

2018 Standard Civil Contract

**Category Specific Rules:
Mental Health**

Section 9 Mental Health Specification

Contents

Part A – Preliminary

- 9.1 Interpretation
- 9.2 Scope
- 9.3 Form of civil legal services.

Part B - Mental Health Service Standards

- 9.4 – 9.5 Presence
- 9.6 Further Requirements
- 9.7 *Requirements on Performing Contract Work for proceedings under the Mental Capacity Act*
- 9.8 – 9.12 Advocacy Before the MHT
- 9.13 Use of Matter Starts
- 9.14 Referral Arrangements Specific to the Mental Health Category
- 9.15 – 9.17 Supervisor’s Legal Competence Standard
- 9.18 – 9.23 *Supervisor’s Legal Competence Standard - MHT*
- 9.24 – 9.31 *Supervisor’s Legal Competence Standard - Mental Health and Mental Capacity*

Part C - Carrying Out Mental Health Work

- 9.32 – 9.38 Funding Criteria
- 9.39 – 9.44 Matter Start Rules
- 9.45 – 9.47 *Mental Capacity Act 2005 Cases*
- 9.48 *Informal Patients/non-detained Clients*
- 9.49 *Matter Starts in other Categories of Law*
- 9.50 – 9.57 Controlled Legal Representation:
- 9.50 – 9.53 *When may you provide CLR?*
- 9.54 – 9.57 *Making a Determination that an individual qualifies for CLR*
- 9.58 Signature on Application Forms for Legal Help and CLR
- 9.59 – 9.64 Prior Authority for Counsel

Part D - Remuneration for Mental Health Work

- 9.65– 9.99 The Mental Health Fee Scheme:
- 9.70 – 9.76 *Mental Health – Non Tribunal Fee*
- 9.77– 9.78 *MHT Fee Level 1 (Mental Health Proceedings)– Initial Advice*
- 9.79 – 9.83 *MHT Fee Level 2 (Mental Health Proceedings)– Negotiation & Preparation*
- 9.84 *MHT Fee Level 3 (Mental Health Proceedings)– Representation before the MHT*
- 9.85 – 9.87 *The Adjourned Hearing Fee*
- 9.88 – 9.93 *Remote Travel payments*
- 9.94 – 9.98 *Escape Fee Cases*
- 9.99 *Transfer of Provider*
- 9.100 Payment for Help at Court for Victims
- 9.101 – 9.104 Review of Decisions of the MHT

PART A - PRELIMINARY

Interpretation

9.1 In this Mental Health Specification the following expressions have the following meanings:

“2007 Act” means the Tribunals, Courts and Enforcement Act 2007;

“Adjourned Hearing Fee” means as defined at Paragraphs 9.85 to 9.87 below;

“Alternative Arrangement” has the meaning given at Paragraph 9.5;

“Care Programme Approach Meeting” or “CPA Meeting” means a meeting convened to assess, review and plan a Client’s care needs under the Department of Health’s Care Programme Approach framework;

“Court of Protection” means the superior court of record established under section 45 of the Mental Capacity Act 2005;

“Hospital Manager’s Review Meeting” means a meeting convened by the relevant hospital managers to review whether or not a Client should be discharged from their detention or Community Treatment Order as described in Chapter 38 of the Mental Health Act 1983: Code of Practice and Chapter 27 of the Mental Health Act 1983: Code of Practice for Wales;

“Mental Health Act 1983: Code of Practice” means the codes of practice issued pursuant to section 118 of the Mental Health Act 1983;

“Mental Health Fees” means the fees payable under the Mental Health Fee Scheme set out at Paragraph 9.66 below;

“Mental Health (Proceedings) Fees” are the Level 1, 2 and / or 3 fees specified at Paragraph 9.66(b) below;

“Mental Health Tribunal” or “MHT” means the First Tier Tribunal (established under the Tribunals Courts and Enforcement Act 2007) acting under any provision of the Mental Health Act 1983 or paragraphs 5 (2) of the Schedule to the Repatriation of Prisoners Act 1984, or the Mental Health Review Tribunal for Wales;

“Nearest Relative” means the individual described as such in section 26 of the Mental Health Act 1983 or any individual carrying out the same functions following an order made under section 29 of that Act;

“Non-MHT” means any legal issue within the Mental Health Category of Law that does not constitute advice, assistance or representation on an application to the MHT;

“Period of Eligibility” means the period during which the Client is eligible to apply to the MHT under the applicable provisions in Part V of the Mental Health Act 1983 relating to their particular circumstances;

“Professionals Meeting” means a meeting of professionals convened to assess, discuss and review the Client’s case other than a s117 Meeting or CPA Meeting;

“Remote Hearing” means a MHT hearing intended to dispose of a case that is conducted via live audio or video link;

“Remote Travel Payment” means as defined at Paragraph 9.88 to 9.93 below;

“Responsible Clinician” has the same meaning given to that term in either section 38 or section 55 of the Mental Health Act 1983 as relevant to the Client’s particular circumstances;

“S117 Meeting” means a meeting convened to discuss the provision of aftercare services under section 117 of the Mental Health Act 1983;

“Victim” means any person with the right to receive information about, or make representations in relation to, a Client’s case as provided for under the Domestic Violence, Crime and Victims Act 2004;

Scope

9.2 This Section applies to all services within the Mental Health Category, including advice in relation to the Mental Capacity Act 2005.

Form of civil legal services

9.3 The following forms of civil legal services are available in the Mental Health Category:

- (a) Legal Help is provided as Controlled Work;
- (b) Help at Court is provided as Controlled Work. Where Help at Court and Legal Help are provided in the same matter it should be counted as part of the same Matter Start. Help at Court may not be provided in relation to the MHT unless the Client is seeking representation as a Victim;
- (c) Legal Representation before a MHT is CLR and is provided as Controlled Work. CLR should be counted as part of the same Matter Start as Legal Help in the same matter. CLR may not be provided to a Victim before the MHT although Help at Court is available;

Legal Representation in any other proceedings in this Category of Work (including proceedings before the Upper Tribunal or in the Court of Protection) is provided as Licensed Work.

