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Legal Team
Legal Services Commission
DX.328 London

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JIE1/SS /48401-001

ET/NMH/134749

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Dear Sirs

We write further to your letter dated 21 September and wish to submit our additional comments as follows:

Point of Principle sought by the LSC:

A means assessment must be undertaken at the outset where there is no immediate intention to pursue an application to the MHT. There must be reasonable expectation to pursue an application to the MHT at the outset of the matter. Merely advising on the possibility of an application is not enough to claim the non-means tested fee as by its very nature Legal Help must be means tested.

Our comments will also draw a distinction between the general POP sought and the actual circumstances of our case.

In the case of M.L.

Even if the PoP were to be successful, we disagree that our costs should be disallowed given that we have provided evidence of client's eligibility for legal help advice. We cannot see how it can be argued by the LSC that our fees should not be paid in these circumstances as evidence of client's means has been supplied. Even if it is argued that client would not be entitled to non-means tested legal help advice, he would have been entitled to means tested legal help advice in any event. The onus of the LSC argument lies in the need for the provider to supply evidence of means so it is perverse therefore for the LSC to try and argue the opposite i.e. to disallow the fees when evidence has been provided.

In any event, this file is a tribunal file and MHRT fees levels 1-3 were claimed therefore we cannot see any reason as to why the fees in relation to initial work to be disallowed as these fall within the level 1 fee.

The contract requires the provider to roll into one NMS and fee all work done for the client within the same eligibility period which incorporates all preparatory work as well as actual representation before MHT. Conversely, if legal help is opened, whether this is means tested or non means tested advice it would be submerged into the 3 levels once the application for tribunal has been made. The provider is paid the standard fee irrespective whether he has spent 12 hours or 20 hours on the case.

Point Of Principle

The argument put forward by the LSC introduces the words '***immediate***' and '***reasonable expectation'*.**

The regulations (the Community Legal Service (Financial) regulations 2000 (as amended) state at PART II (3. Financial Eligibility) state that the following services shall be available without reference to the client's financial resources:

> *...legal help in **potential** proceedings or legal representation in proceedings or **potential proceedings** before a Mental Heath Review Tribunal....*

The Unified Contract Civil Specification, Mental Health Category Law states at paragraph 12.46:

> *... All services provided to a patient whose case is the subject of the proceedings or **potential*** [my emphasis] *proceedings before the MHRT will not be subject to a means assessment.....*

At paragraph 12.47 the regulation states that:

> ...*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.

The regulations and the contract both use words 'potential'. 'Immediate' or 'reasonable expectation' do not appear in the legislation or the regulations. The LSC are attempting to introduce a test that they say our client has not satisfied. However they do not specify what that test is, apart from relying on the use of words 'immediate' and 'reasonable expectation', again not specifying what they mean by either.

'Immediate' surely denotes an instant reaction. It is harder to define what the implications of a 'potential' action are. The LSC seem to have decided to interpret 'potential' as requiring immediate action to apply for a tribunal. Reasonable expectation does not seem to be in conflict with 'potential' and on simple reading the thrust of the argument of the LSC would imply that clients would be reasonably expected to apply for the tribunal as a result of the first interview with their solicitor.

However, the actual regulations, by their use of the word 'potential', surely create an important and necessary degree of flexibility. Clients can be given advice to enable them to make a decision in relation to their potential tribunal application. To repeat paragraph 12.46

> *... All services provided to a patient whose case is the subject of the proceedings or* ***potential*** [my emphasis] *proceedings before the MHRT*

The appeal by the LSC raises the question as to what is a 'potential' tribunal? It is surely the advising the client on their right to apply and seeking their instructions based on that right.

It is useful to examine carefully the information given to patients when they are detained under the Mental Health Act.

The Code of Practice to the Mental Health Act published by the Do H and approved by Parliament states in Chapter 32:

> *32.5 Hospital managers and the local social services authority (LSSA) are under a duty to take steps to ensure that patients understand their rights to apply for a Tribunal hearing. Hospital managers and the LSSA should also advise patients of their entitlement to free legal advice and representation. They should do both whenever:*
>
> - *patients are first detained in hospital, received into guardianship or discharged to SCT;*
> - *their detention or guardianship is renewed or SCT is extended; and*
> - *their status under the Act changes – for example, if they move from detention under section 2 to detention under section 3 or if their community treatment order is revoked.*

The Department of Health publishes the '*Mental Health Act 1983 information leaflets'* for use by hospital managers to enable them to discharge their statutory duties.

> *'The leaflets are designed to assist hospitals and local social services authorities (LSSAs) to meet their legal obligations under the Act to provide written information to patients subject to detention and other compulsory measures under the Act.'*

In the leaflet headed '*Informing the patient and nearest relative of rights to apply to the Tribunal*' it states:

> *'You can ask a solicitor to write to the Tribunal for you and help you at the hearing. The hospital and the Law Society have a list of solicitors who specialise in this. You will not have to pay for help from a solicitor with this. It is free of charge under the Legal Aid scheme.'*

The argument put forward by the LSC shows a lack of understanding of the legal rights of those detained under the MHA. For someone who is depressed or psychotic they sometimes cannot often make an immediate decision because they are simply not well enough. They may want to consider their position.

