Experts in the Family Courts

Resolution's response to the Draft report of the President of the Family Division Working Group

Resolution's 6,500 members are family lawyers, mediators, arbitrators and other family justice professionals, committed to a non-adversarial approach to family law and the resolution of family disputes.

Resolution members abide by a Code of Practice which emphasises a constructive and collaborative approach to family problems and encourages solutions that take into account the needs of the whole family, particularly the best interests of any children.

We also campaign for better laws and better support and facilities for families and children undergoing family change.

This response has been prepared by members of Resolution's Children and Legal Aid Committees (limiting their responses to those questions where they can offer a view).

Resolution representatives contributed to the draft report. We were pleased to have been invited to participate.

The Legal Aid Agency is referred to as the LAA.

Responses to consultation questions

Payment and legal aid

6. How best can the mechanism for obtaining funding be simplified so as to reduce the administrative burden on solicitors and experts?

Some of the matters referred to in recommendation 6 have already been discussed with the LAA and it is hoped that progress will be made.

It would assist if one solicitor can make an application for prior authority on behalf of all parties to instruct an expert where required. We understand the LAA will be setting out in guidance to be published shortly that this will be possible. This will avoid multiple applications for the same prior authority.

We understand that the LAA is able to accept one invoice where all the parties' details are included and the costs split is clear (rather than a separate invoice for each party), and will be publishing updated guidance.

It would be helpful for the LAA to provide clarity for all legal aid providers and LAA caseworkers around these issues which are both essential and necessary. What is most needed is for the LAA to accept one application for prior authority to bind all parties once granted; and for the LAA to accept one invoice for that expert, noting the shares/how it is to be split across each certificate. We suggest that the wording of recommendation 6 might be tightened to reflect this.

We also understand from the LAA that an application for more than one expert can in fact be made on the same prior authority application which is helpful. It will assist for the LAA to clarify how the application should be set out where there are specific and different reasons for the instruction of each of multiple experts by one or more parties.

We don't believe that all our members would necessarily wish to see the removal of the requirement for prior authority where an expert's fee will exceed a codified rate. They would be likely to wish to continue to apply for prior authority to avoid financial exposure and be protected from the possibility that a fee might be reduced if prior authority is not applied for.

Sometimes an expert won't invoice or there is a delay in doing so, but the "burden" is on solicitors to obtain the expert's invoice, and to check the invoice very carefully. The Letter of Instruction (LOI) should make it clear to the expert how the invoice must be set out and what it must include, perhaps with a suggested time target for provision of the invoice and advice about the risk that if the invoice is not produced in a certain time frame, the expert won't be paid.

It might be difficult to reduce the administrative burden much further unless the system works to allows experts to send bills direct to the LAA. However, this would be a significant change, and we aren't currently persuaded that this would always be helpful and work in practice and with the CCMs system.

Other points to consider are the assessment by the LAA of the expert's invoice at the time the initial application for payment on account is made to avoid the risk of it being assessed down at the final billing stage and having to ask the expert for some of the money back.

On a positive note the dialogue with the LAA on the guidance for experts has been very helpful and collaborative and there does appear to be a desire on the part of the LAA to improve the guidance so that it works better for practitioners and the LAA alike. The review of this guidance from time to time allows issues that have emerged to be discussed and the guidance amended and updated.

7. Are there changes which need to be made to the number of hours permitted in respect of particular sorts of reports? How should cases be identified which fall within or outside standard allowances?

There is always going to be a difficulty as many experts don't know how long they will need until they are instructed.

The guidance from the LAA is already fairly clear about the guideline number of hours for initial reports and for addendum reports etc. The LAA has also responded to comments about setting out more guidance on the additional hours needed for psychiatric and psychological assessments where there are multiple parties being assessed and we hope the revised experts' guidance document will provide further guidance for these cases.

We suggest that the LAA should have relevant data on the number of hours commonly taken in different circumstances.

Top up hours, or the need for prior authority, should also be considered where there is a need for a forensic psychiatrist; if the number of pages/length of the bundle which an expert is required to read are in excess of a certain amount (the FAS recognises hours linked to the length of medical records); or there are two or more children.

8. What is the differential in hourly rates paid to medical experts as between privately or insurance funded work and legally aided work. Is it accepted that there is a disparity which needs addressing? If so in what areas is the disparity most acute? What mechanism is needed to establish the appropriate rate for different categories of experts.

This differential is outside of the knowledge of legal aid practitioners, but we assume experts themselves could provide more information.

We would be interested in understanding more about the level of disparity, but it would be very difficult for us to support any increase in legal aid rates for experts only in light of the level of the legal aid rates paid to legal professionals and the time that has elapsed since those have been considered.

