

Unified Contract - Civil Specification

Section 12: Mental Health Category of Law Specific Provisions

This is a draft of the proposed Mental Health Specific Provisions to have effect from January 2008

12.1 Scope

This Specification will apply to all Work in the Mental Health category, including advice in relation to the Mental Capacity Act 2005, and cases involving clients impacted by the decision in 'Bournewood'. It will apply to cases that you begin on or after 1 January 2008. Any case started before that date will continue to its conclusion as if this Specification had not come into effect.

Where your client is already receiving Legal Help in respect of a matter as at 1 January 2008, then that matter will continue to be paid under the previous arrangements if it moves to Help at Court or Controlled Legal Representation ('CLR').

12.2 Levels of Service

The following Levels of Service are available in the Mental Health category:

Legal Help, Help at Court and Legal Representation.

Legal Help is funded as Controlled Work.

Help at Court may not be granted in relation to the Mental Health Review Tribunal ("MHRT"). Where Help at Court is granted in relation to any other proceedings in this category it is funded as Controlled Work but can only be granted following the provision of Legal Help in the same matter and cannot be counted as a separate Matter Start.

Legal Representation before a Mental Health Review Tribunal is CLR and is funded as Controlled Work. CLR cannot be counted as a separate Matter Start from Legal Help in the same matter. Legal Representation in any other proceedings in this category is funded as Licensed Work.

12.3 The Graduated Fee Scheme

The graduated fee scheme applies to all Controlled Work in the Mental Health category, and is divided into three fee levels:

- (i). fee level 1 (initial advice) which is subdivided into Mental Health Review Tribunal ('MHRT') and non MHRT initial advice
- (ii). fee level 2 (negotiation and preparation) and

(iii) fee level 3 (representation before the Mental Health Review Tribunal).

Each case will attract fees at one or more of the levels, depending on the work carried out on that case. Level 1 covers all Legal Help and Help at Court. Levels 2 and 3 cover CLR.

The fees for MHRT and non MHRT work are mutually exclusive- you cannot claim both the Level 1 Non-MHRT fee and the other levels of fees.

There are also additional payments which apply in some cases where there is an adjournment of an MHRT or where remote travel is necessary as set out in this specification.

All Graduated Fees are set out in Section 5 of the Payment Annex

When profit costs and counsel's fees result in a case costing more than three times the overall fee payable for that case it will be classed as exceptional and paid on hourly rates under paragraph 11 below.

12.4 Work within the Fee Schemes

These fee levels apply to work done in connection with all patients regardless of their status i.e. regardless of whether they are detained, liable to compulsion and living in the community or a voluntary patient, either resident or in the community. The fee levels include forensic cases.

The fee levels include advice on treatment and on aspects of community care law and social welfare law related to the client's status. This will include brief advice on the client's entitlement to a community care assessment, welfare benefits, housing, employment and debt advice. However where a client has a separate and distinct legal problem in another category a separate matter start may be commenced in that category subject to the general provisions in section 5 of the Specification.

The fee levels include advice on the client's right to apply for a Hospital Managers' Review and/or a Mental Health Review Tribunal hearing or on pursuing a complaint.

Any necessary advice and assistance on aftercare is included in the relevant fee. This will include advice and attendance at s117 and Care Programme Approach ("CPA") meetings

12.5 Level 1 Non-MHRT

This fee level is payable for work in cases where the issues are separate from the MHRT process such as a separate Manager's Review when there is no MHRT listed. It will also cover complaints or legal issues relating to provision of treatment where there is no MHRT.

If a hearing is listed, or the case proceeds to tribunal, the Level 1 Non-MHRT fee cannot be claimed and you should claim the appropriate levels of MHRT fees. Where an MHRT has taken place but the client needs substantial legal advice on another separate and distinct legal issue then you can start a new matter to deal with this issue subject to the general provisions in section 5 of the Specification. This new matter will be paid the Level 1 Non-MHRT fee only.