PART B - MENTAL HEALTH SERVICE STANDARDS

Presence

- 9.4 You must have a Permanent Presence, as defined in Paragraphs 2.34 to 2.35 of this Specification, in England and/or Wales. For the purposes of the Mental Health Category Permanent Presence does not include a requirement that the majority of Mental Health services are accessed at the Office.
- 9.5 In all Procurement Areas for which you have Schedule Authorisation you must have either a Permanent Presence or you must have Alternative Arrangements in the Procurement Area which meet the following requirements:
- (a) you must have an arrangement to use interview facilities at any of the following: another Provider's offices; another legal service provider's offices; the offices of a mental health third sector organisation; the offices of a non-mental health primary care service; commercially available rented office space. Home visits and/or arrangements to meet in a mental healthcare setting can be considered for individual Clients but must not be the sole means of meeting with Clients resident in the Procurement Area; and
 - (b) Clients must be able to contact you by telephone and speak to a person in your organisation every day from Monday to Friday (excluding Bank Holidays and religious holidays) during normal business hours to arrange appointments and, where appropriate, receive advice in emergency cases. This telephone number may be for an office outside the Procurement Area but the cost of the call to the Client must be below the cost of a Premium Rate Number. Out of hours, Clients who telephone must be able to access information about opening hours and who to contact in an emergency. You must provide appointments as reasonably requested by Clients and facilitated by the availability of your Caseworkers.

Further Requirements

- 9.6 You must comply with the following requirements:
- (a) you must employ an Authorised Litigator. For the avoidance of doubt, the requirements set out in Paragraph 2.8 of the Specification apply to the Mental Health Category, except that the requirement for the Authorised Litigator to work on at least a part time equivalent basis shall not apply;
 - (b) you must maintain a ratio of at least one full time equivalent Supervisor for every four full time equivalent Caseworkers in each Procurement Area for which you have a Schedule Authorisation; and
 - (c) in each Procurement Area in which you have a Schedule Authorisation you must employ for at least 17.5 hours per week excluding breaks an individual who meets the Mental Health Supervisor standard and who actively supervises your Mental Health work in the Procurement Area during business hours. Such person (or each such persons) must be

either a sole principal, one of your employees or a director of or partner in or member of your organisation (where you are a company, partnership (other than an LLP) or LLP respectively) and must at all times during their working hours (except as required for the proper performance of their role (such as attending court and/or Clients)) work from one of or any combination of your Offices. For the avoidance of doubt, the same individual may only act as a Mental Health Supervisor across a maximum of two Procurement Areas.

Requirements on Performing Contract Work for proceedings under the Mental Capacity Act 2005

- 9.7 We may specify further requirements for performing Contract Work in proceedings under the Mental Capacity Act 2005 in this Category at any point during the Contract Period and will give you at least twelve months' notice of the date any such requirements will take effect. Any such further requirements will be based on any relevant accreditation scheme introduced by the Law Society and will only be implemented following agreement with the Consultative Bodies.

Advocacy before the MHT

- 9.8 All advocates before the MHT except self-employed Counsel must be members of the Law Society's Mental Health Accreditation Scheme.
- 9.9 You are required to have a document identifying individuals you have nominated as "Designated Accredited Representatives" who are members of the Law Society's Mental Health Accreditation Scheme and used by you to provide advocacy before the MHT.
- 9.10 Individuals you identify as "Designated Accredited Representatives" for the purpose of Paragraph 9.9 must undertake a minimum of 14 hours' Contract Work in the Mental Health Category for you per week. The 14 hours requirement will be measured on a rolling monthly basis to accommodate different working patterns.
- 9.11 You must use Designated Accredited Representatives for a minimum of 50% of the MHT hearings that you carry out under this Contract over any Schedule period.
- 9.12 You may use Agents and / or Counsel who are not Designated Accredited Representatives for the remaining 50% of hearings in any Schedule period, provided:
- (a) you comply with rules on working with third parties in Clause 3 of the Standard Terms and Paragraphs 2.5 to 2.7 of this Specification;
 - (b) you ensure that any third party you appoint has the appropriate skills, experience and knowledge to advocate on behalf of Clients before the MHT; and,

- (c) you ensure that as far as possible any third party you appoint has familiarised themselves with the Client's case before they provide any advocacy.

Use of Matter Starts

- 9.13 In each Schedule period, at least 70% of the Matter Starts opened by you from your allocation of Matter Starts for a particular Procurement Area must be used for Clients physically located in that Procurement Area at the time the Matter Start is opened. You may use a maximum of 30% of the Matter Starts opened from your allocation of Matter Starts for a particular Procurement Area on Clients not physically located in that Procurement Area at the time the Matter Start is opened.

Referral Arrangements Specific to the Mental Health Category

- 9.14 You must have arrangements in operation so that you can appropriately signpost or refer a Client or potential Client to the following:
- (a) independent advocacy services;
 - (b) publicly funded providers of legal advice services in the Community Care, Welfare Benefits, and Housing and Debt Categories of Law;
 - (c) publicly funded providers of legal advice services in the Community Care and Mental Health Categories of Law that are experienced in conducting Contract Work for proceedings under the Mental Capacity Act 2005 in accordance with this Specification;
 - (d) Local Authority Social Services departments;
 - (e) mainstream Mental Health services; and
 - (f) non-advocacy service support such as user groups and mental health charities.

