

# Mental Health Lawyers Association

## Questions for Legal Aid Agency

22<sup>nd</sup> November 2013

### 1. Exceptional Files

a) In what circumstances will LAA contact supplier for clarification or more info before rejecting a claim?

For some time a reject checklist has been used by caseworkers in the MHU. The list is used when a caseworker checks for rejects, and is returned with the file of papers in order that a provider can use the checklist before resubmitting the file. It is fair to say that to date we only see a limited number of checklists returned with resubmitted files.

Following feedback received from MHLA Committee members at a meeting in August 2013, it was decided that as well as using the checklist the MHU caseworkers would also return files with a covering letter that would provide additional details of the rejection reason(s).

At the same meeting it was agreed that the reject fix facility would be rolled out to include escape cases, and this was carried out in [September 13].

Reject Fix email address:

[Laacivilclaimfix@legalaid.qsi.gov.uk](mailto:Laacivilclaimfix@legalaid.qsi.gov.uk)

Link to MHEC1 checklist:

<http://www.justice.gov.uk/forms/legal-aid-agency/civil-forms/controlled-work-claims>

Reject fix is a service that allows a provider to contact the LAA urgently when they feel they have had a bill rejected incorrectly. It is an email service that a provider contacts with details of the reject and the provider can expect a substantive response within 24 hours. Whilst we have seen some requests through the reject fix facility the numbers are still relatively low.

**Stats from reject fix:**

**1 MH Escape case - refused**

**5 referrals for mental health cert bills – 5 refused, 2 inconclusive and 2 referred to MHU as queries.**

With respect to contacting a provider by telephone prior to rejecting a claim; this again was discussed with committee members at the meeting in August 13 at which it was explained that where a file is being returned for a 2<sup>nd</sup> time providers will always be contacted by telephone to confirm that the files is being returned. If we are unable to reach a provider by telephone we will send an email confirming the return of a file.

With respect to requesting additional information over the telephone; the MHU will contact a provider by telephone to obtain information that does not have an evidential aspect or that does not impact the payment value.

Caseworkers are expected to process work in very strict timescales in order to satisfy our service level agreements with providers. Retaining a file whilst making potentially lengthy and unsuccessful telephone enquires places those agreements in jeopardy. Equally, it is often that the claim requires amendment, and this is not something that a caseworker can do.

**A similar position was previously confirmed to Committee representatives by Matthew Coats.**

## **2. Hearings**

What is the definition of a hearing? Can Advocacy be claimed where not all the panel members are present but directions may be made? and can it include Advocacy by way of a case management hearing before a single judge?

**The crux of this question is 'when can the MHT Fee Level 3 be claimed' rather than the definition of hearing:**

### **9.69 MHT Fee Level 3 – Representation before the MHT**

*(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 Paragraph 9.71.*

*(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 MHT Level 3 fee unless you are entitled to claim a MHT Level 3 fee in substitution for an Adjourned Hearing Fee under Paragraph 9.73 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 MHT Level 3 fee (and any associated Level 1 or 2 fee subject to meeting all other conditions of this Specification).*

**The Spec is clear that it is not a) the manner of communication by which representation at the MHT takes place nor b) the fact that advocacy has taken place which leads to the representation fee being payable (for example HMMs do not attract the Level 3 fee) but rather that the advocate has represented the client at the MHT itself that attracts the fee.**

**In the examples given in the question ('not all the panel members are present' and 'case management hearing before a single judge') it appears that the MHT was not fully convened (i.e. it was just the Tribunal Chair or 'Tribunal Judge' that was present) and so clearly the above criteria were not met.**

**We understand that there is a possibility that a fully convened MHT will never meet (e.g. a hearing is adjourned due to absence of an MHT member but no final hearing ever takes place) and will examine the consequences of this for providers in conjunction with HMCTS, in particular the current inability of providers to claim the Level 3 fee in place of the Adjourned Hearing fee in the scenario given.**

### **3. New Contract**

Will the LAA use the same computer system for the tendering process for the new contract that was used for the current contract? That system was difficult to use and not very user friendly.

**The same eTendering system will be used as for the 2010 tender round. The system is widely by both the public and private sectors. The LAA now has the benefit of significant experience in using this system and has also inputted into improvements to the system functionality to make it more user friendly for applicants. Feedback from representative bodies on behalf of their members following recent tender rounds has been that there have been significant improvements to the way tender processes have been presented in the system.**

**To assist applicants in using the system, user guides will be made available on how to undertake common tasks such as registering and sending messages. Additionally, when the tender round opens a helpdesk will be made available to assist applicants with any technical problems they may be having in using the system.**

### **4. Appeals**

What proportions of appeals are granted by the independent auditor?

**We are currently collating this information and it will be provided at a later date.**

### **Experts Fees**

What detail is required on file to justify use of an expert and their fee?