Substantial advice is advice which requires at a minimum one further attendance with the client and some written work in the form of representations on the client's behalf.

For example, where a client has had a tribunal hearing and was not discharged, (so the MHRT case ended and the appropriate MHRT fees claimed), but as a patient wishes to make a complaint about his/her treatment before he/she has become eligible for another tribunal (therefore before another MHRT case can be started), then a new matter, which will receive the Non-MHRT fee, can be started to deal with this issue).

We reserve the right to limit the number of Non-MHRT matter starts within your overall matter start limit for this category.

12.6 Level 1 MHRT – Initial advice

This fee level covers initial advice in any case where the client is eligible and wishes to apply, or has applied, to the MHRT.

It covers the work done in making an initial visit to the client, and follow-up work such as sending initial letters of instruction or making the application to the MHRT if none has been made.

Because all MHRT 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 MHRT work (except where a case transfers to a new supplier – see paragraph 13 below).

12.7 Level 2 – Negotiation & Preparation

This fee level:

Begins once the initial advice has been given and an application has been made to the MHRT. It includes all negotiation with third parties (such as doctors and hospital managers) and all preparation for the MHRT hearing.

The fee only becomes payable once you have given initial advice. If there is only one visit and a related small amount of follow-up work (see above), the Level 2 fee cannot be claimed.

This level also includes any attendance by the client's representative at a Hospital Managers' Review or other meetings (such as 'CPA Meetings' and Section 117 meetings) between the listing of a Tribunal hearing and the hearing itself.

You must consider in each case whether it is necessary and/or appropriate to attend a Hospital Managers' Review, Section 117 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.

12.8 Fee level 3 – representation before the Mental Health Review Tribunal

This fee level:

Primarily covers the act of representing the client at the Mental Health Review Tribunal and any aftercare services. Work includes counsel's fees for that representation; and

Where the Tribunal adjourns or is postponed, the fee will cover all the sittings of the Tribunal until a decision (disposal) is reached except as set out below.

If no Mental Health Review Tribunal hearing takes place because for example the client is discharged before the hearing, then you will not be entitled to claim a level 3 fee.

12.9 The Adjourned Hearing Fee

When a hearing is adjourned or is postponed or cancelled on the day at the request of the Tribunal or Responsible Medical Officer, or in circumstances where you could not have otherwise reasonably avoided making a request and you have already incurred travel costs and some representation costs, then you may claim the Adjourned Hearing Fee. . This fee covers travel to and attendance at the hearing (including advocacy) and any preparation required.

An additional fee is payable for each additional hearing that is adjourned on the day. When the full hearing takes place then a Level 3 claim can also be made.

Example:

You attend a hearing, and the hearing lasts for 15 minutes and it is then adjourned by the Tribunal 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 hearing. The full level 3 fee is now payable.

12.10 Remote Travel Payments

In general travel and waiting is included within each fee level. The exception to this is where the case qualifies for a Remote Travel Payment under this paragraph.

A Remote Travel Payment is payable only where the case involves travel to a hospital (or the catchment area thereof) which is on the list of hospitals published for this purpose on our website: www.legalservices.gov.uk

You do not require prior authorisation to incur this fee provided the case is remote and payment will be generated by completing the appropriate box on the CMRF. We will monitor the use of this provision through audit.

Where a Remote Travel Payment is payable it will be paid as an additional payment no more than once for each fee level which qualifies under this paragraph.

Where a client is moved during a case and is only at a remote location for part of the case you may nevertheless claim a Remote Travel Payment for all fee levels you have provided in the case.

If we hold a bid round which relates to the provision of services at a location on the published list, we may restrict the right to claim a Remote Travel Payment only to suppliers who are successful in that bid round.

12.11 Exceptional case provisions

Where the total profit costs and counsel's fees of the entire case, based on the relevant hourly rates set out in section 7 and 8 of the Payment Annex, is greater or equal to three times the total of the fixed fees payable for each of the levels of work done, i.e. $3 \times$ (Total of payable Fixed Fees) then you can treat the case as an exceptional case.