Supervisor's Legal Competence Standards

- 9.15 There are two Legal Competence Standards for Supervisors in this Category, namely:
- (a) the MHT Legal Competence Standard at Paragraphs 9.18 to 9.23 for Supervisors who predominately supervise Contract Work in relation to the Mental Health Act 1983; and,
 - (b) the Mental Health and Mental Capacity Legal Competence Standard at Paragraphs 9.24 to 9.31 for Supervisors who supervise a mixture of Contract Work under the Mental Health Act 1983 and Mental Capacity Act 2005.
- 9.16 You may only rely on an individual qualifying as a Supervisor via the Mental Health and Mental Capacity Act Legal Competence Standard at Paragraph

9.15(b) to fulfil the requirements of this Contract where that individual has been directly involved in the delivery of at least 10 new cases (whether delivered under this Contract, a Previous Contract or otherwise), during the 12 months immediately preceding the point that the individual wishes to qualify as a Supervisor, where the primary issue relates to a matter under the Mental Capacity Act 2005.

- 9.17 For the purposes of Paragraph 9.16, an individual will be “directly involved” in the delivery of the case if, for the duration of the case, they have either:
- (a) personally conducted a significant proportion of the casework on the case; or
 - (b) directly supervised an individual with conduct of the case.

Supervisor’s Legal Competence Standard – MHT

- 9.18 The Supervisor must hold current membership of either:
- (a) The Law Society Mental Health Accreditation Scheme; or
 - (b) For non-solicitor Supervisors only, be assessed by The Law Society as meeting the Mental Health Accreditation Scheme criteria.
- 9.19 The alternative at Paragraph 9.18(b) above is only available to Not For Profit Organisations.
- 9.20 The Supervisor must have provided representation on 10 MHT case files in the previous 12 months.

Where the practitioner is unable to demonstrate that they have represented a Client at 10 hearings they may, as an alternative, demonstrate the following in meeting the caseload requirement:

- (a) representation at 5 hearings; plus
 - (b) 5 further cases in which either the preparation for the hearing had been completed and can be demonstrated on file or where they have had conduct of a case which falls within the scope of the Category and for which a determination was made that the individual qualifies for civil legal services.
- 9.21 The Supervisor must have undertaken work on at least 2 Legal Help (Non- MHT) cases in the previous 12 months from any of the following case types within the Mental Health Category of Law:
- (a) advice, assistance and/or attendance at a Hospital Managers’ Review meeting;

- (b) advice, assistance, and/or attendance at a Care Programme Approach meeting;
- (c) advice and/or assistance on the Client's rights under section 117 of the Mental Health Act 1983;
- (d) advice and assistance on a complaint arising from the Client's medical treatment under the Mental Health Act 1983;
- (e) advice and assistance on the Client's right to a leave of absence under section 17 of the Mental Health Act 1983;
- (f) advice and assistance on the Client's remittance to prison under section 50 of the Mental Health Act 1983;
- (g) advice and assistance to a nearest relative on their role under the Mental Health Act 1983; and
- (h) advice and assistance in relation to an issue under the Mental Capacity Act 2005.

9.22 The Supervisor must maintain a portfolio (including case name and reference) of cases to demonstrate compliance with Paragraphs 9.20 to 9.21. Prior to the appointment as Mental Health Category Supervisor the individual must have demonstrated to our satisfaction a portfolio of cases which meet the requirements in Paragraphs 9.20 to 9.21.

9.23 The Supervisor must:

- (a) take account of any changes in legislation and case law and maintain access for the duration of the Contract to the following required texts:
 - (i) access to at least 1 nationally published specialist journal (containing updates on Mental Health case law and statutes(ii) access to medical reference publications which must cover:
 - o categorisation of mental illnesses, and
 - o classification of psychiatric medication
 - (iii) access to the current edition of the Mental Health Act Manual (Sweet & Maxwell);
 - (iv) access to the current edition of the Mental Capacity Act Manual (Sweet and Maxwell) or Jordan's Court of Protection Practice or Legal Aspects of Mental Capacity (Blackwell Publishing) or Mental Capacity (2nd edition, The Law Society) or Mental Health (Jordan's New Law);
 - (v) access to the current Court of Protection Rules

- (vi) access to the current Deprivation of Liberty Code of Practice
 - (vii) access to all relevant practice directions;
 - (viii) access to all relevant judgments and case law in relevant jurisdictions; and
- (b) undertake a minimum of 6 hours of professional development activities (which meet any professional development requirements of your Relevant Professional Body) per year in the Mental Health Category of Law of which at least 1 hour must be on the Mental Capacity Act 2005.

Supervisor's Legal Competence Standard – Mental Health and Mental Capacity

- 9.24 The Supervisor must hold current membership of either:
- (a) The Law Society Mental Health Accreditation Scheme; or
 - (b) (For non-solicitor Supervisors only) be assessed by The Law Society as meeting the Mental Health Accreditation Scheme criteria.
- 9.25 The alternative at Paragraph 9.24 (b) above is only available to Not For Profit Organisations.
- 9.26 The Supervisor must have provided representation on 5 MHT case files in the previous 12 months.
- 9.27 Where the practitioner is unable to demonstrate that they have represented a Client at 5 hearings (due to late cancellation, delay leading to discharge of the patient, etc.) they may, as an alternative, demonstrate the following in meeting the caseload requirement:
- (a) representation at 3 hearings; plus
 - (b) 2 further cases in which either the preparation for the hearing had been completed and can be demonstrated on file or where they have had conduct of a case which falls within the scope of the category and for which a determination was made that the individual qualifies for civil legal services.
- 9.28 The Supervisor must have provided assistance on 5 case files involving advice and assistance on the Mental Capacity Act 2005 in the previous 12 months, including a minimum of 2 case files where an application to the Court of Protection was made.
- 9.29 The Supervisor must have undertaken work on at least 2 Legal Help (Non-MHT) cases in the previous 12 months from any of the following case types from within the Mental Health Category of Law:
- (c) advice, assistance and/or attendance at a Hospital Managers' Review meeting;

- (d) advice, assistance, and/or attendance at a Care Programme Approach meeting;
- (e) advice and/or assistance on the Client's rights under section 117 of the Mental Health Act 1983;
- (f) advice and assistance on a complaint arising from the Client's medical treatment under the Mental Health Act 1983;
- (g) advice and assistance on the Client's right to a leave of absence under section 17 of the Mental Health Act 1983;
- (h) advice and assistance on the Client's remittance to prison under section 50 of the Mental Health Act 1983; and
- (i) advice and assistance to a nearest relative on their role under the Mental Health Act 1983.

