

**Legal Aid Reform:  
Mental Health Fixed Fees**

**June 2007**

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## Introduction

This document contains the details of the new remuneration scheme for mental health controlled matters, to apply to all matters opened by providers on or after 1<sup>st</sup> January 2008.

Implementation of the scheme was originally planned for 1<sup>st</sup> October 2007. However, following consultation responses, discussion with representative bodies and analysis of our data we have decided to delay implementation until the 1<sup>st</sup> January 2008. This is to give service providers more time to prepare for the schemes. It will also allow us to carry out bid rounds in areas where we consider supply may be most vulnerable – there will be a further announcement on this at the end of July.

Unlike in other civil categories of law, Mental Health clients cannot usually travel to visit a provider, and most clients rely on providers attending them in hospital. The fee scheme aims to ensure that providers are paid for this essential travel, without incentivising unnecessary long-distance travel. The fees include a standard amount for travelling and waiting, based on average costs.

For a better understanding of how the scheme will be applied in practice, this document should be read in conjunction with the draft new specification of Mental Health legal services, on which the Commission is currently consulting (available at [www.legalservices.gov.uk](http://www.legalservices.gov.uk)).

A full Impact Assessment of the Scheme can be found on the Commission's website.

**Note:** Throughout this document the term:

- 'Solicitor' refers to any legal representative appointed by the client;
- 'Provider' refers to any agency with a current LSC contract to undertake Mental Health work; and
- 'Tribunal' and 'MHRT' refer to the Mental Health Review Tribunal.
- 'Profit costs' refers to all profit and counsel costs

# Mental Health Fee Scheme

## Part 1

### Principles and objectives

As part of a wider series of reforms aimed at maintaining a sustainable legal aid system within the budget provided, the Legal Services Commission (LSC) is changing the way we commission mental health legal services. We are replacing the two existing remuneration systems of hourly rates and Tailored Fixed Fees with one system that encourages efficiencies and controls costs, and which will apply to all mental health providers. It is our intention that this medium-term solution will be followed by best-value tendering for legal services in the longer term.

Within this context and these parameters, our aim has been to design a scheme that:

- By protecting the mental health budget, maintains, and has the potential to improve, access to mental health legal services for clients and potential clients.
- Is effective in helping providers to prepare for the introduction of best-value tendering.
- Maintains, not reduces, the amount of money available for mental health legal services. The scheme is designed to be budget neutral to the LSC based on 2005/06 data, as set out in 'The Way Ahead'.
- Supports the legal processes in this area of law, notably processes relating to the Mental Health Review Tribunal, which is relevant to 76% of matters.
- Enables matters that are exceptionally costly to undertake to escape from the standard fees.
- Rewards providers who are located close to their clients and who, therefore, are well placed to understand the needs of these clients and make effective links with local providers of social welfare legal services.
- Maintains access to legal services for clients in remote areas.
- Is straightforward to administer despite the varied and potentially complex legal processes involved, and does not increase the administration for either our providers or the Commission.

## **Part 2**

### **Details of the scheme**

#### **Scope**

#### **Providers**

1. The scheme will apply to all providers with a contract in mental health on or after January 2008, whether they are currently paid under the Tailored Fixed Fee scheme or at hourly rates.

#### **Work**

2. The scheme will apply to all controlled work in mental health, including advice in relation to the Mental Capacity Act 2005 and cases involving clients impacted by the decision in 'Bournewood'. It will apply to matters opened on or after 1st January 2008. Where the client is already receiving Legal Help on a matter at that date, that matter will continue to be paid under the previous arrangements (including those relating to Controlled Legal Representation) until the end of the matter.
3. A new contract specification will provide clear guidance on how a matter can be conducted and the limits of work at each stage. We are currently consulting on the draft specification.
4. In addition to the LSC's consultation on a new specification for mental health work, the Ministry of Justice will shortly be consulting on a regulation change to remove the means test for initial advice on an application to the Mental Health Review Tribunal (MHRT). This is to correct the anomaly that whilst preparation for and representation at the MHRT hearing is non-means tested, initial advice is currently subject to the test. As now, the means test will remain in place for all non-Tribunal work undertaken separately from Tribunal work, including work relating to the Mental Capacity Act.