The LSC would seem to be of the view that this should disqualify them from non-means tested advice because they take say two or three days to decide? How long is long enough? Some clients may be frightened to apply for tribunals because they do not want to upset their clinical team in the fear that they may prolong their detention in the hospital? Are three days immediate enough? Perhaps legal aid would still be non means tested if they apply within three days but means tested if their application is made after say three weeks. It becomes an unworkable nonsense.
Further, in the LSC '*Principles of Mental Health Fees'*
http://www.legalservices.gov.uk/docs/civil_contracting/principlesofMHFeesv5(incDps)NEW.pdf

> *'Level 1 MHRT Fee MH 12.18 – 12.19*
> *This fee covers initial advice where the client is eligible to apply for, and subsequently makes, (or has already made), an application to the MHRT. All work at this level should be claimed at Legal Help rates.'*

There is no reference here to any 'immediate' intention. It may be that a patient has a CPA meeting due the following week and would like to defer the decision to apply, having had advice from their solicitor. Would that then make that interview means tested?

Also, patients have been told by the hospital managers (in accordance with the policies of the Department of Health) that MHT's are subject to non means tested legal aid. When dealing with a person who is perhaps paranoid and confused, the solicitor then seeks to obtain evidence of their means. Not only could this affect very adversely the then fragile relation between solicitor and client, but it also has the potential to place the solicitor in a situation of some risk. '*The hospital told me that your services would be free'*

The advice about their right to challenge their detention and the fact that it is free at the point of delivery is one of the best guarantors that the society can offer to those detailed against their will under the MHA. Let us not forget that one in four will suffer mental health problems in their lifetime so anyone can find themselves in that situation.

The clear benefit of the current system is that it allows the patient to consider their options with the help of their legal advisor and thus make the right decision. This is particularly important for those patients who can only apply for a tribunal once during their period of detention which could be as long as year, or even two years, for conditionally discharged patients.

This appeal by the LSC must surely be financially driven. However, the financial benefit for the LSC is most unclear. Our experience is that there is sadly often a correlation between mental disorder and poverty. The need to obtain evidence of means in every tribunal case will put up costs. The DWP will receive many more requests for evidence of means. Hospital managers will have to be asked for details of patients finances.

If this appeal succeeds Parliament will have to approve the amending of the Code of Practice. Also, the Department of Health and hospital mangers will have to change the advice that they give to detained patients. They will have to warn them that if they ask to see a solicitor for advice about a tribunal and decide (perhaps for very good reason) that they do not want to apply, then they are at risk of having to pay the solicitors costs.

And what will be the situation in relation to those patients who are so mentally disturbed that they lack capacity to make these decisions? The appeal raises serious concerns for the mental health practitioners. This attempt at re-interpretation of the current regulations seeks to change them regulations and thus penalise all those who have adhered to the current regulations. This is plainly unjust and importantly unlawful. Such an important change to the funding criteria for clients and their representatives requires consultation and advance notice. Rules cannot be applied retrospectively.

The implications of the decision to uphold the appeal could have catastrophic consequences for a number of mental health practitioners who by and large would have no means of being able to seek out their clients and claim fees from them in the event that those clients were not eligible for means free legal advice.
In the current guidance to the Mental Health Standard Fee Scheme
http://www.legalservices.gov.uk/civil/remuneration/mental_health_standard_fee_scheme.asp

the LSC website, which provides information to professionals and the public, it states:

> *Details of the fees*
> *The fees are designed to be budget-neutral – they maintain current average case costs.*
> *Cases which do not involve work relating to a Mental Health Review Tribunal (MHRT) receive a fixed fee of £275.*
> *Cases which involve work relating to a MHRT can receive a combination of fees depending on the work done.*

Cases therefore that involve *'work relating to a Mental Health Review Tribunal* ' is non means tested.

If successful in this appeal the LSC would be creating perverse incentive for patients detailed under the MHA to make an application, perhaps prematurely, in order to avoid paying legal costs. Life is confusing enough for those who have been sectioned.

In the 2005 case of *MH (by her litigation friend, Official Solicitor) v Secretary of State for the Department of Health*, Baroness Hale stated:

> *"the [ECHR] Convention is there to secure rights that are "practical and effective" rather than "theoretical and illusory"[23]*

It is therefore necessary that the decision in relation to this appeal creates a situation where everyone knows with clarity who is entitled to non means tested legal aid and when legal service may have to be paid for.
It is for the reasons as outlined above that we seek that the LSC appal is dismissed.
Dated 5th October 2012

Yours faithfully

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Director
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