**<http://www.justice.gov.uk/legal-aid/funding> - Guidance can be found online in relation to instruction of experts, particularly the Costs Assessment Guidance. However, please see reference to the LAA 'Electronic Handbook':**

#### **Electronic Handbook – Page 37**

***Invoices for experts should be produced by the expert and should contain details of the experts' specialism, their address, the client name and also a breakdown of the work undertaken. The breakdown should contain the hourly rate or contain sufficient detail to allow the hourly rate to be easily determined. This requirement applies to all claims submitted (including those issued before the codified rates were introduced).***

### **5. Legal Aid Forms**

- a) Which parts of a form are regarded as so essential that the failure to tick a box or provide info will result in disallowance of an otherwise valid claim?

**This is a very broad question with no specific information. In any event all forms should be fully completed.**

- b) When the Controlled Work form is opened providers are required to tick one of three boxes. These are a) non-means tested MHT b) non MHT c) non means tested non MHT
- c) If a file is opened as either b) or c) should providers tick a) in addition if the client subsequently applies to the tribunal?

**You should tick the box that is appropriate at the outset of the case. If this changes during the life of the CW1&2 the any additional box should be ticked.**

## **6. Residence Test**

Will the proposed residence test apply in mental health cases?

**The Ministry of Justice published their consultation response 'Transforming Legal Aid: Next Steps' on 5<sup>th</sup> September 2013. This confirmed that, having considered consultation responses, the Residence Test will not apply to 'detention cases' including those covered by paragraph 5 of Part 1, Schedule 1, LASPO i.e. those under the Mental Health Act and Mental Capacity Act.**

**MoJ have not yet laid the secondary legislation that will define 'detention cases' before parliament, so we are unable to comment further on the definition of 'detention cases' that will be exempted from the Residence Test.**

## **7. Controlled Legal Representation**

- a) What amounts to urgent action for work to be payable before CW1/2 signed? Specifically, is work undertaken for a last minute appointment to represent a P before MHT eg reports received before we get chance to see client, covered?

### ***Standard Civil Contract***

***3.29 You may give advice to a Client over the telephone, by email or other remote communication before that Client has signed the application form where:***

***(a) the Client requests and it is not necessary for the interests of the Client or his or her case to attend you in person; and***

***(b) the Client meets the criteria in the Merits Regulations and Financial Regulations for the provision of Legal Help,***

**and may make a Claim for this work provided that the Client subsequently signs the application form.**

**Therefore you must have been in contact with the client (or litigation friend or deputy) before work can be claimed. Where proceedings have been initiated and where you have been appointed by the MHT as the representative and i.e. an automatic referral, you should still confirm with the client that they are happy for you to act as their representative before you commence work. If a client subsequently refuses to sign the CW1/2 form (and there is nobody else who is willing or able to sign the form on their behalf) then you will be unable to make a claim for costs.**

- b) The current version of the fixed fee guidance ( Principles of Mental health Fees) states that if there is a 'realistic possibility' that a tribunal application will be made then the client does not need to be means tested. However I have had costs disallowed before the tribunal application was made because we advised the client to delay the application (although it was clear that the client would definitely apply

within the eligibility period). How could the LAA decide that there was no 'realistic possibility' of a tribunal taking place when it actually took place?

**This appears to be a case specific enquiry, and we suggest that the appeals process would be the most appropriate way in which to raise this enquiry. Without the full details of the file, and the assessment it would be inappropriate to comment on individual assessments and cases.**

**We have been preparing updated guidance over the course of the last year, which we have been developing with input from MHLA Committee. The issue of when a means assessment should be undertaken has been well discussed in depth and has been one of the more contentious areas. Our hope is that significant MHLA input should ensure that the eventual guidance receives as widespread acceptance as possible. However, an iterative process of development, delayed comments and higher priority work for the LAA has delayed distribution.**

**The current draft of the guidance states:**

***The following conditions must be met in order for a provider to claim a non-Tribunal fee without applying means assessment:***

- a. ***The client must be eligible to apply to the MHT (or the supplier could not have reasonably discovered either before or during the first attendance that the client was ineligible to apply); and***
- b. ***The advice given on the MHT application must satisfy the Sufficient Benefit test (i.e. a reasonable private paying client of moderate means would pay for the legal advice and assistance); and***
- c. ***There must be a reasonable expectation on behalf of both the client and provider to pursue an application to the MHT<sup>1</sup> (notwithstanding where a client subsequently changes their mind and decide not to apply); and***
- d. ***The circumstances in which the means assessment was disapplied and reasons for doing so must be fully evidenced on file. This will include circumstances whereby having been specifically requested to attend upon the client to pursue an application to the MHT, the provider advises the client not to proceed; and***
- e. ***Where the client has capacity to do so, they must have instructed the provider to give Tribunal advice (in addition to instructing the substantive non-Tribunal advice). Regardless of the client's capacity, the Sufficient Benefit test will always apply.***

**We hope to circulate the finalised version by the end of the calendar year, notwithstanding higher priorities.**

If the LAA reply that this is a caseworker training issue can they also inform us as to what is being done to prevent these repeated training issues?

