

Royal College of Psychiatrists

Consultation Response



DATE: 11 Feb 2011

RESPONSE OF: THE ROYAL COLLEGE OF PSYCHIATRISTS

RESPONSE TO: Proposals for the Reform of Legal Aid in England and Wales

The Royal College of Psychiatrists is the leading medical authority on mental health in the United Kingdom and is the professional and educational organisation for doctors specialising in psychiatry.

We are pleased to respond to this consultation. This consultation was prepared by the Child and Adolescent faculty.

The Consultation was approved by: Dr Ola Junaid: Associate Registrar

For further information please contact: Claire Churchill on 020 7235 2351 ext. 6293 or e-mail cchurchill@rcpsych.ac.uk

Response to the 'Proposals for the Reform of Legal Aid in England and Wales'

Introduction

In November 2010 the government published its latest 'Proposals for the Reform of Legal Aid in England and Wales' (CP12/10) recommending major changes in the fees paid to experts in civil, family and criminal proceedings. To summarise; *"The proposals...have been designed with the aim of contributing towards the substantial savings required in legal aid expenditure...(and) achieve more transparency"*

"In the short term...the Government proposes that the benchmark hourly rates currently applied by the LSC when considering whether experts' charges are reasonable, should be codified and subject to a 10% reduction (for example psychiatrists, child psychiatrists and paediatricians would be paid £90/hour in London and £135/hour elsewhere – see Annex H). In the long term...(there will be) a new set of fees for expert witnesses, wherever possible made up of fixed fees, graduated fees (where specific totals are set for particular activities) and a limited number of hourly rates" (see Annex J).

"It is envisaged that the new rates (and, in due course, the new fee structure) will bind the Court to prevent expert costs from increasing at the assessment stage, and that the LSC should have discretion to authorise that they be exceeded in 'exceptional' circumstances. At this stage, it is suggested that 'exceptional' circumstances should be defined as those where: the experts' evidence is key to the client's case; and either the complexity of the material is such that an expert with a high level of seniority is required or the material is of such a specialised and unusual nature that only very few experts are available to provide the necessary evidence."

Response to the consultation

The majority of this response to the consultation (Sections B and C) were prepared by Drs Mike Shaw & Brian Jacobs at the request of the Executive of the Child & Adolescent Faculty of the Royal College of Psychiatrists. Section A was completed by a member of College staff and approved by Dr Ola Junaid. It is relevant that MS was the Royal College of Psychiatrists representative on the Ministry of Justice's 'Analysis of expert witness fees paid in legal aid work Central Working Group', which provided the research for the Consultation Paper.

We address three sets of issues in this response, firstly the establishment of a single gateway telephone hotline, secondly the issues that relate to legal aid for private law litigation in child care and relevant financial disputes and thirdly we address the issues of expert fees and the issues raised in chapter 8 of the consultation paper.

A) The Community Legal Advice Telephone Helpline

Questions 7,8,9 & 11

The College notes paragraph 2.29 of the consultation:

'The introduction of the Legal Services Community Legal Advice (CLA) helpline has demonstrated that advice delivered via the telephone can be as good quality as, or better than, face to face advice, and is preferred by many vulnerable groups in society.'

While this is laudable, the College is concerned that some vulnerable groups in society - specifically refugees/asylum seekers - will not enjoy a similarly high standard of quality. Our concern stems from the increased incidence of mental illness (specifically post-traumatic stress disorder) in refugee populations (see e.g. Fazel, 2005)¹. The College feels that a telephone gateway to legal aid services is not appropriate for this population group as the lack of face-to-face contact may prevent the establishment of a trusting relationship whereby a refugee is comfortable discussing their mental health needs and accessing medical services. P4.275 goes some way towards acknowledging that a single telephone gateway may not be universally suitable:

'Face to face advice provision will be available where cases are too complex to be dealt with appropriately by telephone or where the client's specific needs would not be met (for example, due to mental impairment). This will be assessed on a case-by-case basis and, where appropriate, clients will be referred to face to face advice services.'

The College welcomes this recognition but would recommend in the case of refugees/asylum seekers that an automatic referral is made to face-to-face services rather than on a case-by-case basis as suggested.

¹ Fazel M, Wheeler J & Danesh J. 'Prevalence of serious mental disorder in 7000 refugees resettled in western countries: a systematic review' *The Lancet* **365**,1309-1314 (2005)

B) Private Litigation in child care and legal aid

We are very concerned that a family that is separated and under pressure because of a dispute over aspects of the children's care including access of a previously bullying partner to children who do not want contact will be compromised by this proposed measure. Bullying behaviour may have been chronic and not involved actual domestic violence. It can be just as intimidating and damaging to the children even if it is directed solely to the ex-partner.

In effect, this is a variation on paragraph 4.64 where the Department has accepted that "We recognise that the state has a role to play in helping claimants to obtain protection and consider that those in abusive relationships need assistance in tackling their situation."