9.30 The Supervisor must maintain a portfolio (including case name and reference) of cases to demonstrate compliance with Paragraphs 9.26 to 9.29. Prior to the appointment as Mental Health Category Supervisor the individual must have demonstrated to our satisfaction a portfolio of cases which meet the requirements in Paragraphs 9.26 to 9.29.

9.31 The Supervisor must:

- (a) take account of any changes in legislation and case law and maintain access for the duration of the Contract to the following required texts:
 - (i) access to at least 1 nationally published Specialist journal (containing updates on Mental Health case law and statutes);
 - (ii) access to medical reference publications which must cover:
 - o categorisation of mental illnesses, and
 - o classification of psychiatric medication;
 - (iii) access to the current edition of the Mental Health Act Manual (Sweet & Maxwell);
 - (iv) access to the current edition of the Mental Capacity Act Manual (Sweet and Maxwell) or Jordan's Court of Protection Practice or Legal Aspects of Mental Capacity (Blackwell Publishing) or Mental Capacity (2nd edition, The Law Society) or Mental Health (Jordan's New Law);
 - (v) access to the current Court of Protection Rules;
 - (vi) access to the current Deprivation of Liberty Code of Practice;
 - (vii) access to all relevant practice directions;

- (viii) access to all relevant judgements and case law in relevant jurisdictions; and
- (ix) undertake a minimum of 6 hours of professional development activities (which meet any professional development requirements of your Relevant Professional Body) per year in the Mental Health Category of Law of which no fewer than 3 hours must be on the Mental Capacity Act 2005.

PART C - CARRYING OUT MENTAL HEALTH WORK

Funding Criteria

Financial Eligibility

- 9.32 The Financial Regulations provide that the following services in the Mental Health Category of Law may be provided without a determination on an individual's financial resources:
- (a) Legal Help and Legal Representation in proceedings or contemplated proceedings before the MHT to the extent that the individual is, or is to be, the subject of those proceedings; and
 - (b) Legal Representation in proceedings under section 21A of the Mental Capacity Act 2005 to the extent that those services are provided to:
 - (i) an individual in respect of whom an authorisation is in force under paragraph 2 of Schedule A1 to the Mental Capacity Act 2005; or
 - (ii) a representative of that individual appointed as such in accordance with Part 10 of Schedule A1 to the Mental Capacity Act 2005.
- 9.33 Where a matter is started to provide advice on an application or contemplated application to the MHT and subsequently covers advice to the patient in relation to Non-MHT issues you do not need to conduct a means assessment.
- 9.34 In order to demonstrate that Paragraph 9.33 is applicable you will need to show:
- (a) an application or reference to the MHT was made within the relevant Period of Eligibility;
 - (b) no application to the MHT was made during the relevant Period of Eligibility but the following conditions were met:
 - (i) the Client was eligible to apply to the MHT at the time the application for legal aid was made;
 - (ii) the advice provided on the contemplated MHT application satisfied the sufficient benefit test set out in the Merits Regulations;
 - (iii) both you and the Client reasonably expected that an application to the MHT would be made;
 - (iv) where they had capacity to do so the Client had specifically instructed you to provide advice or assistance on an application to the MHT; and,

(v) you have noted on file the justification for not carrying out a means assessment addressing the points at (i)–(iv) above and setting out the reason(s) why the contemplated application to the MHT did not proceed within the Period of Eligibility.

- 9.35 For the avoidance of doubt, the provision of general legal advice on the Client’s right to apply to the MHT would not be sufficient for Paragraph 9.33 to be applicable.
- 9.36 Subject to Paragraphs 9.32 to 9.34, you must carry out a standard means assessment on all Clients requiring work in this Category.
- 9.37 Regulation 32 of the Merits Regulations applies to Matter Starts which are conducted under Legal Help (Mental Health – Non Tribunal Fee and Level 1 (Mental Health Proceedings) Fee).
- 9.38 Before proceeding to Level 2 (Mental Health Proceedings) Fee or Level 3 (Mental Health Proceedings) Fee in MHT cases the criteria for Legal Representation in Regulation 51 of the Merits Regulations must be satisfied.

Matter Start Rules

- 9.39 The rules in relation to Controlled Work Matter Start Boundaries set out in this Mental Health section of the Specification ensure that issues arising out of the same Period of Eligibility of the Client are dealt with under one Matter Start. The Period of Eligibility is always defined by the period covered by the Client’s statutory entitlement to apply to the MHT under the applicable provisions in Part V of the Mental Health Act 1983 regardless of how the MHT proceedings were triggered (e.g. by a reference made by the hospital managers).
- 9.40 Where a Matter Start is open to deal with a MHT issue and a Non-MHT issue arises relating to the Client’s status as a patient within the same Period of Eligibility (e.g. a complaint about their treatment in this period of detention) you cannot open a new Matter Start for the Non-MHT issue, and the issue will form part of the same Matter Start. All issues will be remunerated through the Mental Health Proceedings Fees that are payable for the MHT related work. This is the case regardless of the order in which the issues are resolved.
- 9.41 As an exception to Paragraph 9.40 additional Matter Starts may be opened for MHT-related work within the same Period of Eligibility in the following circumstances:
- (a) where there is more than one set of MHT proceedings within the same Period of Eligibility then separate Mental Health Proceedings Fees can be claimed for each set of proceedings; and/or,
 - (b) if the Client withdraws from an MHT and applies again within the same Period of Eligibility then a new Matter Start may be opened for the further application provided:

- (i) 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,
- (ii) you have noted the reasons for the withdrawal and reapplication clearly on the case files, including details of your discussion with the client on this decision.

9.42 For the avoidance of doubt, a new Matter Start may not be opened where an application is reinstated. In circumstances where it would have been possible to apply for an application to be reinstated but you have instead chosen to reapply you must justify on the file why this decision was made with reference to the criteria at Paragraph 9.41(b)(i) above.