Court processes

9. Should cases more routinely be removed from the 26 week track as a consequence of the need to ensure the court has the correct expert evidence before it? How best can compliance with the requirements of FPR 25 be achieved? Should a checklist accompany each application which is completed prior to orders being made? Should a standard form order which incorporates all relevant elements be a part of every order providing for expert evidence.

We welcome the report making it clear that Part 25 and PD 25 should be adhered to (recommendation 10).

It is often obtaining prior authority and/or the availability of a type of expert which causes delay more than the instruction process.

Our members' experience of the removal or not of cases from the 26 week track is mixed. In practice, we are not sure that judges refusing to extend the period to ensure that the correct expert evidence is before it is as big an issue as perhaps suggested. However, it is important for judges to be reassured and have the freedom to remove a case from the 26 week track for this and certain other reasons where necessary. Removal should not be automatic or without timescale, but extended by a number of weeks, taking into account the expert's timeframe as advised when instructed.

Whilst we think settling LOIs whilst at court might be encouraged in case there is not agreement, or where the judge and/or the legal representatives wish to do so, we have some concerns about judicial approval being required (paragraph (iv) of recommendation 10). Will there be time at court on the day to do so? Would this cause delay if the parties have to go back before the judge or seek a later decision on the papers? That said we agree that if at all possible, at least the questions for the expert should be sorted out at court.

It may be helpful for LOIs to avoid any detailed background/history (often the subject of discussion and disagreement between lawyers), and refer simply to a very basic factual outline with reference to the papers for more detail.

We suggest that it may be more important in private law children cases, where one or more parties are unrepresented, to get the questions for the expert agreed, and issues of funding by the LiP/s addressed, whilst the parties are still at court (or it might not happen at all). How the expert is to be paid, and the costs shared, need to be agreed at this point so that money can be secured on account, whether on the other party's client account or paid direct to the expert.

We don't agree that a checklist should accompany each application which is completed prior to orders being made. We don't think there is any need for an additional checklist. Although there is some variance in what judges expect, by and large our members report that Part 25 is generally rigorously applied and cases are timetabled through to IRH in public law cases. Some members are of the view that some sort of pro forma part of the order may be more helpful.

10. How best can the necessary documents for an expert be identified? Would the use of a medical records indexing agency be likely to lead to time and costs savings in respect of the expert such as to make the use of such a service a reasonable use of public funds?

Whilst legal practitioners might spend some time considering the index of documents and whether all need to be sent to each expert, it can be difficult for the lawyer to determine whether the whole medical bundle is necessary and this is not really for them to determine. We can see however that it may be helpful to review this at the point of instruction, e.g. does this expert need to see the contact notes? It will also be helpful to have the views of expert themselves on this question and they can review the index. The expert may wish and will be best placed to decide what they need to read.

In some medical cases, using a medical professional provider at approved legal aid rates to schedule and list the medical notes, and remove duplicates, would be very helpful. It would help smooth the instruction of experts in NAI and FII cases and we could all work off the same paginated bundle for medical experts. The LAA can give approval for scheduling of medical notes if an application for prior authority is made - it should perhaps be more routinely considered and applied for in medical injury cases/FII cases in particular.

We'd be happy to support recommendation 11 if medical experts and the LAA agree. The LAA would of course need to approve the use of and cost of the agency.

There are challenges when agreeing a core bundle for the expert in private law cases involving LiPs.

11. Is a single point of communication (probably the lead solicitor) a viable means of ensuring that the expert is provided with all documentation and questions in an administratively simple way?

Yes, this is usually what happens.

12. Is it feasible to fix a guaranteed date for the experts to give evidence within a trial template? What would be needed to ensure this was possible?

Yes, this is feasible. The expert's availability should be known when making the Part 25 application and it is good practice to work that into a witness template in advance. It isn't reasonable to ask an expert to, say, keep a whole week free. Members report usually booking the expert for a certain day within the trial and parties should liaise on fitting other witnesses around them. In medical cases this issue should be addressed in court when the case is listed although it is accepted it is more complicated in medical cases with more experts.

Treatment of experts

13. Is it appropriate for a judge to explain to an expert the issue in relation to their evidence which has required their participation in the hearing and the purpose of cross examination?

We suggest that these questions may largely be more for others responding to the consultation, but, in our view, yes.

14. Is it appropriate to seek to limit the nature of criticism of an expert save where they have plainly failed to comply with their duties to the court or their own professional ethical duties? Is some form of intermediate level of informal complaint mechanism appropriate in this context?

Yes, limiting the nature of criticism as suggested is appropriate and sensible.

