



Scottish Legal Aid Board

Report on the Best Value Review - Mental Health

SCOTTISH LEGAL AID BOARD

BEST VALUE REVIEW: MENTAL HEALTH

SUMMARY

Since the inception of the Mental Health Tribunal for Scotland in 2005, the cost of advice, assistance and representation for those who become subject to the terms of the Mental Health (Care and Treatment) Act 2003 has grown very significantly. Expenditure from the legal aid fund now stands at £4.2 million. Given this increase and some concerns expressed to the Board about both the availability and quality of legal services in this field, the Board has undertaken a review to establish whether the current system offers appropriate access to legal advice, assistance and representation in a manner which represents best value for the Fund.

Key findings:

Expenditure

- Expenditure has increased from £1.8million in 2006 to £4.2 million in 2010
- The average cost of a case has grown in the same period from £918 to £1272.
- 131 firms received a payment from the legal aid fund for relevant work in 2010, but only 14 firms earned over £10,000 in that period
- The top two firms earned between them over £2.2 million pounds, more than any previous year and more than double their total for 2006.

Supply of services and the cost of travel

- Most firms are located in or near the central belt or in the major cities, with little local provision in areas such as the Highlands and Islands or Dumfries and Galloway.
- These areas are well served by firms from the central belt, who undertake extensive travel to represent clients in tribunals from Inverness to Dumfries, Aberdeen to Lochgilphead.
- The local firms in these areas that have undertaken some mental health work have expressed a wish to undertake more, but face barriers in receiving referrals which instead go to central belt firms
- The cost of cases undertaken by distant firms is significantly higher than that in areas served primarily by local firms
- The cost of travel is a significant element of expenditure in this area, as well as being environmentally damaging.
- There is no clear delineation of the country in terms of which firms provide a service where: firms that travel tend to travel all over Scotland, including to areas well served locally.
- This makes it more likely that a firm will experience diary conflicts, as at any one time they may have clients with tribunals calling in several different locations across Scotland

Quality of service

- Many practitioners deliver a high quality service to a vulnerable client group in difficult circumstances
- The Board has received anecdotal and observational evidence of some practices that appear to be of no benefit to clients but which cause cost and inconvenience to the legal aid fund, the tribunal and the health service
- There is some evidence of unnecessary or premature applications being made to the tribunal, or cases being progressed in an inefficient way

Proposals for change

- The Board plans to build on the relationships established during the course of the review with the Mental Health Tribunal for Scotland, the Mental Welfare Commission, the Law Society of Scotland and practitioners and other stakeholders including the Scottish Association for Mental Health with a view to developing a consensus view of best practice in this field
- To reduce the cost of travel and encourage more local supply, the Board proposes a three stage process of reviewing the way in which these cases are paid
 - Reduce the payments available for travel to reduce its costs and remove incentives to travel more than is necessary
 - Restructure the template system for authorised expenditure to reflect best practice, thereby reducing bureaucracy for firms that follow best practice
 - Develop a block or fixed fee structure that reflects and incentivises best practice and local provision wherever possible.
- To ensure the availability of local services in the immediate future, solicitors employed by the Board in the Civil Legal Assistance Office will deliver a mental health advice and representation service from its bases in Inverness and Lochgilphead and, if necessary, Aberdeen
- To help encourage local supply by working with SAMH and advocacy groups to assist them in making referrals to local solicitors willing and able to undertake this work
- To address both supply and quality issues in the longer term, the Board will give further consideration to the idea of contracting with practitioners to deliver these services.
- To reduce the cost, and inconsistency in cost, of independent psychiatric reports, a proactive approach be taken to standardising costs payable.

BACKGROUND

The purpose of this paper is to report on the work undertaken and the findings of the Board's mental health best value review. The purpose of the review itself was to identify whether persons who became subject to the provisions of the Mental Health (Care & Treatment) (Scotland) Act 2003 ("the Act") could access appropriate legal advice, assistance and representation in a manner which represents best value for the Fund. The Board views such representation as important work, which involves a particularly vulnerable client group. The review was set against a backdrop of yearly escalating case costs in the public funding of such legal services, since the inception of the new tribunal system in 2005, as shown in the below table. Although there was a small reduction in total cost in 2009, the total rebounded in 2010 and is now at an all time high at £4.2 million. While case volumes remain below the peak seen in 2008, average costs per case have continued to rise.

	2006	2007	2008	2009	2010
Number of Cases Paid	1,940	2,434	3,434	3,185	3,287
TOTAL Paid inc VAT	£1,781,587	£2,683,794	£4,171,040	£3,991,093	£4,181,917
Solicitor Fees Inc VAT	£1,303,468	£2,004,978	£3,057,676	£2,857,613	£2,930,071
Total Outlays inc VAT	£478,119	£678,815	£1,113,362	£1,133,480	£1,251,846
Average cost per case	£918	£1,103	£1,215	£1,253	£1,272
Average fees per case	£672	£824	£890	£897	£891
Average outlays per case	£246	£279	£324	£356	£381

This table shows the total yearly costs for advice and assistance and Assistance by Way of Representation (ABWOR) to the legal aid Fund for assistance under category code MENO, which is the code used for matters connected to the Act. Advice and assistance is oral and/or written advice provided to a person by a solicitor on a matter of Scots law. It does not include taking steps in connection with instituting, conducting or defending proceedings unless assistance by way of representation (ABWOR) is available, which it is for MENO cases. The average MENO case cost increased by 39% from £918 in 2006 to £1272 in 2010. With the current pressures on public finances, it was imperative that the factors driving up costs were identified and for there to be consideration as to whether services are being delivered in an effective and efficient manner.

The Board was aware that as those accessing the legal services being reviewed will be subject to the provisions of the Act, all proposals must be considered in the context of disability discrimination, to avoid any risk of making access to publicly funded legal services more difficult for persons suffering from mental health issues, than for those who do not, either directly or indirectly.

DISCUSSIONS WITH STAKEHOLDERS

To help inform the review, it was considered important to engage with stakeholders.

The Board developed effective links with key personnel at the Mental Health Tribunal Scotland Administration (MHTSA), enabling a forum to be established for regular meetings to discuss issues of common concern, and to identify if the actions of one organisation are having a negative/positive impact on the operations of the other. An informal meeting was also held with the Mental Welfare Commission, to discuss the findings of the review with the Commission and ascertain their views and any concerns.

