Fee is carried out under Legal Help and as such Legal Help rates in the Remuneration Regulations should be used when calculating costs. All work done under the Level 2 and Level 3 (Mental Health Proceedings) Fees, including any Contract Work used to trigger Level 2 (as above), is carried out under CLR and the Hourly Rates for CLR in the Remuneration Regulations should be used accordingly. This demarcation is set out at paragraph 9.95 of the Category Specific Rules.

6. 'Rolling Up' Matters

General

The contract rules in relation to Controlled Work in Mental Health are designed to make sure that issues arising out the same "Period of Eligibility" are dealt with under a single Matter Start. Paragraph 9.73 of the Category Specific Rules states that where an MHT application is applied for in respect of a Client, or if there is an automatic referral to the MHT, the MHT Fees payable in that case will also cover all Non-MHT legal issues arising out of related to the Client's status as a patient and started during the same Period of Eligibility.

This paragraph also states that the boundaries to be used when determining the start and finish of a of a case are determined by the "Period of Eligibility", which is defined at paragraph 9.1 as "the period during which the Client is eligible to apply the MHT under the applicable provisions in Part V of the Mental Health Act 1983 relating to their particular circumstances." In other words, these boundaries are defined with reference to the client's right to apply to the MHT even where the MHT work arises because of an automatic referral.

Automatic Referrals

Automatic referrals will be treated no differently to cases where the client applied for the tribunal themselves. All Non-MHT work arising within the period during which the client is entitled to apply to the tribunal will roll up into the Mental Health Proceedings Fees payable for any automatic referral that is made within that period[2]. However, providers should note that subparagraph 9.41(a) of the Category Specific Rules states that where "there is more than one set of MHT proceedings within the same Period of Eligibility separate Mental Health Proceedings Fees can be claimed for each set of proceedings."

Therefore, if the automatic referral is the only set of MHT proceedings in the Period of Eligibility then only one set of Mental Health Proceedings Fees should be claimed for work on the referral and all non-MHT work arising out of that Period of Eligibility will roll-up with those fees. If, on the other hand, there are two sets of MHT proceedings within the Period of Eligibility (e.g. the client makes an application and there is an automatic referral) then two sets of fees will be payable. Providers can choose whether or not to bill non-MHT work on either of the MHT files or across both.

Where multiple sets of Mental Health Proceedings fees are being claimed for multiple MHT proceedings arising within a single Period of Eligibility each fee level needs to be justified by work unique to that file. In other words, providers should not duplicate the work being claimed across a number of different files. In particular, where the MHT consolidates two sets of proceedings into one hearing then only one Level 3 (Mental Health Proceedings) Fee can be claimed for the act of representing the client at that hearing.

Nearest Relatives

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 subsequently make their own application to the MHT, the Non-MHT work will be rolled up into the Mental Health Proceedings fees.

Hospital Managers' Renewal Meeting

As per subparagraph 9.43(b) of the Category Specific Rules, where a Manager's Renewal Meeting is convened under Section 20 or 20A of the Mental Health Act 1983, this will 'roll back' into the period to which the Responsible Clinician'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

[2] The date that the automatic reference is "made" is the date the Client's case is referred to MHT by the hospital managers or the Secretary of State.

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.

Deferred Conditional Discharges

The Category Specific Rules clarify the position for deferred conditional discharges at paragraph 9.75. 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. As in other circumstances, aftercare advice does not constitute a separate legal issue and Mental Health Proceedings files should not be billed until all such issues are dealt with.

Conditional Discharges

The Category Specific Rules sets out the position for conditional discharges at paragraph 9.76. 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-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 Period of Eligibility commences and a new set of Mental Health Proceedings fees must be claimed for any new application to the tribunal.

7. Applications by a Nearest Relative

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 when the Nearest Relative is eligible to apply to the tribunal, and will be remunerated in accordance with the provisions in paragraph 9.39 of the Category Specific Rules.