9.43 You must begin a new Matter Start for any work on a new issue where the Client has a statutory entitlement to a further MHT. For the avoidance of doubt, this does not include any issue that originally arose within a previous Period of Eligibility, such as:

- (a) ongoing work on an application or reference already before the MHT that has yet to be concluded; or,
- (b) work on a Hospital Managers Review Meeting convened to consider the renewal of detention or a Community Treatment Order under section 20 and 20A of the Mental Health Act 1983 respectively.

For example:

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.

9.44 Work to communicate the decision of an MHT to the Client and aftercare advice will not constitute a separate Matter Start because it is covered by the Level 3 Mental Health Proceedings Fee. This will include meeting with the Client to advise them of the decision of the MHT. If the Client continues to be detained then it will also include advice regarding when they will be next eligible to apply for an MHT hearing and advice on alternative courses of action including whether they can apply for a Hospital Managers' Review. If the Client is discharged then advice should include how to apply for relevant benefits and any issues regarding compliance with treatment. Similarly, where the Client's case

concludes before an MHT hearing takes place the Mental Health Fee payable at that time will cover any aftercare advice that is required.

- 9.45 You cannot open a new Matter Start when an MHT hearing has been adjourned or postponed. The same case will continue until there has been a hearing finally disposing of the Matter or until the Client is discharged or the MHT is withdrawn. In some circumstances however you will be able to claim an Adjourned Hearing Fee as set out in 9.85 to 9.87 below.

Mental Capacity Act 2005 cases

- 9.46 Paragraphs 9.47 and 9.48 are subject to the provisions at Paragraph 9.7 above.
- 9.47 Initial advice on issues under the Mental Capacity Act 2005 can be claimed using the Mental Health non Tribunal Fee (as defined at Paragraph 9.65). 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.
- 9.48 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 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.

Informal patients / non-detained Clients

- 9.49 Where the Client is not detained but is nonetheless seeking advice on a matter under the Mental Health Act 1983 this is covered by the Mental Health non Tribunal Fee.

For example:

This would cover advice to a former patient if a legal issue arose concerning the provision of aftercare services under section 117 of the Mental Health Act 1983. However, if the primary issue is not within the scope of the Mental Health Category of Law but for example relates primarily to an area of social welfare law then a new matter should be started under the appropriate Category and not as a Mental Health Matter Start.

- 9.50 The Mental Health Fees include brief advice on treatment and on aspects of Community Care law and social welfare law where the issues arise out of and are related to the Client's status as a patient. This will include any brief advice on the Client's entitlement to a Community Care assessment. A separate Matter Start in a Category of Law other than Mental Health may be commenced in accordance with Section 3 of this Specification.

Controlled Legal Representation

When may you provide CLR?

- 9.51 You may undertake CLR before the MHT in the Mental Health Category of Law in accordance with the criteria in the Merits Regulations and the provisions in this Specification provided that your Schedule permits you to carry out Controlled Work in the Mental Health Category of Law.
- 9.52 CLR is available to the Client whose case is to be considered by the MHT and to the applicant to the MHT who may be the patient's Nearest Relative. If the Client and Nearest Relative make separate applications to the MHT in the same Period of Eligibility then they may be started as separate Matter Starts. Additionally, if a Nearest Relative makes an application to the MHT, the Client whose case is to be considered is entitled to a separate Matter Start for representation should they require it.
- 9.53 CLR for proceedings before the MHT is not means tested, regardless of whether the applicant for CLR is the patient or Nearest Relative.
- 9.54 Applications may, however, be refused if it appears unreasonable that approval should be granted in the particular circumstances of the case, though this would be unusual.

Making a determination that an individual qualifies for CLR

- 9.55 CLR should be applied for as soon as it is clear that the case will be considered by the MHT.
- 9.56 The applicant (whether the Client or another person on the Client's behalf in accordance with Regulations 22(3) or (4) of the Procedure Regulations) must complete and sign the Application Form before you sign it. The applicant may send you the signed Application Form in accordance with Paragraph 3.15 subject to meeting the requirements specified within that paragraph.
- 9.57 When you make a determination that an individual qualifies for CLR you must record details of the reasons justifying the determination on the appropriate section of the Application Form.
- 9.58 For the avoidance of doubt a determination that an individual qualifies for CLR does not operate retrospectively.

Signature on Application Forms for Legal Help and CLR

- 9.59 Regulations 22(3) and 22(4) of the Procedure Regulations set out when an application for Controlled Work can be made on behalf of a Client. 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.

Prior Authority for Counsel

- 9.60 Counsel's fees do not count as a disbursement and unless otherwise provided for in this Specification you are responsible for agreeing and paying Counsel's fees out of (but not limited to) any fees paid by us to you.

- 9.61 In cases of unusual complexity Counsel can be reimbursed (partially or wholly) at an hourly rate that is higher than the solicitor Hourly Rates set out in the Remuneration Regulations. You will, however, need to seek prior authority from us. Where we allow a higher rate we will specify both an hourly rate and a maximum cost limit. You may not exceed the specified hourly rate or the maximum cost limit without further authority from us. This authority will not be granted retrospectively and you must obtain it before the work is done.
- 9.62 We will only grant prior authority if the case poses unusually complex evidential problems or novel or difficult points of law (but not otherwise). In MHT cases it is likely to be highly unusual for a prior authority to be granted and it is generally considered that a member of the Law Society's Mental Health Accreditation Scheme should be able to deal with most legal issues.
- 9.63 Where authority is granted and the Matter Start becomes an Escape Fee Case in accordance with Paragraph 9.94 to 9.98 below we will pay external Counsel's reasonable fees to you at the rate(s) and up to the maximum specified in the authority. Where authority is granted but the Matter Start does not qualify as an Escape Fee Case then we will pay to you, in addition to the Mental Health Fees payable, a sum equal to the difference between external Counsel's fees as authorised by the prior authority and the applicable fees which would have been payable under the Remuneration Regulations.
- 9.64 We will pay this differential rate for each hour appropriately claimed by external Counsel up to the authorised limit. You are responsible for accounting to external Counsel as usual.
- 9.65 For the avoidance of doubt the Hourly Rates set out in the Remuneration Regulations shall not apply to Counsel's fees claimed under Paragraphs 9.60 to 9.63.