**With respect to training issues; the unit welcomes any information from providers who consider they have received incorrect or inconsistent decisions. However, we actually rarely receive such information despite requested it.**

**We conduct quality control checks on over 10% of our E case weekly intake.**

**We are also core tested on this area work, demonstrating another element of scrutiny on the work. Results from both mechanisms are used to identify training needs within the team.**

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<sup>1</sup> For example, decision to apply to MHT made at initial attendance or client says to provider 'I want a tribunal', 'I want to get out of hospital' or 'I am thinking about a tribunal application but want to discuss it' and the provider has a reasonable expectation at that time that such an application will be discussed and pursued. However, if a client says to provider 'I want to get out of hospital but I don't want a tribunal', the client's means must be assessed.

- **We frequently refer questions of policy to Service Development to ensure the quality and consistency of decisions.**
- **We have a permanent e case team member that sits on the CCBIG consistency group, to whom issues are referred.**

It is probable that the above reduction will be granted on appeal. What proportion of appeals are granted by a subsequent LAA caseworker?

**We are currently collating this information and it will be provided at a later date.**

## **9. Means assessment in non MHT cases**

- a) What amounts to a satisfactory explanation on a file for not having evidence of means?

**It is not possible to give an absolute definition of what constitutes a satisfactory explanation of not having evidence of means on file as the circumstances of each case are different. Despite this if you have undertaken work on a file without evidence of the client's financial eligibility please ensure that you make it clear why you have not obtained details of the client's financial eligibility, and what attempts have been made in order to obtain evidence of the same. In addition please also ensure that the explanation is in a prominent place on the file to ensure that the same is considered (CW1/2, EC Claim1 or covering letter).**

- b) The regulations in this area are inconsistent. As a consequence much work done in good faith on behalf of clients who are clearly financially eligible for legal help/controlled work is being disallowed.

B6 of the Funding Code (as amended) sets out the basic funding principle that financial eligibility must be assessed before controlled work can be carried out. Detained mentally disordered patients were not, I think, uppermost in the minds of those who drafted this particular principle, as evidenced by the entry at 3.36 of Volume 2 D-218, which does take account of the inherent difficulty in getting proof of means from a client who cannot get out of hospital to provide evidence of means, and who is very likely to be mentally distressed.

It seems that even when evidence is provided later, covering the date of the signing of the form, the LAA are rejecting the claims on the basis that POP CLA 55 says "...a satisfactory explanation as to why a claim was submitted for payment without such evidence being on file..." must be supplied.

I don't think the ICAs' who drafted CLA 55 would have anticipated claims being rejected in respect of mentally disordered clients with no access to evidence of means simply because it has taken time to gather and adduce this evidence.

**CLA55 allows for discretion when considering files in which evidence of the client's financial eligibility is provided after the original claim has been reduced to nil. If upon appeal adequate evidence is provided showing that the client was eligible to receive assistance when the CW1/2 form was signed and a satisfactory explanation is given as to why the claim was originally submitted without such evidence being on file the costs in the matter can potentially be reinstated. The circumstances of each individual file will be considered separately and discretion applied when this criteria is met.**

**If it simply a matter of having started work on the file and then having obtained the means evidence throughout the lifetime of the case the costs will not be reduced to nil, providing the evidence subsequently obtained relates to the period in which you opened the file and shows that the client was financially eligible to receive assistance. Conversely in circumstances in which the file was opened without evidence but this subsequently shows the client was not eligible you will not receive payment for such a claim.**

- b) Letters to obtain evidence of a client's means are being disallowed as not being "...the direct provision of legal services to a client.." (CAG 2.1). Obtaining evidence is a necessary element of file preparation and it is reasonable for a supplier to claim for a proportionate level of work to provide such evidence. Please confirm.

**CAG 2.1 is as follows:**

***"Subject to any express exceptions, payment will not be made for time spent on purely administrative matters. This will include the costs of opening and setting up files, maintaining time costing records and other time spent in complying with the requirements of the 2010 Standard Civil Contract other than the direct provision of legal services to a Client".***

***Ensuring that a client is financially eligible to receive assistance is a mandatory part of complying with the requirements of the Standard Civil Contract and does not constitute the direct provision of legal services to a client. Given this fact the time spent in obtaining such evidence is not a claimable item of work.***

- c) What amounts to sufficient proof of benefits? Can a statement or form confirming benefits received from DWP but not stamped by them, be accepted as genuine by suitable proof of receipt by the supplier?

**Guidance regarding sufficient proof of financial eligibility (including state benefits) can be found at the following link:**

**[http://www.legalaidmanual.co.uk/manual/vol3/partC/3C\\_001#para-3C\\_033](http://www.legalaidmanual.co.uk/manual/vol3/partC/3C_001#para-3C_033)**

**An award letter, statement or form confirming a client's benefits from the DWP can be accepted as sufficient proof of receipt as long as the document is authentic, confirms the client's name, the benefit received and the amount and the date/period of claim.**