MHTSA and the Commission agreed that it would be beneficial for more formal multi-party meetings to be held, involving the Law Society of Scotland, with a view to producing a joint statement of best practice for solicitors operating within the mental health system. Subsequent changes to the structure of fees for relevant work could thereafter be developed in light of, and to encourage, this agreed best practice.

Informal discussion with the Society suggested that the Society shared some of the Board's concerns in relation to some aspects of the operation of the system at present. The Society was also concerned, however, that any changes introduced to address these issues should not reduce – and would preferably increase – the availability of solicitors to undertake this important work.

The Board also established a link with Scottish Association for Mental Health (SAMH), as every person subject to the provisions of the Act has an automatic right to independent advocacy. SAMH's nationwide presence meant they could provide insight into tribunal and representation issues in different geographical areas. SAMH suggested it may be helpful for lists to be compiled for their service users to access, which had as a criterion for inclusion that some independent benchmark of quality has been achieved.

The Board met with some of the firms who currently undertake large volumes of mental health work; we met with firms operating or based in Glasgow, Edinburgh, Glenrothes and Aberdeen. The two largest firms, based in Glasgow and Glenrothes, were contacted, but neither chose to engage. The information supplied by those firms who did engage provided useful perspectives.

Generally firms reported difficulties in managing diaries to fit with tribunal dates, due to MHTSA appearing to be unable or unwilling to reschedule hearings to accommodate solicitors. Firms reported this was exacerbated by MHTSA providing solicitors with a lack of adequate notice of hearings. One practitioner (who also acts as a convener) commented that regardless of how early an application is made to detain someone by way of a Compulsory Treatment Order (CTO), MHTSA will only provide solicitors with notice of hearings a few days in advance, and it is understood that psychiatrists and Mental Health Officers are given similar notice. This means hearings may ultimately have to be adjourned to ensure their attendance.

MHTSA commented that there are very short statutory timescales within which it must schedule a tribunal to determine an application for a CTO, arrange a venue and intimate the application to parties. Where an application for a CTO is received by MHTSA during the 28 day lifetime of a short-term detention certificate (STDC) then the application for the CTO must be heard by a tribunal no later than the end of five working-days after the end of the STDC. Nearly 80% of CTO applications received by MHTSA are received during the final five days before the expiry of the STDC. Once MHTSA has scheduled a hearing any decision to re-schedule that hearing is a judicial decision to be made by the Mental Health Tribunal for Scotland (“the Tribunal”).

MHTSA's view was that this statutory timescale meant that the difficulties outlined above were inherent in the system as it currently stands, but might be alleviated to some extent were changes to be made along the lines suggested by the Scottish Government in its response to the McManus review i.e. a move to ten instead of five days.

While the application of the statutory timescales is likely to be problematic for most practitioners with busy practices, it appears that this problem is likely to be most acute for those who appear at tribunals in many different locations. The issue is therefore perhaps unique to mental health, in that most general civil or criminal firms will tend to focus on business in their local court. While many firms undertaking mental health work tend to focus on their local hospital or hospitals, a

small number provide a high volume nationwide service. For example, in 2010 alone the largest two providers represented clients in 28 and 26 separate hospital/tribunal locations respectively.

These firms offer this level of service with relatively few solicitors for the volume of business they undertake, so it is perhaps inevitable that they will sometimes find themselves double-booked for tribunal hearings. While this might be an issue that could be addressed in part by MHTSA, it is perhaps unreasonable to expect the diarising of cases by MHTSA – which already has to take place within a strict and short statutory timetable – to be subject to negotiation on a case by case basis as to the availability of solicitors whose business model makes diary clashes more or less inevitable.

As well as these difficulties with tribunal scheduling, some firms reported difficulties in operating within the Board's interpretation of when Advice & Assistance and when ABWOR should be granted for MENO representation. This is examined in more detail below.

FACTORS DRIVING COSTS

Accessibility of legal advice, assistance and representation across Scotland

Analysis

Firstly the review considered where persons requiring mental health legal services were based, and where their legal representatives operated from, to capture what work was being carried out, and from where.

Payments in relation to mental health work were made to a total of 131 firms in 2010. This suggests a good degree of coverage, representing around a quarter of all firms registered to provide civil legal assistance. However, a large proportion of these firms did very little work (fewer than ten cases per year), many of them doing one or two. At the other end of the scale, 37 firms were paid more than £5,000 in 2010. Of these, 14 earned more than £10,000, a further four earned more than £50,000, a further six earned more than £100,000 and two more than £1million.

The top twenty firms received just under 94% of all payments in 2010, the top ten for 85%. The two highest earning firms received 53% of all payments (but were responsible for only 44% of the cases).

A detailed analysis of the geographic distribution of firms was undertaken through a series of mapping exercises. The table below shows the location, case volumes and mental health legal aid earnings of the twenty largest providers by earnings. A fuller version of this table, showing average costs and case volumes is included in Appendix 1.

On the basis of this information it was clear the Central Belt (and surrounding areas such as Ayrshire, Fife and Tayside) is being well serviced, whereas areas such as Dumfries and the Highlands are largely reliant on the availability of solicitors from outwith the area with few local firms undertaking the work. This situation is compounded by there being a relatively small number of firms that provide such legal services nationwide. As noted above, this leads to a few firms covering very large swathes of the country. However, there appears to be little geographic delineation of the practices of many firms, with multiple firms covering the same wide range of locations. This means that firms based in the central belt (primarily Fife and Glasgow) each provide cover in Inverness, Aberdeen, Dumfries, Lochgilphead and all points between.