PART D - REMUNERATION FOR MENTAL HEALTH WORK

The Mental Health Fee Scheme

- 9.66 The Mental Health Fee Scheme applies to all Controlled Work in the Mental Health Category of Law except for Help at Court for Victims (in relation to which see 9.100). The Mental Health Fee Scheme is divided into:
- (a) a fee for all Non-MHT matters (“Mental Health – non Tribunal Fee”); and,
 - (b) three fees for MHT matters as follows:
 - (i) Level 1 (Mental Health Proceedings) (initial advice);
 - (ii) Level 2 (Mental Health Proceedings) (negotiation and preparation); and
 - (iii) Level 3 (Mental Health Proceedings) (representation before the Mental Health Review Tribunal).

The Mental Health non Tribunal Fee and Levels 1, 2 and 3 (Mental Health Proceedings) Fees are together referred to as “Mental Health Fees” and the provisions applying to Standard Fees and Graduated Fees in Sections 1 – 6 inclusive of this Specification shall apply to them unless otherwise stated in this Section 9.

- 9.67 Each Matter Start will attract either the Mental Health non Tribunal Fee or Levels 1, 2 and 3 (Mental Health Proceedings) Fees at one or more of the levels, depending on the work carried out on that Matter. The Mental Health non Tribunal Fee and the Mental Health Proceedings Fee Level 1 cover all Legal Help and Help at Court except as set out at Paragraph 9.100. Mental Health Proceedings Fee Levels 2 and 3 only apply to CLR. All Mental Health Fees are set out in the Remuneration Regulations.
- 9.68 Disbursements, such as travel expenses, are not covered by the Mental Health Fees and are paid in accordance with the relevant provision in Section 4 of this Specification. In addition you may submit a claim to us for an interim payment in respect of unpaid Controlled Work disbursements (not including Counsel’s fees). You may only apply under this Paragraph if at least three months have elapsed since the start of the Matter and, if you have previously applied for payment under this Paragraph, at least six months have elapsed since that application was made.
- 9.69 The fees for Mental Health Proceedings and Mental Health non Tribunal work are mutually exclusive - you cannot claim both the Mental Health non Tribunal Fee and any level of Mental Health Proceedings Fee in the same Matter for a Client.
- 9.70 The Mental Health Fees apply to work done in connection with all Clients regardless of whether they are the patient, the Nearest Relative or another party, and, regardless of whether the patient is detained, liable to compulsion

and living in the community or an informal patient, either resident or in the community.

Mental Health non Tribunal Fee

- 9.71 This Fee covers all work within the scope of Legal Help within the Mental Health Category of Law which does not concern applications to the MHT. The fee is payable for work in matters where the issues are separate from the MHT process, such as a separate Hospital Managers' Review, when there is no MHT applied for. It will also cover legal issues relating to complaints or provision of treatment where there is no MHT applied for. If you have conducted a Non-MHT matter and then give advice on a MHT application but do not submit an application to the MHT you are only entitled to the Mental Health non Tribunal Fee.
- 9.72 For the avoidance of doubt, the Mental Health non-Tribunal Fee also covers attendance at a Hospital Managers' Review or other meetings (such as CPA Meetings, s117 Meetings or Professionals Meetings) where no MHT has been applied for or reference made. You must consider in each case whether it is necessary and/or appropriate for the provision of Controlled Work to attend a Hospital Managers' Review, s117 Meeting, CPA Meeting or Professionals Meeting. Factors to take into account will include the nature of issues to be discussed at the meeting and whether legal advice and/or representations will be required.
- 9.73 If an MHT hearing is applied for in respect of a Client, or if there is a reference made to the MHT, the Mental Health Fees payable in that case will also cover all Non-MHT legal issues arising out of or related to the Client's status as a patient and started during the same Period of Eligibility. In these circumstances the Level 1 (Mental Health Proceedings) Fee replaces the Mental Health non Tribunal Fee. In respect of such Non-MHT matter and ensuing MHT work you may only claim the appropriate levels of Mental Health Fees and may not make a separate claim for a Mental Health non Tribunal Fee, except as provided for in this Section 9.
- 9.74 As an exception to the rule at Paragraph 9.73 above, a Non-MHT matter may be started after the MHT work is complete but within the Period of Eligibility where a new Matter Start is permitted in accordance with the rules set out in Section 3 of this Specification. However for this purpose:
- (a) attendance at or work in relation to a s117 Meeting, Care Programme Approach Meeting or Professionals Meeting; and/or
 - (b) work relating to a complaint arising from the Client's status as a patient within this Period of Eligibility
- do not count as separate and distinct legal problems and do not entitle you to claim a New Matter Start.
- 9.75 Where a Client receives a recommendation from the MHT for deferred conditional discharge you may not open a Non-MHT matter to continue to advise the Client. Any necessary further advice is covered by the MHT Fees paid in the matter.

- 9.76 Where a Client is conditionally discharged (for example under Section 75 of the Mental Health Act 1983) though no longer detained they are entitled to make application to the MHT and the Period of Eligibility may be up to two years. Any separate legal matters (for example a complaint or a Hospital Managers' Review) occurring during the conditional discharge Period of Eligibility can be considered separate matters and Non-MHT Matter Starts may be opened in addition to any relevant MHT matter. If the Client is recalled to hospital and placed under a different section a new Period of Eligibility commences and a new MHT Matter Start may be opened if required.