All profit costs will then be paid at Hourly Rates. Note that in determining whether a case is exceptional and what payment should be made when a case is exceptional, the relevant Hourly Rate for Legal Help should be applied to all work within the scope of Level 1 and the rate for CLR to all work within the scope of Level 2 or 3.

If the case qualifies for the Remote travel payment or an Adjourned Hearing Fee, then in order to become exceptional its costs need to exceed the total of:

- i) three times the total of all fee levels payable plus
- ii) the total of all additional payments payable

For example:

A MHRT case with work at levels 1, 2 and 3 and two adjourned hearings, the costs would need to be greater than or equal to:

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

In general, any kind of profit cost which would normally be allowable under the standard basis of assessment may contribute to making a case exceptional. This includes time spent travelling and waiting. However exceptional cases will be subject to cost assessment.

In working out whether a case will be paid as exceptional, advocacy costs will be calculated at prescribed solicitors' hourly rates for CLR regardless of whether the advocacy was carried out by solicitors or counsel. The exception is where we have granted prior authority under paragraph 12, in which case rates specified by us in the prior authority should be used for this purpose.

12.12 Prior authority in exceptional cases

Where because of the complexity of the case you think it is necessary to instruct counsel at higher rates than those provided for in the Payment Annex to advise and/or represent and you believe that the case will become exceptional then you can seek prior authority from the Commission to incur these higher counsels costs.

Where authority is granted under this paragraph and the case becomes exceptional in accordance with paragraph 11 above we will pay counsel's reasonable fees via you up to the levels specified in the authority

Where authority is granted but the case does not in fact qualify as exceptional for fees purposes then we will pay to you, in addition to the graduated fees payable, a sum equal to the difference between counsel's fees as authorised by the prior authority and the counsel's fees which would have been payable under section 8 (c) of the Payment Annex. You will be responsible for accounting to counsel as usual.

12.13 Transfers of Provider

Where a client transfers their case to you from another contracted provider then you will be entitled to the full fee for each of the levels of work you undertake, including initial advice and negotiation/preparation.

For example, if during the preparation of a case before the MHRT under level 2, a client transfers their case to you then you will also be able to claim a level 1 and level 2 fee if you undertake work in preparation for the Tribunal regardless of whether the previous supplier has also claimed this fee.

12.14 Counsel's Fees

Counsel's fees do not count as a disbursement and unless otherwise provided 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

Where a case becomes exceptional under paragraph 11 above and is therefore payable by means of Hourly Rates we will pay counsel's reasonable fees in addition to your profit costs. Payments will be made to you and you will be responsible for accounting to counsel.

In such cases the payment rate for counsel may not exceed the hourly rate for advocacy specified in section 8 (c) of the Payment Annex unless this has been authorised by us under a prior authority granted under paragraph 12 above.

12.15 Means and merits tests

Means tests

All services which relate to proceedings or potential proceedings before the MHRT will not be subject to a means assessment.

All other clients requiring legal advice within the mental health category (for example in relation to the Mental Capacity Act 2005 where no MHRT proceedings are pending) will be subject to the standard means test for Legal Help.

Applications on behalf of a patient may be accepted in accordance with Rule B5 of the Funding Code Procedures and paragraphs 2.30 to 2.33 of the General Specification but in all cases which are subject to means assessment it is the means of the patient which must be assessed.

Merits test

In cases which are conducted under Legal Help (Level 1), the sufficient benefit test will apply.

Before proceeding to level 2 or 3 in MHRT cases the Reasonableness Test for CLR and other relevant Funding Code criteria must be satisfied – see in particular sections 4 (Standard Criteria) and 12 (Mental Health) of the Code.

Examples:

A client seeks advice regarding an application to the Court of Protection. You should assess the client's means and subject to the sufficient benefit test being satisfied then a Legal Help form should be signed and this will cover all work prior to full representation being granted.