Firm	Location	2006	2007	2008	2009	2010
1	Glasgow	£369,633	£693,782	£908,911	£837,991	£1,156,109
2	Fife	£677,141	£783,342	£1,235,391	£1,274,335	£1,064,308
3	Glasgow				£123,927	£249,120
4	Fife	£36,600	£67,147	£151,251	£175,275	£238,584
5	Glasgow	£2,075	£30,275	£151,080	£232,332	£209,118
6	Fife				£139,392	£187,881
7	Glasgow/Edinburgh	£151,804	£177,195	£140,465	£144,912	£172,498
8	Edinburgh		£17,256	£95,492	£108,002	£109,723
9	Glasgow	£11,824	£50,377	£34,692	£63,938	£75,153
10	Glasgow	£71,933	£75,247	£94,764	£78,634	£73,646
11	Perthshire	£3,796	£25,531	£25,529	£45,486	£72,333
12	Ayrshire	£18,048	£41,541	£44,136	£48,761	£65,853
13	Aberdeen	£32,007	£45,869	£61,475	£40,592	£40,352
14	Angus				£7,922	£35,892
15	Ayrshire					£34,247
16	Ayrshire	£8,275	£17,729	£12,281	£15,075	£30,824
17	Tayside	£10,609	£5,348	£13,123	£35,709	£28,623
18	West Lothian					£27,025
19	Edinburgh	£19,021	£41,828	£26,783	£58,560	£24,756
20	South Lanarkshire	£38,011	£39,065	£41,647	£36,073	£24,263
TOTAL		£1,781,587	£2,683,794	£4,171,040	£3,991,093	£4,181,917

It can certainly be argued that these firms are meeting what might otherwise be an unmet need by delivering a service in the Highlands and the south west. However, it is difficult to get a clear picture of what supply would look like were these firms not providing such a regular service. We have been told by some local solicitors that they would be keen to undertake more mental health work than they currently do, but find it difficult to get referrals from hospitals as they tend to be made to the firms that visit regularly. In addition, some of the big firms market themselves effectively, leaving business cards, stationary and posters in visible locations on the wards. Finally, we are aware that firms visiting to see one client may often gain instructions from another simply by dint of being on hand in the hospital. There are therefore considerable barriers to entry into the market for local providers, which creates the impression that the central belt firms are the only ones willing or able to undertake this work.

The argument about meeting an unmet need is harder still to make in relation to parts of the central belt where there is plentiful supply. Despite local firms undertaking mental health work in the same hospitals, firms from Fife currently undertake work in Edinburgh and Glasgow, and those from Glasgow undertake work in Perth, Dundee and Edinburgh. While this may be seen as a sign of a healthy market with a positive degree of competition, it might also be regarded as a hugely inefficient use of resources, with solicitors criss-crossing the country and competing for business in parts of the country that are already well served. It also means that a very significant proportion of all time spent by solicitors on mental health work is actually spent travelling, rather than attending with clients or representing them in the tribunal. If solicitors focused on their local hospitals instead of travelling to hospitals that are already well-served, there would be a significant reduction in the cost of provision and a far more efficient use of solicitor resource. This would also help reduce the problem of solicitors being required by MHTSA to be in two places at once.

The market is only able to operate in this way because the rates of remuneration for travelling are at present the same as those for meeting with a client. It is therefore just as profitable to have fewer clients located far away than a larger number of clients located closer to the firm's base. There is therefore no disincentive for solicitors to take cases at a distance. In fact, given the finite

demand for mental health services, approaching the work this way means that it is possible for the system to provide an income for many more solicitors than would be the case if all firms operated at a local level. In other words, the total cost to the taxpayer of the current approach is far more than need be for the number of clients with a need for assistance would suggest.

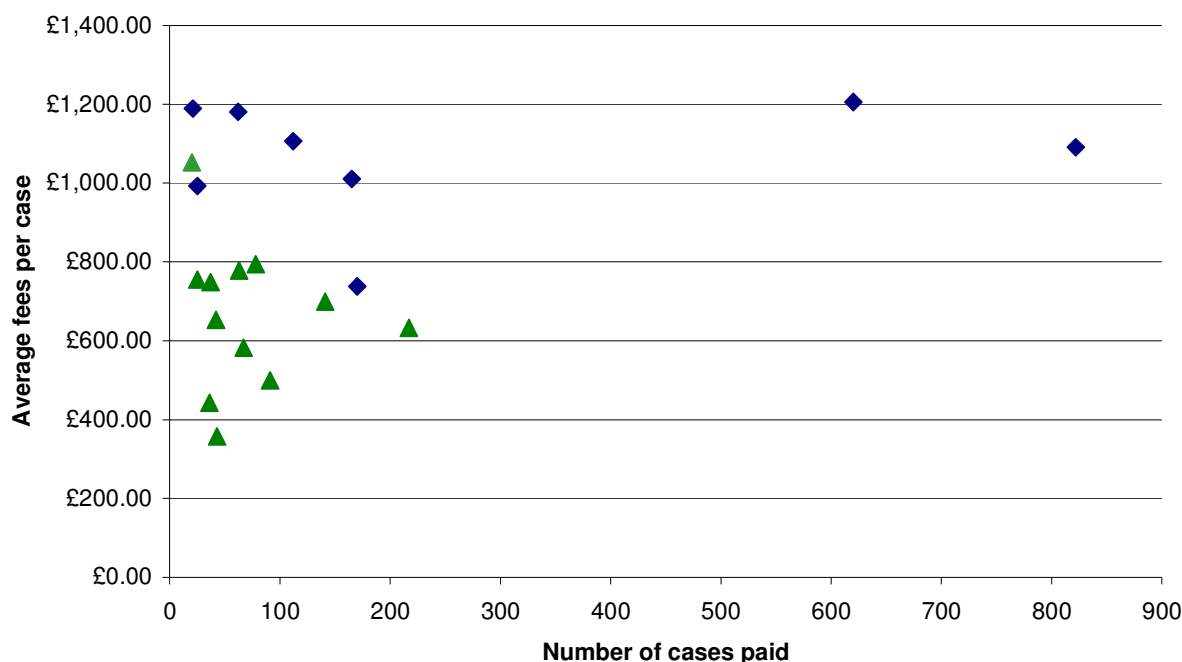
Travel is currently paid for on a time and line basis, and this has obvious cost implications to the Fund, which can be demonstrated by comparing a sample of accounts in respect of assisted persons based in the Highlands against a sample for assisted persons based in the Tayside Health Board area, where it is predominantly local practitioners who provide mental health legal services. Although a similar number of accounts have been submitted, the average cost is notably different. Costs for travel time and mileage incurred by non-local practitioners operating in the Highlands are the main differential as many clients in the Highlands are represented by solicitors from the Central Belt.

