

## Unified Contract

### Civil Specification

#### Section 12 Mental Health Category of Law Specific Provisions

##### Contents

12.1 – 12.2	Scope
12.3	Levels of Service
12.4 – 12.10	The Mental Health Fee Scheme
12.11 – 12.12	Work Within the Mental Health Fee Schemes
12.13 – 12.17	Non MHRT Fee
12.18 – 12.19	MHRT Fee Level 1 – Initial Advice
12.20 – 12.23	MHRT Fee Level 2 – Negotiation and Preparation
12.24	MHRT Fee Level 3 – Representation before the Mental Health Review Tribunal
12.25 – 12.27	The Adjourned Hearing Fee
12.28 – 12.33	Remote Travel Payments
12.34 – 12.38	Exceptional Case Provisions
12.39	Payment for Help at Court for Victims
12.40 – 12.44	Prior Authority for Counsel
12.45	Transfers of Supplier
12.46 – 12.50	Financial Eligibility and Funding Code Criteria
12.51 – 12.63	Controlled Work Matter Start Boundaries
12.64	Matter Starts in other Categories of Law
12.65 – 12.68	When You May Provide Controlled Legal Representation
12.69 – 12.72	Granting an Application for Controlled Legal Representation
12.73	Signature on application forms for Legal Help and CLR

## **Unified Contract - Civil Specification**

### **Section 12: Mental Health Category of Law Specific Provisions**

#### **Scope**

- 12.1 This Section applies to all Controlled Work in the Mental Health Category, including advice in relation to the Mental Capacity Act 2005, and advice under Controlled Work to Clients impacted by the decision in 'Bournewood'. It applies to Matter Starts that you begin on or after 1 January 2008. The transitional provisions set out in Part A of the Civil Specification apply.
- 12.2 Where your Client is already receiving Legal Help in respect of a matter as at 1 January 2008, that Matter Start will continue to be governed by the previous arrangements if it moves to Help at Court or Controlled Legal Representation ('CLR').

#### **Levels of Service**

- 12.3 The following Levels of Service are available in the Mental Health Category: Legal Help, Help at Court and Legal Representation. These services are funded as follows:
- (a) Legal Help is funded as Controlled Work.
  - (b) Help at Court is funded as Controlled Work. Help at Court can only be granted following the provision of Legal Help in the same matter and should be counted as part of the same Matter Start. However Help at Court may not be granted in relation to the Mental Health Review Tribunal ("MHRT" or "Tribunal") unless the Client is seeking representation as a victim under the Domestic Violence, Crime and Victims Act 2004 ("Victim").
  - (c) Legal Representation before a Mental Health Review Tribunal is CLR and is funded 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 granted to a Victim before the MHRT although Help at Court is available.
  - (d) Legal Representation in any other proceedings in this Category of Work is funded as Licensed Work and is governed by Sections 1 – 9 inclusive of Part A of the Civil Specification.

#### **The Mental Health Fee Scheme**

- 12.4 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 12.39 below), and is divided into (a) a fee for all non MHRT matters ("Non MHRT Fee") and (b) three fees for MHRT matters ("MHRT Fees") as follows:
- (i) MHRT Fee Level 1 (initial advice)
  - (ii) MHRT Fee Level 2 (negotiation and preparation) and
  - (iii) MHRT Fee Level 3 (representation before the Mental Health Review Tribunal).

The Non MHRT Fee and MHRT Fee Levels are together referred to as “Mental Health Fees” and the provisions applying to Standard Fees and Graduated Fees in Sections 1 – 9 inclusive of Part A of the Civil Specification shall apply to them unless otherwise stated in this Section 12.

- 12.5 Each Matter Start will attract either the Non MHRT Fee or MHRT Fees at one or more of the levels, depending on the work carried out on that matter. The Non MHRT Fee and the MHRT Fee Level 1 cover all Legal Help and Help at Court. MHRT Fee Levels 2 and 3 only apply to CLR.
- 12.6 Disbursements, such as travel expenses, are not covered by the Mental Health Fees and are paid in accordance with Section 7 of the Unified Contract Civil Specification.
- 12.7 The fees for MHRT and non MHRT work are mutually exclusive - you cannot claim both the Non MHRT Fee and any level of MHRT Fee in the same matter for a Client.
- 12.8 There are also additional payments which apply in some matters where there is an adjournment of an MHRT or where a Remote Travel Payment is payable as set out below.
- 12.9 All Mental Health Fees are set out in Section 5 of the Payment Annex.
- 12.10 Where the amount of any Claim as calculated on the basis of Hourly Rates exceeds three times the Mental Health Fee(s) payable for that Matter Start in its entirety i.e. including all Fee Levels which are claimed, it will be classed as an Exceptional Case and paid on Hourly Rates under paragraphs 12.34 – 12.38 below. Paragraph 12.36 sets out the way in which additional payments referred to at paragraph 12.8 are taken into account in this calculation.