## The Fees

5. The fees to be paid (exclusive of any VAT payable) are:

<b>Basic Fees</b>	<b>Value</b>
Non-MHRT	£275
Level 1 (MHRT)	£140
Level 2 (MHRT)	£340
Level 3 (MHRT)	£311
<b>Additional fees</b>	<b>Value</b>
Adjourned Hearing Fee	£124
<i>Remote travel payment:</i> Level 1 (MHRT)	£75
<i>Remote travel payment:</i> Non-MHRT Level 2 (MHRT) Level 3 (MHRT)	£150

6. As set out here, each matter will attract basic fixed fees at one or more of the four levels, depending on the work carried out on that matter, and potentially one or more of the additional fees. However, when profit and counsel costs result in the costs of a matter being equal to or greater than three times the overall fee payable for that matter, it will be classed as exceptional and paid at hourly rates (see Exceptional Cases at paragraph 42).
7. A matter cannot receive both the non-tribunal fee and the other tribunal fees.

## Definition of a matter and guidance on new matter starts

### Detained clients

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

The Unified Contract Specification contains rules on when a matter ends and when a change in circumstances justifies a new matter. In the mental health category the following events will constitute changes in circumstances, and therefore the potential to begin a new matter for any subsequent work:

- A client is eligible for a(nother) Tribunal hearing as above;
- There is a change in the client's section type;

- The client is discharged from their section.

Work to communicate the decision of an MHRT to the client and/or basic aftercare advice following discharge, and to communicate other statutory decisions and/or non-statutory recommendations will not constitute a separate matter but will form part of the relevant Level(s) of work. However, where additional substantial work is required for a client that is detained under section, a new matter can be started.

9. On completion, a matter will be classified as:
  - a. MHRT if an application to the Tribunal has been made during the case, or indeed has triggered it; or
  - b. non-MHRT if a Tribunal hearing has not been applied for or listed.

Therefore, a matter will attract *either* the Non-MHRT fee *or* one or more MHRT fees.

10. A matter cannot attract both Non-MHRT and MHRT fees, and the MHRT process takes precedence. In other words, where a matter includes both MHRT and non-MHRT work, the appropriate MHRT fee(s) are payable; the Non-MHRT fee is not payable. This applies regardless of when during the matter the Tribunal-related work has been undertaken.
11. For example where there is already an open case file dealing with an MHRT, a new matter should not be started for a Hospital Managers' Review. All work in relation to one of more Hospital Managers' Reviews will form part of the matter already opened. This is because costs for non-MHRT work carried out within MHRT cases have been integrated into each of the three MHRT fees (see Part 3 – Background Information).
12. Where there is no open MHRT case, a new matter for non-MHRT related work should be opened, and the Non-MHRT fee claimed at the end of the case. However, if an application is made to the MHRT on a case originally dealing only with non-tribunal work, the matter should be reclassified as an MHRT. The appropriate combination of Levels 1, 2 and 3 should be claimed at the end of the matter depending on the work undertaken. The Non-MHRT fee will not be payable.
13. A provider should not open a new matter start when an MHRT hearing has been adjourned or postponed. Normally the same matter will continue at least until either there has been a full effective hearing (a disposal) or until at least one of the conditions in paragraph 8 above are met, for example, the client is discharged from their section. However, in some circumstances, a provider will be able to claim an Adjourned Hearing Fee as set out in paragraph 29.

### **Examples**

*A patient makes an application for a Tribunal hearing and instructs a solicitor to represent them. During the preparation of the case for Tribunal, the solicitor also attends a Hospital Managers' Review, following which their client is discharged. The case does not proceed to Tribunal. This matter is classified MHRT and attracts MHRT fees at Level 1 and Level 2.*

*A patient instructs a solicitor to advise them about a non-MHRT issue, for example regarding their Nearest Relative. During the course of the case, the client discusses the possibility of making an application with their solicitor, but no application to the Tribunal is made. The matter is classified non-MHRT and the non-MHRT fee is payable.*