	Number of Accounts submitted	% of Overall Accounts	Cost	Average Cost
Tayside	256	7.6	£209,094	£817
Highlands	203	6	£351,544	£1732

With travel being paid for on a time in line basis, at the same rate as representation work, a high level of remuneration can be recovered by firms who travel outwith their locale and do so frequently.

The chart below shows the average fees paid per case handled by the top twenty firms by volume, plotted against the volume of cases paid in the calendar year 2010. It clearly shows that two firms handle a very large number of cases, with a fairly wide range of firms undertaking more moderate volumes. Of the seven firms with average fees per case of over £1,000, six (marked with blue diamonds) undertake significant amounts of travel (although several also have significant local caseloads). Of the remaining firms, all but one work predominantly in local hospitals (such firms are marked by green triangles).

Mental Health Payments by Firm - Average Fee per case/number of cases Paid



Risk

Whilst the mapping exercise has shown there are currently areas with little local representation, and therefore firms can justify the need to travel substantial distances, there is a risk that paying for travel in this way could act as a perverse incentive and affect the manner in which some firms may conduct their business, in an effort to maximise travel-related income by having clients based further from their business premises, frequent attendances, multiple tribunal hearings, etc. Such a risk could be exacerbated by the fact that there is a relatively small and geographically concentrated group of practitioners undertaking the work, and in some areas, such as the Highlands, there is almost a complete lack of local competition.

The quality of legal advice, assistance and representation

Analysis

Most of those spoken to in the course of the review observed that many practitioners in this field were dedicated, hard-working and experienced and delivered a high level of service to clients and the tribunal. However, the Board has also received anecdotal evidence through discussions with stakeholders about dissatisfaction with the quality of services provided by some practitioners. A common concern was the frequency of requests for adjournment or continuation of proceedings, leading to the granting of interim orders, but it is appreciated that the issues surrounding the current statutory timescales for hearings were the subject of consideration in the McManus Review and subsequent consultation; in response to which the Scottish Government has proposed lengthening these timescales. The introduction of new statutory timescales may reduce the frequency of requests for interim orders.

Concerns were also raised about the appropriateness of advice being given in relation to prospects of success in making applications to the tribunal. Solicitors have a professional duty to give a client advice as to whether or not it is in their interests to appeal against or oppose an order, usually based on prospects of success. It was identified there may be a risk that vulnerable people are becoming involved in proceedings in which they have no realistic prospect of success, particularly when an independent psychiatric report supports the terms of the order being sought or in place. In such cases the proceedings may actually be damaging to the patient's interests and mental health with the only apparent gain from the proceedings being a financial one for practitioners, raising professional conduct and ethical concerns.

The difficulty here is that the "value" of a tribunal cannot simply be determined on the basis of whether a hearing resulted in the person opposing an order being successful, as the purpose of the tribunal is to facilitate proper consideration as to the necessity of a compulsory order being in place and to secure the appropriate participation of the person who is to be subject to the order.

Nevertheless, a pattern of repeat applications to raise proceedings by a firm on behalf of the same assisted person could help indicate whether there was any realistic value in raising or opposing proceedings. It is reasonable to assume that if a practitioner acted for someone on a number of occasions, they would be best placed to advise them against launching an appeal. This is particularly so if there had been no material change in their circumstances since the previous appeal, and so no prospects of success and/or no perceivable benefit to that person in proceeding to a tribunal. An analysis was undertaken of the number of applications for legal assistance made by four firms, per assisted person, over the last two full financial years, reflected in the table below.

Firm	Applications	Clients	Clients with more than 3 Applications	% more than 3 Applications
A	1233	635	151	24
B	1381	888	118	13
C	208	133	17	13
D	293	233	10	4

About one quarter of all legally aided clients represented by firm A had more than three applications for assistance. The benchmark of three applications was set on the basis for a client under MENO (which unfortunately for this purpose is a catch all category code for mental health work) could have an application in respect of a Short Term Detention Certificate, followed by an application in respect of opposing an application for a Compulsory Treatment Order and another for an appeal against a Compulsory Treatment Order.

Further analysis showed that of the five clients with the highest number of applications represented by A; one had 11 applications, three had 8 applications and one had 7 applications. This was compared with applications for firm C’s five most frequently assisted clients, three of whom had 5 applications and two had 4 applications.

The Board has also been contacted directly by those concerned about the approach of some firms in making repeated applications on behalf of patients to MHTS to oppose or review compulsory orders, where there is no change in that person’s circumstances and/or no perceivable benefit for them going through a tribunal process.

The Board received correspondence from a treating consultant psychiatrist expressing concern about the involvement of a particular firm with one of his long-term patients. This firm has assisted his patient to make regular applications to MHTS to oppose compulsory measures of care and treatment, despite there being no change in this patient’s condition and no independent medical evidence supportive of a removal or variation of the measures in place. In addition, the Board was advised that repeated unsuccessful challenges had caused this patient distress. In the opinion of the consultant psychiatrist this firm;

“has revealed questionable professional judgement in regards to advising [the patient] of the viability of appealing against compulsory treatment in the face of evidence provided by an independent medical opinion and having considered her own medical evidence [the patient’s own diagnosis being a broken heart] as credible enough to formally submit to a tribunal.”

It appears that there was little substantive basis for any challenge, meaning not only could unnecessary distress have been experienced by the patient, but in addition the time and resources of health and social care professionals, as well as MHTS, were diverted for proceedings which ultimately had little benefit – and may have been actively harmful - for this patient.

Correspondence was also received from a “named person” under the Act, who believed that solicitor-facilitated applications against an order were routinely made despite there being little or no change in this patient’s longstanding condition, and in the views of the named person, little prospect of success at the tribunal. The named person wrote to the Board after matters repeatedly proceeded to the tribunal with no supportive medical evidence for the patient being lodged, despite independent psychiatric reports being procured at public expense on several occasion. In one of the several tribunal hearings in this case, the representing solicitor had withdrawn the patient’s application at the hearing, after a procedural argument for an adjournment was not

accepted, and instead the tribunal sought to make a determination on the patient's application. Such a determination could have effectively prevented review of the order for a further three months, and it appears unclear what substantive arguments were to be put before the tribunal.