#### **Work within the Mental Health Fee Schemes**

- 12.11 These 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. The Mental Health Fees apply to forensic cases.
- 12.12 The Mental Health Fees 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. They also include advice in relation to Mental Capacity Act 2005 and “Bournewood” cases: see paragraphs 12.60 - 12.62.

#### **Non MHRT Fee**

- 12.13 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 MHRT. The fee is payable for work in matters where the issues are separate from the MHRT process such as a separate Hospital Managers’ Review when there is no MHRT applied for. It will also cover legal issues relating to complaints or provision of treatment where there is no MHRT applied for.
- 12.14 If an MHRT hearing is applied for in respect of a Client, or if there is an automatic referral to the MHRT, the MHRT Fees payable in that case will also cover all non MHRT legal issues arising out of or related to the Client’s status as a patient and started during the same period of statutory entitlement for the MHRT hearing

under the Mental Health Act 1983 (“Period of Eligibility”, see also 12.55 below). For the avoidance of doubt, each time the Client is (newly) eligible to make an application to the MHRT they are in a new Period of Eligibility. In respect of such Non MHRT matter and ensuing MHRT work you may only claim the appropriate levels of MHRT Fees and may not make a separate claim for a Non MHRT Fee, except as provided for below.

12.15 As an exception to rule 12.14 above, a non MHRT matter may be started after the MHRT work is complete but within the Period of Eligibility where a new Matter Start is permitted in accordance with the rules set out in paragraphs 5.6 to 5.22 of Part A of the Civil Specification. However for this purpose:

(a) attendance at or work in relation meetings pursuant to s117 of the Mental Health Act 1983 (“s117 Meetings”) or Care Programme Approach meetings (“CPA Meetings”); 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.

12.16 Where the non MHRT Matter is started by you outside the Period of Eligibility, you may claim a Non MHRT Fee in respect of this work but only where a new Matter Start is permitted in accordance with the rules set out in paragraphs 5.6 to 5.22 of Part A of the Civil Specification.

12.17 We reserve the right to limit the number of Non MHRT Matter Starts within your overall Matter Start limit for this Category of Law by amending your Schedule accordingly, and we reserve the right to do this both while a Schedule is in force and on issuing a new Schedule. We would do this if we wished to prioritise MHRT work or if we reasonably considered that you were commencing Non MHRT Matter Starts other than in compliance with the rules of this Section 12.

#### **MHRT Fee Level 1 – Initial Advice**

12.18 This fee level covers initial advice in any case where the Client is eligible and makes an application 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.

12.19 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.

#### **MHRT Fee Level 2 – Negotiation & Preparation**

12.20 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.

12.21 The fee only becomes payable once you have given initial advice and an application to the Mental Health Review Tribunal has been issued. All work up to and including making an application to the Mental Health Review Tribunal is included in MHRT Fee Level 1. You can claim the Level 2 fee only once you have

carried out substantial legal work (as defined in paragraph 5.9 of Part A of the Civil Specification) after issue of the application.

- 12.22 This level also includes any attendance by the Client's representative at a Hospital Managers' Review or other meetings (such as CPA Meetings and s117 Meetings) between the application for a MHRT hearing and the hearing itself.
- 12.23 You must consider in each case whether it is necessary and/or appropriate 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.

### **MHRT Fee Level 3 – Representation before the Mental Health Review Tribunal**

- 12.24 (a) This fee level primarily covers the act of representing the Client at the MHRT and any aftercare services. Work includes Counsel's fees for that representation.
- (b) Where the Mental Health Review Tribunal is adjourned or is postponed, the fee will cover all the sittings of the Tribunal until a decision (disposal) is reached, except as set out below at paragraph 12.25.
- (c) If no effective Mental Health Review Tribunal hearing takes place, for example because the Client is discharged before the hearing, then you will not be entitled to claim a MHRT Level 3 fee unless you are entitled to claim a MHRT Level 3 fee in substitution for an Adjourned Hearing Fee under paragraph 12.27 below.

### **The Adjourned Hearing Fee**

- 12.25 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 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 Tribunal to claim this fee, but it is not necessary for you to have appeared before the Tribunal. This fee covers travel to and attendance at the hearing (including advocacy) and any preparation required.
- 12.26 An additional Adjourned Hearing 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 be made for that hearing.

*For example:*

*You attend a hearing, which lasts for 15 minutes before being 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 effective hearing. The Level 3 fee is now payable.*

- 12.27 If an MHRT is adjourned on one or more occasions in circumstances which would entitle you to claim an Adjourned Hearing Fee but no final hearing ever takes place you may claim an MHRT Level 3 fee in substitution for the final Adjourned Hearing Fee.