### **Mental Capacity Act matters (including possible 'Bournewood' type matters)**

14. Mental Capacity Act matters (including possible 'Bournewood' type matters) will be paid the Non-MHRT fee and are subject to the financial eligibility test. Any additional work will be via a certificate and therefore outside the scope of this fee scheme.
15. Where preparation is needed for both an MHRT hearing *and* a Mental Capacity Act matter (such as a 'Bournewood' type matter), for example because a client progressing an application to the Court of Protection is then sectioned, a new matter may be started for work relating to the MHRT and the relevant fees will be payable. The original matter will remain a Mental Capacity Act matter, and will be limited to the Non-MHRT fee as above.
16. Cases can become exceptional in the usual way (see paragraph 42 below).

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

*(Advice not related to the Mental Capacity Act / 'Bournewood' type matters)*

17. 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. The matter is subject to the financial eligibility test.
18. This applies, for example, to advice provided to a voluntary patient if they want to leave hospital. Such advice might include advice on their rights under mental health legislation in anticipation of the possibility of being sectioned, and/or basic advice on their right to housing and other forms of care in the community.

19. However, if the primary issue is not mental health but, for example, relates primarily to another area of social welfare law, a new matter should be started under the appropriate category of law and not as a mental health matter start. Where the mental health legal services provider does not have a contract for the relevant category and the case is not suitable to be conducted under tolerance, swift referral should be made to a suitable LSC contracted specialist provider (see draft specification).
20. If a client is subsequently detained under section, a new Controlled Work form should be signed and a new matter started.

### **Non-Mental Health Review Tribunal (MHRT) matters**

21. This fee is payable for work on cases where the issue(s) have not included work relating to the MHRT process, i.e. an MHRT hearing has not been applied for, listed, prepared for or taken place over the length of the case. Such non-MHRT work might include:
  - a. Attending a Hospital Managers' Review;
  - b. Assisting with a complaint when other complaints processes have been exhausted or are not appropriate; or
  - c. Advocating on legal issues relating to provision or non-provision of treatment.
22. The Non-MHRT fee cannot be claimed if, at any point during the case:
  - a. A Tribunal hearing is applied for or listed;
  - b. Work relating to a Tribunal hearing is undertaken; and/or
  - c. A Tribunal hearing takes place.

Instead, the matter attracts the appropriate level(s) of MHRT fees. This is because costs for non-MHRT work carried out within MHRT cases have been integrated into each of the three MHRT fees (see Part 3 – Background Information).

Where an MHRT hearing has taken place but the client needs substantial legal advice on work not relating to a tribunal, a new matter can be started to deal with this issue. This new matter will be means tested and paid the Non-MHRT fee only. See the draft specification for a definition of 'substantial'.

### **Allocation of matter starts**

23. We are currently consulting on a change to the schedule to enable us to separately allocate new matters for MHRT matters and non-MHRT

matters. This is in order to be able to prioritise funding for different kinds of case, particularly matters relating to the Tribunal, according to what services clients in a particular location need.

# Fee Levels

## Mental Health Review Tribunal

### Level 1 (MHRT) – Initial Advice

24. Level 1 (MHRT) covers initial advice in any matter where the client is eligible and wishes to apply, or has applied, to the MHRT. It covers the initial visit to the client and limited follow-up work, such as sending initial letters of instruction or making the application to the MHRT if none has been made. It also includes an initial visit and limited follow-up where first contact and advice on the matter has been made by telephone. Because all MHRT matters require the solicitor to make an initial visit and take initial instructions even where the hearing has already been listed prior to the provider taking on the case, Level 1 (MHRT) is payable once in all matters relating to MHRT work, including when the client transfers to another provider.

### Level 2 (MHRT) – Negotiation and Preparation

25. This level begins once the initial advice has been given. It includes all negotiation with third parties (such as doctors and hospital managers) and all preparation for the MHRT hearing.
26. This fee is only payable if an application has been made to the MHRT and where work is needed to progress the case for a Tribunal hearing.
27. This level also includes any attendance by the client's representative at Hospital Managers' Reviews or other meetings (such as Care Programme Approach meetings and Section 117 meetings) between the listing of an application for a Tribunal hearing and the hearing itself.