A further application for revocation or variation of the CTO was subsequently made. At the tribunal hearing to consider this application, in common with all earlier hearings, the representing solicitor submitted no supportive medical evidence and instead sought to lead evidence that did not relate to the grounds of the order in place. The solicitor again chose to withdraw the application at that point rather than allowing the tribunal to make a determination. It therefore remained open to the patient to make a further application without waiting the six months stipulated by the Act had a determination been made at this hearing.

Risk

Different risks may arise depending on the nature of the compulsory order in place or sought.

- Short Term Detention Certificate (STDC)

These certificates authorise compulsory measures of care and treatment for up to 28 days. From discussions with MHTSA it is understood that a very small number of appeals against these certificates are successful at tribunal. It is also understood from discussions with practitioners that many will obtain independent medical evidence, and if it is not supportive and there are no other grounds for a challenge, advise their client not to proceed to a tribunal. This is not, however, a universal practice. As few challenges appear to succeed, particularly those without supportive independent medical evidence, the value to a patient of proceeding at a tribunal may be limited in these circumstances.

MHTSA advised that some patients have had more than one tribunal hearing convened during the lifetime of a single certificate. Once an application is made to revoke a certificate, MHTSA have a KPI for there to be a hearing within five days, due to the short nature of the order. Under the current statute nothing precludes a further application being lodged where a previous application (submitted earlier in the duration of the same certificate) has already been rejected or withdrawn by the patient. Another hearing would require to be convened, regardless of whether there had been any change in circumstances or supportive substantive evidence had thereafter been obtained and lodged.

In addition, it is often the case that, by the time the tribunal convenes to consider the appeal to revoke the STDC, the approved medical practitioner has decided either that the patient has responded well and should be discharged or that a longer period of treatment is necessary and so makes an application for a Compulsory Treatment Order (see below). In such circumstances the tribunal may not go ahead, as there may be nothing left to decide, the patient having been discharged.

Alternatively, if the application has been made late in the 28 day detention period, the tribunal may not in fact be able to convene before the certificate expires. The later an application to revoke a STDC is made, the less opportunity there is for MHTSA to intimate the proceedings to the parties and arrange a hearing and so the less likely it is that a hearing will be able to go ahead. In these circumstances, if no CTO application has been made, the certificate will come to an end and the patient will be discharged. If a CTO application has already been made, the patient will continue to be detained for five days after the term of the STDC, under section 68 of the Act, to enable the tribunal to

convene to consider the CTO application. In neither case will the tribunal actually consider the terms of the STDC. If medical evidence is obtained in relation to the challenge to the STDC, it is likely either to be obviated (if the patient is discharged before the hearing) or superseded by a subsequent report commissioned to address the different tests should a CTO be sought.

The availability of public funding for solicitors to ask the tribunal to review an STDC clearly provides an important safety valve for the system, ensuring the ability to challenge a wholly inappropriate or technically defective STDC. It may also give the patient the reassurance that their detention will be reviewed by the tribunal. However, there appears to be little substantive benefit to the patient in many, but not all, cases in which a challenge to a STDC is made. Where the application is made early in the 28 day period without supportive medical evidence, it appears highly likely to be refused unless there is some other deficiency. If the application is made late in the period it is unlikely that there will be time for it to be decided by the tribunal at all.

It is questionable whether it is an appropriate use of public funding to support an application for revocation of an STDC made so late that it may not leave sufficient time for MHTS to arrange a hearing, or indeed only to schedule the hearing to take place on the last of the 28 days. It is less easy to identify definitively the circumstances in which an earlier challenge is or is not appropriate. It seems however that many more STDCs are challenged than are revoked by the tribunal, and unless a challenge is going to proceed other than on medical grounds, an early application unsupported by medical evidence again raises questions about the reasonableness of this use of public funds.

- Compulsory Treatment Order (CTO)

These orders authorise compulsory measures of care and treatment for a period of up to 6 months, in the first instance. Interim compulsory treatment orders, which can last up to 28 days can also be authorised prior to final determination of an application for a CTO. The main concern identified was that lack of preparedness (including problems with the availability of independent psychiatric reports) led to too many continuations and interim orders being required too frequently. As discussed above, it seems likely that this is an inevitable consequence of the short statutory timescales for hearing a CTO application, but concern was also expressed about a lack of preparedness and unnecessarily protracted proceedings when the tribunal reconvenes, sometimes leading to further adjournments and additional cost to the legal aid fund, the tribunal and the health service, as well as unnecessary stress to the patient.

- Applications for revocation or variation of a CTO

The Act enables patients to seek revocation or variation of an order, across defined statutory time periods. There is a risk that patients are assisted in making an application to convene a tribunal, despite there being no change in their condition, and no evidence obtained (such as a supportive independent medical report) that would help convince a tribunal of the need to revoke or vary an order. This was the case in the example above, where it appeared applications to MHTS were diarised as a matter of course. In such circumstances i.e. where the timing of the application is in the patient's hands, there seems no good reason for a review being sought without the solicitor first of all obtaining a medical report. Further, it does not seem appropriate for cases to be diarised so that a review application is made (or a medical report sought) every six months, whether or not

there is any *prima facie* evidence to suggest that there has been a change in the patient's circumstances.

If vulnerable people are being encouraged to participate in tribunal proceedings which are of no benefit to them, this is not only potentially causing them distress and/or simply giving false hope, but again has cost implications to the Fund and for MHTSA, who advise the cost of an average tribunal hearing is £2,500, and which will require the attendance of a consultant psychiatrist and nursing staff, who could otherwise have been on the hospital floor. In addition, there exists a mandatory statutory obligation upon the MHTS to review the appropriateness of an order, by way of a hearing, when it has been in place without review for a period of two years. Therefore orders will be routinely reviewed, regardless of whether or not a patient's condition has changed.

These risks identified could constitute professional conduct issues. A number of stakeholders believed that a Code of Conduct for practitioners in this area could assist. Such a Code could also assist practitioners and patients alike by enabling the development of a fee structure that reflects and indeed encourages best practice, while not rewarding more questionable approaches.