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 9.52 of the Category Specific Rules and the "Sufficient Benefit Test" in the Civil Legal Aid (Merits Criteria) 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.

As above, 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 Start 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 Matter Starts for the two different clients.

8. The Court of Protection

All applications for legal representation before the Court of Protection will be dealt with by the Legal Aid Agency's Mental Health Unit, which is based in the Liverpool office. This also includes cases appealing from that Court to the Court of Appeal or Supreme Court

Cases before the Court of Protection are generally subject to the usual financial eligibility rules for civil legal aid 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.

Initial advice on issues under the Mental Capacity Act 2005 can be claimed using the Mental Health non Tribunal Fee (as defined at Paragraph 9.66 of the Category Specific Rules). This includes advice and assistance on applications under the Mental Capacity Act 2005 to the Court of Protection where it would not be possible or appropriate for these services to be funded via Legal Representation.

Representation at the Court of Protection is not covered under the Mental Health Fee Scheme. Providers will need to make an application for Legal Representation (as Licensed Work) which will be paid for under the applicable Hourly Rate. Where a Client has an open Non-MHT matter in relation to the Mental Capacity Act 2005, but the Client is then sectioned or otherwise requires MHT advice, a separate MHT matter may be opened concurrently provided the relevant merits criteria are satisfied.

9. Work in Prisons

Section 8(3) of LASPO states that "'civil legal services' means any legal services other than the types of advice, assistance and representation that are required to be made available under sections 13, 15 and 16 (criminal legal aid)." The effect of this provision is that any work that stands to be funded as criminal legal aid cannot be funded under the civil legal aid scheme even where the proceedings are ostensibly described in Part 1 of Schedule 1 to LASPO. Mental Health providers should take care not to provide advice on a matter under Part III of the Mental Health Act 1983 that ought to be funded as criminal legal aid.

For example, where a hospital order is made under section 37 of the Mental Health Act 1983 any initial appeal against the terms of that order to the criminal courts

would constitute an appeal against a sentence and would fall under criminal legal aid. This can be contrasted with an application to the Mental Health Tribunal in relation to that detention as permitted under Part V of the Mental Health Act 1983, which falls exclusively within the Mental Health category of law and cannot be done by Crime providers.

For the avoidance of doubt, advice and assistance regarding Sections 47 and 48 of the Mental Health Act (i.e. transfer of sentenced and un-sentenced 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 transfer 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.

10. Designated Accredited Representatives

Paragraph 9.9 of the Category Specific Rules states that Providers must have a document identifying individuals you have nominated as "Designated Accredited Representatives" who are used by them to provide advocacy before the Mental Health Tribunal.

There are two qualifying requirements that must be met in order for an individual to qualify as a Designated Accredited Representative:

1. They must be members of the Law Society's Mental Health Accreditation Scheme; and,

2. The must undertake a minimum of 14 hours' Contract Work for you per week in the Mental Health Category of Law.

In terms of the second requirement, "Contract Work" means any work carried out by virtue of the Contract and is not limited to specific types of activity such as preparation or advocacy. The 14 hours requirement will be measured on a rolling monthly basis to accommodate different working patterns.

Providers must use Designated Accredited Representatives for a minimum of 50% of the MHT hearings that are carried out over any Schedule period. The LAA will be monitoring this requirement via information submitted on CWA and providers will be reminded of the requirement at various points throughout the schedule period if it appears likely the target may be missed.

Providers are asked to keep appropriate records to demonstrate on request that an individual they have nominated as a Designated Accredited Representative meets

the qualifying requirements and have done so for the whole of the period they have been on the list.

These records should be sufficient to show that there can be no reasonable doubt that the requirements have been met, in particular as far as the need to demonstrate that an individual has worked for 14 hours per week on a rolling basis is concerned. Designated Accredited Representatives should be included on a provider's organogram, even where they are not formally employed by the firm.

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