Level 1 (Mental Health Proceedings) Fee – Initial Advice

- 9.77 This fee level 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. It covers the work done in making an initial visit to the Client, including all advice and assistance provided to the client at your first attendance, and follow-up work such as:
- (a) preparing and sending initial letters of instruction;
 - (b) making the application to the MHT if none has been made; and/or
 - (c) 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 the immediate follow-up work).
- 9.78 Because all MHT cases, even where the hearing has already been listed, require you to make an initial visit and take initial instructions, this fee level is payable (once only) in all cases relating to MHT work where Legal Help has been provided by you.

Level 2 (Mental Health Proceedings) Fee – Negotiation & Preparation

- 9.79 This fee level begins once the initial advice has been given and an application has been made to the MHT. It includes, but is not limited to, all negotiation with third parties (such as doctors and hospital managers) and all preparation for the MHT hearing.
- 9.80 The fee only becomes payable once you have given initial advice and an application to the MHT has been issued. All Contract Work up to and including making an application to the MHT is included in the Level 1 (Mental Health Proceedings) Fee. You can claim the Level 2 (Mental Health Proceedings) Fee only when substantial legal work has been carried out on the Client's application or reference to the MHT or dealing with any Non-MHT issues that are payable under this fee.
- 9.81 For the purpose of paragraph 9.80 "substantial legal work" must consist of at least:
- (a) an additional 30 minutes of preparation or advice; or,
 - (b) separate communication with other parties on legal issues.

- 9.82 This fee level also includes any attendance at a Hospital Managers' Review or other meetings (such as CPA Meetings, s117 Meetings and Professionals Meeting) between the application for a MHT hearing and the hearing itself.
- 9.83 You must consider in each case whether it is necessary and/or appropriate for the provision of Controlled Work to attend a Hospital Managers' Review, s117 Meeting or CPA Meeting. Factors to take into account will include the nature of issues to be discussed at the meeting and whether legal advice and/or representations will be required.

Level 3 (Mental Health Proceedings) Fee – Representation before the MHT

9.84

- (a) This fee level primarily covers the act of representing the Client at the MHT and any aftercare services. Work includes Counsel's fees for that representation.
- (b) Where the MHT is adjourned or is postponed, the fee will cover all the sittings of the MHT until a decision (disposal) is reached, except as set out below at Paragraphs 9.85 and 9.85A.
- (c) If no effective MHT hearing takes place, for example because the Client is discharged before the hearing, then you will not be entitled to claim a Level 3 (Mental Health Proceedings) Fee unless you are entitled to claim a Level 3 (Mental Health Proceedings) Fee in substitution for an Adjourned Hearing Fee under Paragraph 9.85 or 9.85A below.
- (d) If, however, an effective hearing takes place but the decision is set aside and a new hearing is fixed to re-decide the case (pursuant to section 9(5)(a) of the 2007 Act or otherwise) you may treat the new hearing as a fresh Matter and may claim a new Level 3 (Mental Health Proceedings) Fee (and any associated Level 1 or 2 (Mental Health Proceedings) Fee subject to meeting all other conditions of this Specification).

The Adjourned Hearing Fee

- 9.85 When a MHT hearing is adjourned or is postponed or cancelled on the day at the request of the MHT or Responsible Clinician, or in circumstances where you make a request to adjourn, postpone or cancel, and where you could not have otherwise reasonably avoided making such a request, and you have already incurred travel costs and/or some representation costs, then you may claim an Adjourned Hearing Fee. You must have actually attended the place of the MHT to claim this fee, but it is not necessary for you to have appeared before the MHT. This fee covers travel to and attendance at the hearing (including advocacy) and any preparation required.
- 9.85A When a MHT hearing that has been listed as a Remote Hearing is adjourned or postponed to another day, or is otherwise cancelled, on the day of the hearing:
- (a) at the request of the MHT or Responsible Clinician; or

- (b) in circumstances where you make a request to adjourn, postpone or cancel the MHT hearing, and where you could not have otherwise reasonably avoided making such a request,

and in either case you have incurred:

1. some travel costs by travelling to, and arriving at, the client's location to take part in the MHT hearing in their presence; and/or
2. some advocacy costs in putting the client's case forward to the MHT before the MHT hearing was adjourned, postponed or cancelled; and/or
3. some attendance costs for attending a Remote Hearing, provided that a minimum of fifteen minutes elapsed between the hearing having started (or having been scheduled to start) and the hearing having been adjourned, postponed or cancelled (as applicable), without you providing any advocacy;

then provided that you have taken reasonable steps to prevent any of the costs set out in sub-paragraphs 1, 2 and/or 3 above being incurred, for example, by seeking an adjournment at the earliest possible opportunity before the MHT hearing has started where it is clear that one will need to be requested, then you may claim an Adjourned Hearing Fee.

9.85B For the avoidance of doubt, Paragraph 9.85A applies to any claim for an Adjourned Hearing Fee in respect of a Remote Hearing which has been adjourned, postponed or cancelled since the issue of the "Pilot Practice Direction: Contingency Arrangements in the First-Tier Tribunal and the Upper Tribunal" by Sir Ernest Ryder, Senior President of Tribunals on 19 March 2020, including any procedures for assessing remuneration or subsequent appeals, and regardless of the date the claim was submitted to the Legal Aid Agency. The reasons behind the adjournment, postponement or cancellation of the Remote Hearing should be documented on file along with a justification, and any relevant evidence, that the circumstances warrant the Adjourned Hearing Fee to be claimed.

9.86 An additional Adjourned Hearing Fee is payable for each additional hearing that is adjourned, postponed or cancelled on the day. When the full hearing takes place then a Level 3 (Mental Health Proceedings) Fee claim can be made for that hearing.

For example:

You attend a hearing, which lasts for 15 minutes before being adjourned by the MHT pending further reports. The Adjourned Hearing Fee is now payable. Two weeks later you go to the re-scheduled hearing. However, this second hearing is also adjourned after 20 minutes. A second Adjourned Hearing Fee is now payable. A week later, you attend the re-scheduled hearing, which is a full effective hearing. The Level 3 fee is now payable.