Independent Medical Reports

Analysis

Often independent medical reports are instructed by solicitors, for the purposes of advising their clients on their medical condition and the prospects of success of appealing against detention. Firms can instruct a report on the basis of the first MENO template increase, and the average cost is circa £450 per report. Generally solicitors procure these reports on the basis of a fixed fee, regardless of the time engaged or complexity in a given case. However, it would appear that the average cost can fluctuate from firm to firm, and the average costs incurred by four firms over the past year were examined.

- A £580.22
- B £458.57
- C £376.75
- D £375.45

An increased average cost of report correlates to an increased tendency of the firm to travel. It may be the case that firms are using experts local to their firm, as opposed to local to the assisted person, meaning travel costs are also being incurred connected to these reports. The Board is currently undertaking a best value review into the use and costs of outlays, so such expert reports could be further analysed to ascertain what individual experts charge, if they are local or have to travel to complete their reports, as well as identify if there is any difference in costs depending on which firm instructs an expert.

Risk

The Board contacted the Team Manager of the Mental Health Unit at the Legal Services Commission to discuss how independent reports are dealt with in England and Wales. LSC then advised solicitors need not obtain prior approval to instruct reports, but had noticed the costs of these reports had greatly increased recently, with an average report now costing anywhere between £750 and £1500. This increase appeared simply to be due to experts raising their rates, with a relatively small number of experts available to do the reports. There is a risk this could

also happen in Scotland if the market for reports is not sufficiently competitive to influence the price requested by individual practitioners.

Advice & Assistance and ABWOR Distinction

Analysis

Some practitioners raised concerns about the Board's interpretation of when advice & assistance and ABWOR should be granted for MENO representation. This was a significant issue as there is no means assessment for ABWOR in these cases but under the Advice & Assistance (Scotland) Regulations 1996, unless a solicitor can be satisfied that a person is financially eligible, they may not admit that person to advice & assistance. The distinction between A&A and ABWOR therefore impacts on when a solicitor can act without applying a means test.

The Board's interpretation was that unless tribunal proceedings were fixed, the matter is dealt with entirely under advice & assistance, not ABWOR. Therefore if ABWOR has been granted (without application of a means test), and there is no tribunal, the account may not be paid. This approach risked causing certain behaviour amongst the practitioner group.

Risk

Some solicitors explained the difficulty in assessing a client's means if by reason of their mental ill health (including perhaps their detention) they can not or will not provide financial information. With non means tested ABWOR automatically available for tribunal proceedings, the distinction might encourage solicitors to proceed with a tribunal hearing even where the initial investigation of the client's circumstances (often including commissioning and perusal of an independent psychiatrist report) suggests that tribunal proceedings would not be appropriate.

The Board was provided with the scenario as described at 3.3.2 above, that for a person detained under a STDC, a tribunal to review the certificate will only be convened if that person, or their legal representative acting on their behalf, applies for one. Then there must be a hearing within five days, and there being no statutory provision to preclude an application being withdrawn and a further application being lodged later during the lifetime of that order, with another hearing then being fixed.

This situation could be creating a perverse incentive for some practitioners to encourage clients to appeal STDCs in the first instance, to enable a grant to be made of non means tested ABWOR, rather than make full enquiries, or obtain a report in the first instance, to advise the client on the prospects of success of such an appeal, and to only raise proceedings if there are issues appropriate for review by a tribunal. Such work would be currently considered as preparatory and therefore must be completed under advice & assistance, and be subject to a means test. Alternatively, by raising tribunal proceedings, it is likely the solicitor will get paid under ABWOR, and will not have had to complete a means test, regardless of whether there is any "value" to their client in the work undertaken, or the financial consequences for the Board and MHTS.

These risks ran contrary to the Board's expectations that practitioners should undertake the necessary preparation to be ready to run a full hearing at first calling in an effort to avoid seeking adjournments. Given the timescales involved in these proceedings, it might be argued that it is unduly onerous for Advice & Assistance to be used in the first instance, then to move to ABWOR, literally just on the day of the proceedings. It also seems unjust for practitioners who

have undertaken preparatory work in good faith to receive no payment because of the withdrawal of an application by a third party.

The requirement to means test vulnerable clients who may be unclear about their own financial circumstances and/or unable to evidence them due to their detention (compounded by the short timescales for appeals), appears to place practitioners in the invidious position of either refusing to act or risking non-payment for a thorough assessment of the prospects of an appeal.

Accordingly the interpretation of when ABWOR could be granted was remitted to the Board's Legal Services Policy Committee. It was agreed that the existing definition of ABWOR does not restrict the work that can be done to only cover taking steps in proceedings or representing the person subject to the provisions of the Act. The scope of ABWOR can be much wider than this. Whilst ABWOR does cover representation or taking steps in proceedings, other preparatory steps can be taken. In contrast advice and assistance can never cover representation or taking steps in proceedings, such as for example instructing a report and lodging it in process. The Committee also approved that the existing template increases in authorised expenditure be reviewed to ensure that proceedings would not be brought prematurely or unnecessarily under a grant of ABWOR.

PROPOSALS FOR CONSIDERATION

The key aim of the review is to improve access to legal services for mental health patients and named persons in respect of proceedings before the Tribunal, thus supporting the Tribunal in discharging its functions, in a way that represents best value for the Fund and the taxpayer more generally. The following proposals outline different vehicles that could assist in achieving this aim, and address some of the concerns outlined in this paper. These proposals could be considered as stand-alone options, with one preferred option to be chosen, or as components of a package of options.

Change fee arrangements to disincentivise travel and/or incentivise firms to provide mental health services.

There are a number of proposals that taken together form a continuum.