## **Remote Travel Payments**

- 12.28 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.
- 12.29 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.
- 12.30 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 CMRF. We will monitor the use of this provision through audit.
- 12.31 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.
- 12.32 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.
- 12.33 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.

## **Exceptional Case Provisions**

- 12.34 Subject to paragraph 12.36, 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 Exceptional Case. For the avoidance of doubt, time spent travelling and waiting may be included in your calculation for these purposes.
- 12.35 The relevant Hourly Rates referred to in paragraph 12.34 above are as follows:
- (a) in respect of work covered by the Non MHRT Fee or the MHRT Fee Level 1 the relevant Hourly Rate for Legal Help set out in the Payment Annex.
  - (b) in respect of work covered by MHRT Fee Level 2 and MHRT Fee Level 3, the relevant Hourly Rate for CLR set out in the Payment Annex.
- 12.36 When calculating whether a matter or case qualifies as an Exceptional Case, if the case qualifies for Remote Travel Payment(s) and/or Adjourned Hearing Fee(s), then in order for it 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:*

*In an MHRT case with work at levels 1, 2 and 3 and two adjourned hearings, in order to become exceptional 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)*

- 12.37 When calculating the value of Counsel's time under 12.34 above, you should apply the Hourly Rates at 12.35 above, even if you have obtained a prior authority for a higher rate under paragraphs 12.40 – 12.44 below.
- 12.38 Exceptional Cases will be remunerated on the basis of the relevant Hourly Rates set out in 12.35. 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 12.40 – 12.44 below).

### **Payment for Help at Court for Victims**

- 12.39 Help at Court for Victims under paragraph 12.3 (b) above is not remunerated under the Mental Health Fee Scheme but is paid at the Hourly Rates set out in the Payment Annex.

### **Prior Authority for Counsel**

- 12.40 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.
- 12.41 If, because of the unusual complexity of the case you want to be reimbursed (partially or wholly) for Counsel at an hourly rate which is higher than the solicitor Hourly Rates set out in the Payment Annex you will 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.
- 12.42 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 Mental Health Review Tribunal Cases it is likely to be highly unusual for a prior authority to be granted and it is generally considered that a Solicitor should be able to deal with most legal issues.
- 12.43 Where authority is granted and the Matter Start becomes an Exceptional Case in accordance with paragraph 12.34 – 12.38 above we will pay Counsel's reasonable fees to you at the rate(s) and up to the maximum specified in the authority.
- 12.44 Where authority is granted but the Matter Start does not qualify as an Exceptional Case then we will pay to you, in addition to the Mental Health Fees payable, a sum equal to the difference between Counsel's fees as authorised by the prior authority and the applicable fees which would have been payable under section 8 (c) of the Payment Annex. We will pay this differential rate for each hour appropriately claimed by Counsel up to the authorised limit. You are responsible for accounting to Counsel as usual.

## **Transfers of Supplier**

- 12.45 Where a Client transfers their case to you from another Supplier 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.

## **Financial Eligibility and Funding Code Criteria**

### **Financial Eligibility**

- 12.46 All services provided to a patient whose case is the subject of the 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 of Law (for example in relation to the Mental Capacity Act 2005) will be subject to the standard means assessment test for Legal Help.
- 12.47 Where the matter started covers advice to the patient in relation to both the MHRT as well as other non MHRT issues you should not conduct a means assessment.
- 12.48 Applications on behalf of a patient may be accepted in accordance with Rule B5 of the Funding Code Procedures and paragraphs 2.30 to 2.34 of Part A of the Civil Specification but in all cases which are subject to means assessment it is the means of the patient which must be assessed.

### **Funding Code Criteria**

- 12.49 The Sufficient Benefit Test as set out in the General Funding Code applies to Matter Starts which are conducted under Legal Help (Non MHRT Fee and MHRT Fee Level 1).
- 12.50 Before proceeding to MHRT Fee Level 2 or MHRT Fee Level 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 Funding Code.

## **Controlled Work Matter Start Boundaries**

- 12.51 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.
- 12.52 Therefore where a Matter Start is open to deal with a Tribunal Issue and a non Tribunal issue arises relating to the Client's status as a patient (e.g. a complaint about their treatment in this period of detention) you cannot open a new Matter Start for the non Tribunal issue, and the issue will form part of the same Matter Start. All issues will be remunerated through the MHRT fees that are payable for the Tribunal related work. This is the case regardless of the order in which the issues are resolved.

*For example:*

*If the Client is sectioned, then makes a complaint about his treatment under that section, has a Hospital Manager's Review and finally a Tribunal within the same Period of Eligibility, this is all part of the same Matter Start.*

- 12.53 However if you see a Client who is an informal patient (a patient who is not detained) in relation to a non MHRT Mental Health issue and the Client is then

sectioned you can open a new Matter Start to apply to the MHRT. The Client will then have two Matter Starts open at the same time – see paragraph 12.16 above.