A client seeks advice regarding a possible application to an MHRT and future Managers Review. A legal help form (non means tested) should be signed in respect of this work. If the matter proceeds to preparation for a MHRT hearing under level 2, then the client must also sign a CLR form.

12.16 Matter Start Boundaries

Subject to the rules and examples set out below the rules on commencing new Matter Starts in the general provisions of the Specification apply (see sections 5.6 to 5.22). Note, however, that you may never have more than one Matter open for a particular client within the Mental Health category except for combined MHRT and Mental Capacity/Bournewood cases as specified below.

Detained clients

You may open a new matter for a client each time they are eligible to apply for an MHRT hearing, e.g. under s3 cases within the first six months, second six months following renewal and then in general every twelve months. This means that the client may sign a number of applications in succession over time

The following events mark the end of a case, and therefore the potential to begin a new matter for any subsequent work:

- a client is eligible for a further MHRT.
- there is a change in the client's section type.
- the client is discharged from their section.

For example

A client is detained under section 2. A new matter is started. The client is then transferred to a section 3 prior to an MHRT taking place. A new matter may be started in respect of the s 3 application which then proceeds to Tribunal. A level 1 MHRT can be claimed in connection with the s 2. A level 1,2 and 3 can be claimed in respect of the s 3.

Work to communicate the decision of an MHRT to the client and basic aftercare advice will not constitute a separate matter but will form part of Level 3 advice. This will include meeting with the client to advise him of the decision of the MHRT. If the client continues to be detained then it will also include advice regarding when he will be next eligible to apply for an MHRT and advice on alternative courses of action e.g. whether he can apply for a Managers Review. If the client is discharged then advice should include how to apply for relevant benefits and any issues regarding compliance with treatment.

Where however additional substantial work is required then a new matter can be started as set out below.

A new matter should not be started in respect of a Hospital Managers' Review where there is already an open file dealing with an MHRT. All work in relation to the Hospital Managers' Review should form part of the same case.

Where there is no open MHRT case then a new matter for non-MHRT related work can be opened and work claimed as Level 1 Non – MHRT. If an application is then made to the MHRT this work should form part of the same case and the case should then be reclassified as an MHRT case and levels 1,2 or 3 can be claimed depending on the work undertaken. However you cannot make a claim for both MHRT and non-MHRT fees within the same case.

You cannot open a new matter start when an MHRT hearing has been adjourned or postponed. The same case will continue until there has been a full effective hearing or until the client is discharged or Tribunal withdrawn. In some circumstances however you will be able to claim an Adjourned Hearing Fee as set out in above.

Mental Capacity Act or "Bournewood" cases

Initial advice can be claimed using the Level 1 Non-MHRT fee. This includes the preparation of an application for funding for an application to the Court of Protection prior to a full certificate being granted.

Representation at the Court of Protection is not covered under Levels 2 or 3. Providers will need to make an application for Legal Representation which will continue to be paid for under Hourly Rates. See section 28 of the Funding Code Decision Making Guidance.

Where a client has an open non MHRT matter in relation to the Mental Capacity Act or the implications of the Bournewood case, but the client is then sectioned or otherwise requires MHRT advice, a separate MHRT matter may be opened concurrently provided the relevant merits criteria are satisfied. In all other cases where the client requires both MHRT and non-MHRT related series, only one matter may be claimed, but using the MHRT rates.

Voluntary patients / non-detained clients

Where the client is not detained but is seeking advice on a mental health issue other than an issue regarding the Mental Capacity Act or Bournewood it is covered by the Level 1 Non-MHRT fee.

For example, this would cover advice to a voluntary patient if they wanted to leave hospital. This might include advice on their rights under mental health legislation if they were subsequently sectioned or basic advice on their right to housing and other forms of care in the community. However, if the primary issue is not mental health but for example relates primarily to another area of social welfare law then a new matter should be started under the appropriate category and not as a mental health matter start.

If a client is subsequently detained under section and requires MHRT related services before the non-MHRT matter is closed a new matter should not be commenced but all work can be claimed in the MHRT matter.