- in the first instance, the rate at which travel is paid could be reduced, as proposed in the Scottish Government's recent civil legal assistance savings package, to 50% of the normal fee rate. This will help bring Scotland more closely in line with other jurisdictions, such as England and Wales, where travel time and advocacy are paid at different rates and could generate substantial savings. However, this change alone might not fully address the frequency of (unnecessary) travel concerns here and, except perhaps by reducing the levels of competition if central belt firms chose not to travel as often, would do relatively little to encourage local supply. Nor would it address the Board's other concerns in relation to best practice. Thus while it would clearly achieve one of the major aims of the review – to reduce unnecessary cost to the taxpayer – the Board regards it as an initial response to the issues set out in the review.
- A further interim measure, and one that can be taken forward without the need for additional regulations, would be for the Board to develop a more refined approach to increases in authorised expenditure, supported by appropriate accounts guidance for the profession. Ideally this would be underpinned by the specification of best practice developed by the relevant stakeholders into a Code of Conduct. This approach would mean that sufficient authorised expenditure for steps undertaken in accordance with best

practice would be made available under a template, thereby reducing bureaucracy and giving solicitors a clear guide as to the sums available for each type of case.

Where solicitors adopted a non-best practice approach, or in cases which did not follow a normal trajectory, detailed increases in authorised expenditure would require to be applied for at each stage of the case to cover the work involved in that stage, to be granted only on cause shown.

- Such an approach to templates could also be harnessed in due course for incorporation into a fixed/block fee regime, analogous to the arrangements in either summary criminal legal aid cases or those funded via civil legal aid. Depending on their detailed structure, these could be deemed to include a standardised provision for travel, yet allow provision for exceptional case status in certain circumstances. This is the preferred option of the Board's Legal Services Policy Committee but would be a matter for the Scottish Government. Depending on the fee structure, this could help remove frequency of travel concerns, and also could help address concerns that were raised by the McManus Review that time in line fees lead to practitioners seeking adjournments. Fixed or block fees could also be used to benefit, on average, those practitioners who are providing a local service and one that reflects best practice. It would provide firms with surety of income and a reduction in bureaucracy at the accounts stage. In addition, if adequate remuneration helped ensure hearings were progressed more efficiently, or resulted in there being fewer hearings, this would be beneficial for the assisted person and also generate savings for other stakeholders, namely MHTS and the health professionals attending tribunals.

These options should allow a reduction in the current cost of provision, with the second and third options also helping project likely spend with more certainty. It would also be important to set fees at a rate that would not deplete local supply in areas where coverage is currently good, and to incentivise more local supply in areas where it is currently sparse.

Enhanced use of employed solicitors in the Highlands, and potentially elsewhere

The Board already has employed solicitors based in the Highlands at the Inverness Civil Legal Assistance Office. Using existing members of staff to provide mental health legal services would require no additional costs being incurred by the Board. By taking on cases non-local practitioners would have otherwise run, savings could soon be realised because extensive travel would be unnecessary. For example, only necessary and local travel time should be incurred, with adjournments requested when appropriate. This would generate substantial savings for the Fund.

The CLAO in Inverness has started to provide a mental health representation service. The office has forged links with local stakeholders such as advocacy groups and has, when possible, encouraged other firms based in the Highlands to provide these services, by way of referral. CLAO coordinated two training and awareness events in Inverness, most recently on 16th November 2010; "Mental Health and the Law – The System, Stigma and Jargon (It's All About Real People)". This event was aimed at solicitors, advocacy workers and mental health professionals, and was designed to get more local practitioners involved in providing mental health legal services, as well as alerting other mental health professionals that this is a service the CLAO are now offering. It is hoped this will encourage local practitioners in the area to provide these services, and the CLAO will help to facilitate this by making case referrals to firms with an interest in undertaking this work. The Board intends to publish a report on the events organised by the CLAO to date.

Until such time as non-local firms reduce their level of presence within the hospitals in the Highlands, it will remain difficult for the CLAO and/or firms local to persons requiring mental health legal representation to become established providers. This is for the reasons outlined on page 6 and is borne out by the CLAO's experience of delivering a mental health representation service over the last year or so. There are also other areas of the country that could benefit from Board employed solicitors providing coverage. There is little local coverage in Dumfries and Galloway. An analysis of accounts relating to this Health Board between 2007 and 2009 showed that 76 out of 82 accounts involved travel of more than 50 miles being incurred and cost on average £1891.23. The 6 accounts with travel below 50 miles cost on average £327.35. Discussion with those local solicitors that have delivered limited mental health legal representation suggests a willingness to undertake more, but a difficulty in obtaining referrals.

There is also limited local provision in Lochgilphead, with the majority of cases involving travel from the Central Belt. However, the Board has an employed solicitor based in Lochgilphead, and this solicitor will be providing mental health representation in early course, as well as encouraging other firms in the locality to undertake this kind of work.

Another potential barrier to the CLAO becoming established as a major local provider appears to stem from the appointment by the tribunal of central belt solicitors as curators. It can often be the case that a solicitor appointed as a curator subsequently facilitates that another solicitor from that firm represents the client. It is the Board's view that employed solicitors could in fact also be instructed as curators, which would end the need for some clients effectively to be directed out of the local area for assistance.

Contracting with Mental Health Practitioners

The Board has the ability under its grant funding powers in s4 of the Legal Aid (Scotland) Act 1986, to contract with firms for the provision of civil legal assistance, subject to Ministerial approval. Contracting or grant funding could be an appropriate mechanism both to help regulate the cost and the quality of the work being undertaken by solicitors in this area or to ensure that any gaps in supply are filled. Different contracts could operate in different regions, for example, contracts could be awarded to incentivise firms in areas with a dearth of local representation to undertake the work, which overall would still represent a lower cost to the Fund than paying practitioners to travel from elsewhere. In those areas where supply is not so much of an issue, contracts could have more of a focus on securing a high quality of services.

Contracting could be done by way of a lighter touch, with contracts operating as a type of service level agreement with practitioners, to underpin the general expectations the Board has in terms of professional conduct, with specific clauses relating to travel and having due regard to economy. There would still be a risk of perverse incentives in the system continuing, with potentially little benefit to the detained person or the tribunal system. Alternatively, the contract could be more comprehensive by incorporating; a fixed fee payment regime, requiring adherence to Board guidance, requirements to conform with best practice models, and/or require a de minimis number of cases to be taken.

To achieve best value, contracting could be used to secure a range of legal services for persons with mental health issues, not just tribunal representation, in a given geographical area. Besides advice on issues related to the Act, a contracted firm could provide a range of ancillary civil assistance for issues such as social welfare, debt, housing and disability discrimination for this client group. Such a service could provide legal and lay representation as appropriate, alongside developmental policy work, such as encouraging the engagement of local solicitors.