### Level 3 (MHRT)– Representation before the Mental Health Review Tribunal

28. Level 3 (MHRT) covers the act of representing a client before the MHRT. It includes any fees payable to counsel for representation. In general, this fee (*together with* any Adjourned Hearing fee(s) that are payable - see paragraph 29 below) covers all the sittings of the Tribunal until a decision (disposal) is reached. Where the Tribunal hearing is postponed or cancelled on the day (i.e. no effective hearing takes place) an Adjourned Hearing Fee will be paid *instead* of the Level 3 (MHRT) fee (see below).

### Adjourned Hearing Fee

29. The Adjourned Hearing Fee is payable when a hearing adjourns, or is postponed or cancelled on the day of the hearing at the request of:
  - the Tribunal or the Responsible Medical Officer; or

- the solicitor, in circumstances where the solicitor could not have reasonably avoided making such a request on the day of the hearing *and* where they have already incurred travel or other costs associated with attendance at the hearing.

30. The fee covers travel to and attendance at the hearing (including advocacy) and any required preparation for the hearing. This fee is payable each time a hearing is adjourned or postponed or cancelled in this way. If and when a hearing takes place that reaches a disposal, the Level 3 fee becomes payable.

*Example:*

*A solicitor attends a hearing, which proceeds for 25 minutes before being adjourned. The Adjourned Hearing Fee is now payable. A week later, the solicitor attends the re-scheduled hearing, which reaches a decision. The Level 3 fee is now also payable.*

**Travel and waiting – standard travel**

31. Payment for standard travel and waiting is included within the fees. We have set the fees by looking at work undertaken during 2005/06 and calculating which level or levels of work these past matters would include. We have then worked out the cost of such work, including time spent travelling and waiting.

**Travel and waiting – remote travel**

32. We will publish a list of hospitals which we deem have insufficient services nearby, and for which we will therefore pay one or more fixed additional fees for each matter undertaken for clients resident in these locations.

33. This is to cover the additional travel that providers further away will have to undertake to reach these clients, and is intended to ensure that we maintain access for clients who are based in hospitals with relatively little local provision. We will keep the list of remote hospitals under review to take account of any changes in the provision of mental health services and in the location of our providers.

34. We are circulating a preliminary definition of ‘remote’ travel to all providers. However, this definition (and therefore the hospitals that are deemed to be remote) is subject to review and change (as we consider necessary and on an ongoing basis), in order to allow a rational pattern of provision. If the definition changes substantially, we may need to change the values of the additional fees.

35. Matters undertaken in remote areas will attract additional fees at the amounts shown here. The relevant fee(s) are each payable once at each Level of work undertaken on the matter.

Level	Remote Travel Uplift Fee
Non-MHRT	£150
MHRT Level 1	£75
MHRT Level 2	£150
MHRT Level 3	£150

*Thus, a remote matter including work at Levels 1 and 2 will attract a total payment of £705: [£140 + £75 for Level 1] + [£340 + £150 for Level 2].*

36. The uplift fee(s) will become payable as soon as the matter qualifies as remote (i.e. involves travel to a hospital on the published list), whether this be at the beginning of the matter or later on. The whole matter will be deemed to be remote (except as set out in paragraph 42).
37. It will be self-authorised by the provider in the first instance, i.e. a provider will declare on the Controlled Matter Reporting Form (CMRF) that the matter qualifies for a remote travel payment. This will generate payment of the appropriate additional amount and also flag the matter as qualifying for an audit (to ensure it meets the definition of remote travel).
38. Where a matter transfers from one provider to another, and this coincides with the client being transferred from a remote location to one which is not remote, the matter will not be classed as remote for the purposes of claiming by the new provider.
39. It is important to remember that the payment(s) are for the 'remote' element of time spent travelling and waiting as the cost of standard travel and waiting is built into each fee.
40. It is for individual providers to decide whether they take on cases that are at a considerable distance from them. However, unless the client is *resident at a remote hospital* (whether detained or voluntary) additional payments will not be made and the matter must not be flagged as remote on the CMRF.

### **Disbursements**

41. All disbursements, including fees for independent experts, sit outside the Scheme and will continue to be claimed and remunerated separately. Counsel fees are not a disbursement and their costs are included in each fee level.