- 12.54 In the circumstances outlined at paragraph 12.14 above, where only one set of MHRT Fees are payable in respect of Non MHRT work and MHRT work you may only open one Matter Start.

### **Detained clients**

- 12.55 On the happening of the following events you may begin a new Matter Start for any subsequent work on a new legal issue:
- Owing to passage of time, a Client has a statutory entitlement to a further MHRT.
  - There is a change in the Client's section type.
  - The Client is discharged from their section.
  - The Client withdraws from a MHRT and, within the same period of eligibility, applies again (in these cases the reason for withdrawal must be clearly noted on the file).

provided you comply with the rules set out in this Section 12.

*For example:*

*A Client is detained under section 2 of the Mental Health Act 1983. A Matter Start is used. The Client is then transferred to a section 3 prior to an MHRT taking place. A new Matter Start may be started in respect of the s3 application.*

- 12.56 Work to communicate the decision of an MHRT to the Client and aftercare advice will not constitute a separate Matter Start because it is covered by the MHRT Level 3 Fee. This will include meeting with the Client to advise them of the decision of the MHRT. If the Client continues to be detained then it will also include advice regarding when they will be next eligible to apply for an MHRT and advice on alternative courses of action e.g. whether they can apply for a Hospital Managers' Review. If the Client is discharged then advice should include any brief advice how to apply for relevant benefits and on any issues regarding compliance with treatment.
- 12.57 A new Matter Start should not be used 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 matter as an MHRT application in the same Period of Eligibility (see also 12.14).
- 12.58 Where a Matter Start is open to deal with a non Tribunal issue and a Tribunal issue arises in a different Period of Eligibility to that in which the non Tribunal issue arose then you can open a new Matter Start for the Tribunal issue.
- 12.59 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 hearing finally disposing of the Matter 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**

- 12.60 Initial advice can be claimed using the 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.
- 12.61 Representation at the Court of Protection is not covered under MHRT Fee Levels 2 or 3. Providers will need to make an application for Legal Representation which will continue to be paid for under the applicable Hourly Rate. See section 28 of the Funding Code Decision Making Guidance.
- 12.62 Where a client has an open non MHRT matter in relation to the Mental Capacity Act 2005 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.

### **Informal patients / non-detained clients**

- 12.63 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 Non MHRT Fee.

*For example:*

*This would cover advice to an informal 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 law 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.*

### **Matter Starts in other Categories of Law**

- 12.64 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 paragraphs 5.6 to 5.22 of Part A of the Civil Specification.

### **When You May Provide Controlled Legal Representation**

- 12.65 Rule 3.6 of the Specification provides that you may undertake Controlled Legal Representation before the Mental Health Review Tribunal in the Mental Health Category of Law in accordance with the criteria in the Funding Code and the provisions in this Specification provided that your Office Schedule permits you to carry out Controlled Work in the Mental Health Category of Law.
- 12.66 Controlled Legal Representation is available to the patient whose case is to be considered by the Tribunal and to the applicant to the Tribunal who may be the patient's nearest relative.
- 12.67 Controlled Legal Representation for proceedings before a Mental Health Review Tribunal is not means tested, regardless of whether the applicant for Controlled Legal Representation is the patient or nearest relative.

12.68 Applications may, however, be refused if it appears unreasonable that approval should be granted in the particular circumstances of the case. Controlled Legal Representation may, therefore, be refused on the basis of reasonableness but this would be exceptional and subject to justification in the particular circumstances of the case. Automatic referral or the making of repeated applications to the Tribunal, as permitted by the Mental Health Act 1983, would not automatically constitute sufficient reason for refusal. However where the patient's condition and circumstances appear unaltered (for example, on the available evidence and/or Client's instructions) since the case was last considered by the Tribunal, the prospects of obtaining a significant benefit for the patient would generally be limited and, in particular, obtaining independent reports would be unlikely to be justified.

### **Granting an Application for Controlled Legal Representation**

12.69 Controlled Legal Representation should be applied for as soon as it is clear that the case will be considered by the Mental Health Review Tribunal.

12.70 The Client must complete and sign the Controlled Legal Representation form before you sign the form. The Client can send you the signed application by post or fax in the circumstances set out in paragraph 2.14 of Part A of the Civil Specification.

12.71 When you grant Controlled Legal Representation you must record details of the reasons justifying the grant on the appropriate section of the application form.

12.72 For the avoidance of doubt the grant of Controlled Legal Representation does not operate retrospectively.

### **Signature on application forms for Legal Help and CLR**

12.73 Exceptionally, where it is not appropriate to use any of the possibilities for the application for Legal Help or for CLR to be made on the patient's behalf and the patient will not sign the application due to their condition, then you may annotate the form to that effect and one of the Approved Personnel of your organisation may sign the form.