We do not accept the distinction in paragraph 4.67 that seeks to suggest that unless there is actual domestic violence then contact and residence disputes should be outside the purview of legal aid. These matters are crucial to children's lives. They are dependent and have no power in the situation. If their resident parent is coerced and appropriate resolution of the matter, if necessary by the courts is not supported by the State, then the risk of mental health harm is much higher for the child.

4.70 Whilst mediation is undoubtedly helpful on occasion and can avoid litigation that is unhelpful, we remain concerned that when that route is considered that very careful thought is given as to whether the couple relationship was previously coercive. This may well make it an unsuitable case for such an approach to matters involving children's future welfare.

We agree with the position that the large majority of separating couples are able to resolve their childcare issues without recourse to the courts (4.209). We also agree that, where possible, the sentiment expressed in 4.210 is also

true – “We do not consider that it will generally be in the best interest of the children involved for these essentially personal matters to be resolved in the adversarial forum of a court.”

However, under the circumstances we refer to earlier we think that ongoing legal advice and legally aided access to the courts is essential for the protection of children’ welfare and mental health.

4.106 We are relieved to see that legal aid to support the representation of children’s interests under Rule 9.5 of the Family Proceedings Rules 1991 is to be retained.

In chapter 5, we are concerned at the proposal to raise the contributions in private law cases that relate to childcare from 20% to 30% of income. We think that this will lead to disproportionate pressure on marginally vulnerable families and may result in deterioration in child mental health.

C) Expert Fees:

Question 39: Do you agree that:

There should be a clear structure for the fees to be paid to experts from legal aid;

While we have no objection to a clear structure for the fees to be paid to experts from legal aid, the level of payment needs to be commensurate with the complexity and gravity of the task.

The Family Courts are responsible for some of the most disadvantaged and vulnerable children in our society. Because *‘Child maltreatment substantially contributes to child mortality and morbidity and has long-lasting effects on*

mental health, drug and alcohol misuse (especially in girls), risky sexual behaviour, obesity, and criminal behaviour, which persist into adulthood' (Gilbert et al, *The Lancet*, [Volume 373, Issue 9657](#), Pages 68 - 81, 3 January 2009). Decisions made by the Family Court have implications not only for particular children and families, but also for the health and welfare of the population.

To fulfil its role the court cannot act alone. It needs expertise in the diagnosis and treatment of the causes and consequences of childhood abuse and neglect. Social Workers or Children's Guardian's do not possess this expertise, however good they are. Instead the court requires high quality advice from an inevitably small group of clinicians, with decades of training and experience in helping maltreated children and their families.

In the short term, the current benchmark hourly rates, reduced by 10%, should be codified;

In the current economic climate a 10% reduction is understandable. However the origin of the proposed 'current benchmark rates' is opaque and the levels chosen bear little relationship to current practice.

In this regard we find the consultation document confusing. Paragraph 8.7 says *'There are no published guideline rates in civil matters. In criminal matters, the Ministry of Justice (MoJ) has set out guideline rates for the purposes of guiding court staff dealing with claims from expert witnesses in respect of court attendance under the Costs in Criminal Cases Regulations 1986..The LSC seeks to control expenditure through the application of benchmark rates as to what is a reasonable hourly rate. However, there is no requirement on the LSC to apply the benchmark rates'*. If the benchmarks have remained unpublished and not been adhered to, it suggests to us that they have not influenced actual practice.

When the MoJ consulted on the rates in 2009 (*Legal Aid: Funding Reforms CP 18/09*), it '*invited comments on proposals...(for) fixing a set of hourly rates for experts in regulations, based on Costs in Criminal Cases Regulations 1988* (which for Psychiatrists and Psychologists was £70-100/hour). *Respondents to the consultation argued that these rates were well below what experts were usually paid, and that implementing the proposals could lead to serious problems with the supply of experts, particularly in family cases*' (paragraph 8.10).

So it is unexpected that paragraph 8.11 & 8.12 states that the MoJ's 'Analysis of expert witness fees paid in legal aid work' project is gathering data on current rates paid from file reviews and interviews and has found '*the median level of charges appears to be in line with the benchmark rates applied by the LSC*'. Furthermore MS who is a member of the 'Working Group' does not recognise these figures (papers he has seen suggest an average of £150-170/hour).

We think that the proposed rate of £90/hour is too low. £90/hour is not commensurate with the complexity and gravity of the task. It is not a rate that the NHS would charge for senior consultant time, nor is it in anyway comparable with rates in private practice.

In line with the previous consultation we believe that implementing the current proposals '*would lead to serious problems with the supply of suitably trained and experienced experts*'. We would predict that the quality of advice available to the court would fall dramatically with damaging consequences for children, families and society. As members of the National Family Justice Council's Expert Sub-Committee we are aware of emerging findings from a study commissioned by the FJC that suggests that there is a need to improve the quality of the advice available to the family courts; reducing fees, in the way proposed, is unlikely to achieve this.