### **Exceptional cases**

42. All profit costs will be paid at hourly rates if a matter is deemed exceptional. For a matter to be exceptional, the total profit cost of the entire matter (based on current hourly rates) must be greater or equal to three times the total of the fixed fees payable for each of the levels of work done, i.e. 3 x (total of payable fixed fees). Exceptional cases will be subject to assessment.

**Example**

*For an MHRT case with work at Levels 1, 2 and 3, to qualify as exceptional, the costs would need to be greater or equal to:*

$$3 \times (\pounds 140 + \pounds 340 + \pounds 311) = \pounds 2,373.$$

*All profit costs will be paid at hourly rates.*

43. If a matter qualifies for the additional travel payment or an Adjourned Hearing Fee, its costs need to exceed three times the fees plus the total of any additional payments payable in order to become exceptional.

**Examples**

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

$$(3 \times (L1 + L2 + L3)) + (2 \times \text{Additional Hearing Fee}) =$$

$$(3 \times [\pounds 140 + \pounds 340 + \pounds 311]) + \pounds 248 = \pounds 2,621$$

*Similarly, for initial advice under the Mental Capacity Act for a client resident in a remote location to be exceptional, the costs would need to be greater than or equal to:*

$$(3 \times \text{Non-MHRT}) + \text{Non-MHRT Remote Travel Fee} =$$

$$(3 \times (\pounds 275)) + (\pounds 150) = \pounds 975$$

44. In general, any kind of profit cost may contribute to making a matter exceptional. This includes time spent travelling and waiting and time spent on costs incurred through postponements, adjournments or cancellations. Exceptional cases will be subject to cost assessment.

45. In working out whether a case will be paid as exceptional, all work done by counsel will be calculated at solicitors' hourly rates.

### **Prior authority**

46. Prior authority may be sought from the LSC for an extra payment where counsel is to be instructed at rates that are higher than solicitor hourly rates. Details of this will be consulted upon in the contract specification. This extra payment will only be authorised where the LSC considers that the unusually complex circumstances of the case require and justify representation by more senior counsel at a higher rate. Authority for the extra payment will not be granted retrospectively, i.e. it must be requested before the extra costs are incurred. The amount of the extra payment will be the difference between the counsel's costs at the agreed higher rate and at the solicitor rate.

### **Prior authority and exceptional cases**

47. Where authority is granted but, ultimately, the costs of the case are not exceptional, payment for the matter will be limited to the fixed fee levels and it should not be claimed as an exceptional case.

### **Transfer of cases**

48. In some cases, it will be necessary for a matter to transfer from one contracted provider to another part-way through. Where a matter transfers from one contracted provider to another, each provider will be entitled to the full fee for each of the levels of work they have undertaken. Each provider working on an MHRT type matter will be entitled to claim the Level 1 (MHRT) fee (see paragraph 24 above).

### **Forensic cases**

49. The same structure and fees will apply to forensic cases. The rationale for this is explained in 'Part 3 – Background Information'.

### **Aftercare and other relevant community care advice**

50. Any necessary advice and assistance on aftercare is included in the relevant fee. The fees are based on work that providers currently carry out, counting provision for some community care work, including aftercare advice following discharge from a section and/or from a hospital.
51. Thus, where the client is discharged or aftercare advice is needed during Level 1 work, relevant aftercare is included in the Level 1 fee; during Level 2, in the Level 2 fee; as a result of a Tribunal hearing, in the Level 3 fee; between adjourned hearings; in the adjournment fee(s) – reflecting the current costs and distribution of such work.

## **Not-for-profit agencies**

52. Not-for-profit agencies will also receive the same fees, and their contractual arrangements will be subject to the transitional arrangements currently being agreed with the sector.

## Part 3

### Background information

In developing this scheme, we took into account historic case cost data gathered through regular reporting, formal consultation and discussions, and a review of 967 files (which equates to 825 cases).

### Review of files

The file review has enabled us to refine what we know from regular reporting about the:

- Kinds of work carried out for clients;
- Combinations and proportions of work; and
- Cost to providers and the LSC.