More Active Role in the Procurement of Independent Reports

Through the link established with MHTSA, the Board learnt that it compiled and holds a list of independent experts who can provide panel members or MHTSA appointed curators with reports, in accordance with a pre-determined incremental fee arrangement, which is capped at an upper limit of £328 (beyond which prior approval should be sought). However, it is understood that MHTSA does not compel panel members or curators to adhere to this list and it is for guidance purposes only.

In arriving at this fee scale, MHTSA undertook a survey of the rates other organisations paid for comparable reports, and their fee arrangement is based upon what is paid by Crown Office and Procurator Fiscal Service. Experts were contacted to see if they would be willing to go on the list. So, at that time, those experts on the list did commit to provide reports at a lower rate than solicitors generally seem to be able to procure currently.

The spread of the costs incurred by the Fund for solicitors to obtain such report is outlined on page 12. In order to gain greater control on the costs to the Fund of these reports, a similar exercise to that undertaken by MHTSA could be carried out by the Board. Practitioners could then be advised through guidance, or as part of a contract to use those experts on the list for MENO cases, where practicable. If another expert is used, and there is additional cost to the Fund it will have to be justified at the during assessment of the solicitor's account as to why it was reasonable to use this expert, due regard having been had to economy. This could assist solicitors to drive down costs, as experts not on the list will be aware that public funds will only pay a certain fee, and if they can not compete with this, then they will not be instructed. With the availability of non means tested ABWOR, a high volume of expert reports are paid from public funds, as opposed to privately. There would have to be consideration given as to whether this approach would adversely affect solicitors being able to get reports for their clients in time for tribunal hearings, and the quality of the reports that are produced.

CONCLUSIONS AND PROPOSALS

The Board's review has shown that those subject to the provision of the Mental Health (Care and Treatment) (Scotland) Act 2003 are, in general, able to access high quality and responsive legal services. However, while most parts of the country have good local supply, others have few local solicitors undertaking this work. The result is that central belt firms provide a service across the country, resulting in duplication, inefficient use of solicitor resource and significant cost to the taxpayer and the environment. Steps are required to improve the operation of legal assistance in these important cases. We consider that better value can be achieved for the taxpayer, the environment and most importantly for this vulnerable group. The Board proposes that steps be taken to:

- facilitate a greater supply of local firms across the country, including through fee changes and by providing training on the skills necessary to undertake this work
- reduce the current cost of provision, in the short term by reducing the fees payable for travel and restructuring the template system for authorised expenditure and in the medium term by developing a system of block or fixed fees
- work with stakeholders to encourage an approach to service delivery grounded in best practice and with greater assurance as to the quality of services being provided
- standardise the cost of independent psychiatric reports.

The Board welcomes comments on the issues set out in the paper and the proposals it contains. Please send all comments to: Kieran Burke, burkeki@slab.org.uk.

APPENDIX 1: FIRM PAYMENTS, CASE VOLUMES AND AVERAGE COSTS

Firm	Location	TOTAL Paid inc VAT					No. of Cases					Average case cost inc VAT				
		2006	2007	2008	2009	2010	2006	2007	2008	2009	2010	2006	2007	2008	2009	2010
1	Glasgow	£369,633	£693,782	£908,911	£837,991	£1,156,109	351	511	739	693	822	£1,053	£1,358	£1,230	£1,209	£1,406
2	Fife	£677,141	£783,342	£1,235,391	£1,274,335	£1,064,308	410	437	665	658	620	£1,652	£1,793	£1,858	£1,937	£1,717
3	Glasgow				£123,927	£249,120				71	165	-	-	-	£1,745	£1,510
4	Fife	£36,600	£67,147	£151,251	£175,275	£238,584	42	53	88	98	112	£871	£1,267	£1,719	£1,789	£2,130
5	Glasgow	£2,075	£30,275	£151,080	£232,332	£209,118	6	42	137	226	217	£346	£721	£1,103	£1,028	£964
6	Fife				£139,392	£187,881				119	170	-	-	-	£1,171	£1,105
7	Glasgow/Edinburgh	£151,804	£177,195	£140,465	£144,912	£172,498	177	209	144	158	141	£858	£848	£975	£917	£1,223
8	Edinburgh		£17,256	£95,492	£108,002	£109,723		14	77	71	62	-	£1,233	£1,240	£1,521	£1,770
9	Glasgow	£11,824	£50,377	£34,692	£63,938	£75,153	8	37	35	52	63	£1,478	£1,362	£991	£1,230	£1,193
10	Glasgow	£71,933	£75,247	£94,764	£78,634	£73,646	95	77	84	83	78	£757	£977	£1,128	£947	£944
11	Perthshire	£3,796	£25,531	£25,529	£45,486	£72,333	6	31	37	60	67	£633	£824	£690	£758	£1,080
12	Ayrshire	£18,048	£41,541	£44,136	£48,761	£65,853	37	69	77	71	91	£488	£602	£573	£687	£724
13	Aberdeen	£32,007	£45,869	£61,475	£40,592	£40,352	33	50	50	42	42	£970	£917	£1,230	£966	£961
14	Angus				£7,922	£35,892				8	21	-	-	-	£990	£1,709
15	Ayrshire					£34,247					25	-	-	-	-	£1,370
16	Ayrshire	£8,275	£17,729	£12,281	£15,075	£30,824	14	33	21	27	37	£591	£537	£585	£558	£833
17	Tayside	£10,609	£5,348	£13,123	£35,709	£28,623	24	13	35	46	43	£442	£411	£375	£776	£666
18	West Lothian					£27,025					25	-	-	-	-	£1,081
19	Edinburgh	£19,021	£41,828	£26,783	£58,560	£24,756	33	56	43	67	36	£576	£747	£623	£874	£688
20	South Lanarkshire	£38,011	£39,065	£41,647	£36,073	£24,263	33	30	35	32	20	£1,152	£1,302	£1,190	£1,127	£1,213
TOTAL (ALL FIRMS)		£1,781,587	£2,683,794	£4,171,040	£3,991,093	£4,181,917	1,940	2,434	3,434	3,185	3,287	£918	£1,103	£1,215	£1,253	£1,272