15. Is it appropriate to give an expert a right to comment on a judgment which proposes to criticise them in respect of a failure to abide by their duties to the court or their professional duties? If so how can this be achieved in a realistic timeframe? If there are issues as to a failure to abide by their duties should this be raised with the expert when they give their evidence rather than at the judgment stage?

It sounds right that an expert should be given the chance to respond to criticism relating to a failure to abide by their duties, which is clearly different to the judge simply finding against the expert's opinion/views.

However, the more we considered this question, the more questions arose about exactly how this would happen in a timely way, and what might happen next, especially at judgment stage. We agree that there is a need to carefully think through the end point if the expert disagrees with the criticism. Without very tight timescales, which could make the exercise meaningless, the potential for delay and uncertainty in finalising the judgment is concerning. There is a risk of the parties being unable to move on with the child remaining in limbo. Would the order be made and implemented in any event? A party cannot of course appeal against a judgment which remains in draft.

16. Should any expert receive a copy of the final judgment? Is a précis of some form more appropriate? If so who would draft this?

Providing feedback to experts at the conclusion of cases should not really be an issue in light of Rule 25.19. But some cases don't end up in judgment so notifying of the outcome can fall by the wayside when settling cases in practice and/or where the expert is no longer involved after providing the written report. We suggest that both standard orders in public and private cases should include that the solicitor for the child (if there is one) should notify the expert of final order or agreed outcome. If there is a judgment the expert should receive it or that part that relates to their evidence (if a fact finding case).

Having to prepare and agree a precis would be a concern as it would create additional work and costs post the final hearing which certainly legal aid practitioners would not get paid for. We doubt it would happen.

It should be noted that the LAA will not usually pay for transcripts of judgments unless they are needed for an appeal or following a fact finding hearing so this excludes legally aided parties paying for final hearing transcripts.

Training

17. Should interdisciplinary training, mentoring and feedback form part of the recommendations? What ethical problems may arise and need to be addressed both in relation to mentoring and feedback?

Yes. Opportunities for experts to shadow hearings should also be explored.

Resolution has some peer supporter and mentoring materials. These are lawyer to lawyer but we would be happy to share them if that might be helpful to inform further consideration of mentoring.

20. What training currently exists within specialist organisations such as the ALC, Resolution and the Family Law Bar Association in relation to training lawyers in relation to handling expert witnesses? To what extent is there existing interdisciplinary training run by these organisations? Are there any models which could be used for national regional training?

Resolution's Advocacy for family lawyers course, which we are currently running every other month, includes examination and cross examination of expert witnesses (the trainer is a practising barrister).

We tend to offer bespoke sessions for members at one off events or as the demand arises, which by their nature may be interdisciplinary and involve expert witness speakers.

We have a guidance note for all members on Instructing experts in proceedings including children.

Expert witnesses are all welcome to join Resolution. Associate members endorse the Code of Practice and have access to all of Resolution's support, resources, networks, and professional development opportunities.

We keep our training offer under review and will of course carefully consider the Working Group's final recommendations.

21. How could an expert witness handbook or information pack for experts and legal professionals be commissioned?

We are not sure we need a handbook although there is one that Wall J wrote some years back.

We have the PD which is clear and the pro forma LOI and guidance notes (from the Law Society) provide further information. There may be a need for a guide including key procedure points, what is expected, how it all works. This would require some work to do this but it would be better done as an e document so it can be easily updated.

Supporting and Sustaining Change

23. Are regional "experts in the family justice system' committees the most effective way of delivering training, mentoring and feedback opportunities? How can local family justice boards be incorporated into the process of ongoing implementation of training, mentoring and feedback? What should the membership of such regional committees be? Is the circuit family division liaison judge the best person to chair such committees? How should such committees be administratively supported? What reporting back functions could they properly be expected to have in relation to the family Justice Council subcommittee?

We have some initial concerns that some local justice boards are very active and others less so, with potentially lots of asks being made of them across the various President's Working Group recommendations. We also understand that experts are not really regional. There is a risk that if this is left to local boards, some may be very effective and others may not. This may need a national lead. Having said that, we would encourage our members to apply to and become involved with any regional committees.

Additional points

- Further guidance needs to be considered around the issues for experts who are in criminal and family cases and how to streamline that, i.e. where a criminal court expert is used for the family court and vice versa. We need to be clear on the status of the reports which are prepared in one jurisdiction and used in another, obtaining consent by those experts for their reports to be used and whether they should report in both courts , and if so how this is managed. Following on from this, we need to ensure that we know who is reporting in a criminal case when there is a family case.

- We may also need to provide some guidance to help treating clinicians manage their role in the family court.

- The importance of a central e bundle cannot be over-stated. Most local authorities now provide central e bundles which is very helpful. However, some do not and it seems that as part of this review we need to do what we can to ensure that all local authorities provide paginated e bundles.

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