Files were selected to provide a picture of **all types** of work across **all regions** and from **all types of provider**.

Our review of files has identified that a small proportion of matters that are 'forensic' (i.e. involving criminal proceedings) are not being reported as such. We adjusted our data before finalising fees and took the decision not to have a separate set of fees for forensic cases.

Because of the change in the definition of one 'matter' under the new fee scheme, previous claims do not exactly equate to what will be 'matters'. Some providers have previously claimed Legal Help and Controlled Legal Representation in one claim for what is, under the new scheme, one matter, while others have put in two separate claims. In the file review, we were able to link claims which were part of one matter so that costs per matter could be calculated.

### How we calculated the fees

The fees are based on average costs of work currently being done. The MHRT fees take into account the costs of any non-MHRT work being carried out on MHRT matters.

The fees were calculated using data from matters reported by solicitors in 2005-06 and from the file review. File review data allowed us to estimate how many matters would be paid at each of the new fee levels and what the average costs of these matters would be. An initial fee level was set so that the fee was the average of those matters, which were not exceptional. These were then applied across the whole range of matters reported in 2005-06 to check the impact on providers and service provision.

More details can be found in the Appendix 'How the mental health fees were calculated', which is available at [www.legalservices.gov.uk](http://www.legalservices.gov.uk).

## **Revisions to the scheme following consultation**

As a result of concerns raised through the consultation process and information from the review of files (see 'Legal Aid: a sustainable future – analysis of responses', available at [www.legalservices.gov.uk](http://www.legalservices.gov.uk)), we have:

- Changed the definition of Level 1 and increased the value of the fee;
- Re-structured the scheme so that non-MHRT work carried out not in conjunction with MHRT work is remunerated separately;
- Refined our approach to paying for travel and waiting, incorporating provision for travel to remote areas (see below);
- Clarified what is meant by a matter and when one can be started (as set out in the forthcoming draft specification);
- Responded to concerns about what work providers will be asked to do on issues that do not pertain to mental health law;
- Confirmed that all the relevant fees (including the Level 2 fee) will be payable for work carried out on behalf of a client on a Section 3 when they have recently had an MHRT hearing while on a Section 2, via a new matter;
- Lowered the threshold for exceptional cases from 4 x the total of the fees payable to 3 x the total of the fees payable;
- Re-structured the scheme so that adjournments, and late cancellations and postponements are remunerated separately from the Level 3 fee (which is slightly lower as a result);

## **Travel to remote areas**

To ensure continued access in all locations we are introducing additional travel payments for cases located in hospitals which are remote from sufficient service provision. This is to cover additional travel to these locations. We are currently defining the list of these hospitals and will discuss our intentions with representative bodies as well as individual providers. This information will also allow us to run a bid round to allocate matters in areas shown to be at risk of reduced provision following the implementation of the new scheme.

## **Why national fees?**

In the consultation paper, we proposed paying national fees and asked respondents whether they agreed with this approach or whether they would agree with regional or London/non-London fees instead. Responses varied, often depending on the respondent's location. Our general policy across the fee schemes has been to take national fees as a starting point. We have maintained this position for mental health as providers operate over wide areas not coinciding with our regional boundaries. Indeed, some work on a national basis. For example 42% of cases dealt with by London suppliers are for clients outside of London. Current regional costs therefore reflect to some extent the high costs of firms travelling to see clients in different regions rather than the real cost of supply of advice. Paying a high element for travel represents an inefficient use of public funds – we see the future of mental health law services for the detained as based around hospitals rather than the current geography of supply, and wish to encourage local supply outside of London.

## **Why does the Scheme apply to forensic cases?**

While 'forensic' matters (involving clients sectioned through criminal proceedings) have in the past cost more on average than other kinds of case, and while it is true that some forensic cases are among the most complex and costly cases, most providers currently undertaking forensic work do so in the context of a large mental health caseload, either solely forensic cases, or in combination with other mental health cases. As a result of this pattern of supply, in conjunction with the lower threshold for exceptional cases, we are therefore confident that it is appropriate to both apply the principle of 'swings and roundabouts' to forensic cases and to set one set of fees for all cases including forensic cases, taking into account the cost of all those cases.