9.87 If an MHT is adjourned, postponed or cancelled 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 a Level 3 (Mental Health Proceedings) Fee in substitution for the final Adjourned Hearing Fee.

Remote Travel Payments

- 9.88 In general, the cost of all time spent in travel and waiting is included within each Mental Health Fee payable. The exception to this is where the Matter qualifies for a Remote Travel Payment as set out below.
- 9.89 A Remote Travel Payment is payable only where the case involves travel to a hospital which is on a list of hospitals which we may publish for this purpose from time to time on our website. Hospitals on this list are those where we consider Remote Travel Payments are necessary to ensure Clients' access to appropriate services. If we reasonably consider that there is adequate access to appropriate services at a particular hospital or hospitals we may remove that hospital or those hospitals from the list, giving three months' notice of our intention to do so.
- 9.90 You do not require prior authorisation to incur this Remote Travel Payment provided the criteria are satisfied. Payment will be generated by completing the appropriate box on the Claim for Controlled Work. We will monitor the use of this provision through audit.
- 9.91 Where a Remote Travel Payment is payable, it will be paid as an additional payment no more than once for each Mental Health Fee (i.e. for each fee level) which qualifies under this specification.
- 9.92 Where a Client is moved during a case and is only at a hospital on the list for part of the case you may nevertheless claim a Remote Travel Payment for all fee levels you have provided in the case.
- 9.93 If a hospital is removed from the list during a Client's case you will be entitled to claim a Remote Travel Payment for each of the fee levels you provide in that case prior to the date of its removal from the list.

Escape Fee Cases

- 9.94 Subject to Paragraph 9.96 where the amount of any Claim for a matter or case calculated at the relevant Hourly Rates (including Counsel's time calculated on the same basis) is greater than three times the total of Mental Health Fee(s) payable for the work done you may apply to us for that matter or case to be treated as an Escape Fee Case. For the avoidance of doubt, time spent travelling and waiting may be included in your calculation for these purposes but disbursements may not.
- 9.95 The relevant Hourly Rates referred to in Paragraph 9.94 above are as follows:
- (a) in respect of work covered by the Mental Health non Tribunal Fee or the Level 1 (Mental Health Proceedings) Fee the relevant Hourly Rate for Legal Help is set out in Table 7(a) of Schedule 1 to the Remuneration Regulations.

- (b) in respect of work covered by Level 2 (Mental Health Proceedings) Fee and Level 3 (Mental Health Proceedings) Fee the relevant Hourly Rate for CLR is set out in Table 8(d) of Schedule 1 to the Remuneration Regulations.
- 9.96 When calculating whether a matter or case qualifies as an Escape Fee Case, if the case qualifies for Remote Travel Payment(s) and/or Adjourned Hearing Fee(s), then in order for it to become an Escape Fee Case its costs need to exceed the total of;
- (a) three times the total of all fee levels payable plus
- (b) the total of all additional payments payable;

For example:

In an MHT case with work at levels 1, 2 and 3 and two adjourned hearings, in order to become an Escape Fee Case the costs would need to be greater than or equal to:

(3 x (Level 1 Fee + Level 2 Fee + Level 3 Fee)) + (2 x Adjourned Hearing Fee)

- 9.97 When calculating the value of Counsel's time under 9.94 above, in order to calculate whether the case should be treated as an Escape Fee Case you should apply the Hourly Rates at 9.95 above, even if you have obtained a prior authority for a higher rate under Paragraphs 9.60 to 9.65 above.
- 9.98 Escape Fee Cases will be remunerated on the basis of the relevant Hourly Rates set out in 9.95. These rates will apply to work carried out by either solicitor or Counsel (subject to a higher rate being applied for Counsel's time in accordance with Paragraphs 9.60 to 9.65 above).

Transfers of Provider

- 9.99 Where a Client transfers their case to you from another Provider (in accordance with the rules set out at 3.40 – 3.45) then you will be entitled to the full Mental Health Fee for each of the levels of work you undertake, including initial advice and negotiation/preparation.

Payment for Help at Court for Victims

- 9.100 Help at Court for Victims under Paragraph 9.3(b) above is not remunerated under the Mental Health Fee Scheme but is paid at the Hourly Rates set out in Table 7(a) of Schedule 1 to the Remuneration Regulations.

Review of Decisions of the MHT

- 9.101 When you provide representation before the MHT, any work done in applying to the MHT to review its decision under section 9 of the 2007 Act and/or in applying to the MHT for permission to appeal to the Upper Tribunal under section 11 of the 2007 Act will be treated as falling within the scope of the Level 3 (Mental Health Proceedings) Fee. However, if the MHT sets aside its decision under section 9(4)(c) of the 2007 Act or agrees to permit an appeal to the

Upper Tribunal under section 11(4)(a) of the 2007 Act you may, in addition to the Level 3 (Mental Health Proceedings) Fee but subject to Paragraph 9.103 below, claim an additional 'bolt-on payment' of an amount equal to that specified for an Adjourned Hearing Fee in the Remuneration Regulations.

- 9.102 For the purpose of the Escape Fee Cases provisions under Paragraphs 9.94 to 9.98, a payment under Paragraph 9.101 above shall be treated in the same way as payment of an Adjourned Hearing Fee under Paragraphs 9.85 to 9.87.
- 9.103 No additional bolt-on payment may be claimed under Paragraph 9.101 above if the case becomes an Escape Fee Case in accordance with Paragraphs 9.94 to 9.98 (in which case work done in relation to the application for a review/permission to appeal may be claimed under Hourly Rates).
- 9.104 If you carry out Contract Work in applying to the MHT to review its decision under section 9 of the 2007 Act and/or in applying for permission to appeal under section 11 of the 2007 Act, but you did not provide representation at the substantive hearing which resulted in that decision, you may not claim a Level 3 fee or any bolt-on payments to that fee but you may claim a Level 1 or 2 (Mental Health Proceedings) Fee for any Contract Work reasonably undertaken.