What is more we think that the proposals would fail in their overall aim of contributing '*substantial savings required in legal aid expenditure*'. Removing access to high quality advice will add to costs by causing delay in decision-making, lead to bad decisions and incur further costs downstream to the court system.

There is a further danger that any reduction in the quality and quantity of experts will undermine the scope of the Family Justice Review to make recommendations about the role of the expert and to suggest quality control systems.

In the long term the structure of experts fees should include both fixed and graduated fees and a limited number of hourly rates

We would not objection to expert's having both fixed and graduated fees and a limited number of hourly rates. The question is what would those fixed and graduated fees and hourly rates be. With the work of the 'Analysis of expert witness fees paid in legal aid work' project still incomplete, we can only agree to the principal.

The categorizations of fixed and graduated fees shown in Annex J are appropriate,

Annex J does not provide enough information. The reasoning that supports the proposed categorisation is not provided and so cannot be commented upon.

The proposed provisions for exceptional cases set up in paragraph 8.16 are reasonable and practicable?

Paragraph 8.16 is vague and falls a long way short of the Consultation's own aim of greater transparency. With all due respect we doubt that LSC staff are in a position to judge whether 'exceptional circumstances' apply. There will be

a need for some discretion in the system. The judge will be in the best position to take a view as to whether exceptional circumstances apply. There might be a role for employing a few experts on a sessional basis to advise judges as to the likely level of clinical complexity.

There also needs to be a mechanism for revising rates in cases that start off more straightforward but become intensely complicated further down the line or for the case where the reverse happens. A duty on the judge to assess this issue will be the most reliable guide.

Relevant excerpt from the consultation paper

8 Expert Fees: Civil, Family and Criminal Proceedings

Introduction

8.1 This chapter sets out the Government's proposals for the reform of expert fees in civil, family and criminal proceedings. The proposals, which are set out below, have been designed with the aim of contributing towards the substantial savings required in legal aid expenditure. Later in this chapter, we invite views on the questions set out below. When expressing views on those questions, respondents are advised to have the overall fiscal context firmly in mind.

Background

8.2 As set out in the consultation paper '*Legal Aid: Funding Reforms*' issued in 2009, experts are a disparate group, with a wide range of specialist skills and knowledge, who are used to provide information in court cases. For some experts, this is their sole professional activity. Others deliver these services alongside their 'day job', working in their private time. The experts' market is complex, with a number of different bodies involved – some of them based on particular professions, others on the practitioners' role as an expert. Experts in court cases are chosen and commissioned by solicitors, and selection of the right expert is said by many lawyers to be critical to the outcome that they can achieve for their client. On the other hand, it has been argued that excessive or inappropriate commissioning of expert evidence plays a part in delaying proceedings and increasing costs.

8.3 The Legal Services Commission (LSC) does not contract directly with experts. The costs incurred by solicitors for expert evidence are included in the bill they present to the LSC for disbursements which also include travel and

the other 'out of pocket' expenses of the case.

8.4 The amount paid for experts' costs is not recorded separately by the LSC, but is estimated to be around two-thirds of the total spent per year on disbursements in criminal, civil and family cases. This total was £192m in 2007–08, of which £21.4m was recovered from unsuccessful opponents. Gross spend on disbursements increased to £205.4m in 2008–09 and to £232.4m in 2009–10. The most significant increase in disbursement spend was in public law family work, which increased by 46.6% between 2005–06 and 2008–09. In light of the need to reduce spending on legal aid, these cost increases are unsustainable.

8.5 Although payments to experts are not recorded separately, there is a risk that the LSC is paying different amounts for the same work by different experts and across different categories of law. This is in potential conflict with the LSC's responsibility under the Access to Justice Act 1999 to achieve value for money in the services it funds. The lack of control over amounts paid to experts also makes expenditure unpredictable and prevents the LSC from reducing disbursement expenditure to a more sustainable level, particularly important given the need to reduce expenditure on legal aid.

8.6 For these reasons, the Government is clear that a new structure for the fees for expert witnesses needs to be put in place which will facilitate greater control over rising expenditure.

Current arrangements

8.7 Most experts' fees are currently paid at hourly rates. There are no published guideline rates in civil matters. In criminal matters, the Ministry of Justice (MoJ) has set out guideline rates for the purposes of guiding court staff dealing with claims from expert witnesses in respect of court attendance under the Costs in Criminal Cases Regulations 1986. These rates are used as broad

guidelines by the Crown Prosecution Service, Her Majesty's Courts Service (for payments from Central Funds) and the LSC, with exceptional circumstances taken into consideration. The LSC seeks to control expenditure through a process of 'prior authority', where providers have to seek permission to incur experts' costs, and through the application of benchmark rates as to what is a reasonable hourly rate. However, there is no requirement on the LSC to apply the benchmark rates, it is not compulsory to seek prior authority, and higher rates may be allowed by the Court on final assessment than those agreed by the LSC. The ultimate decision on whether an expert is to be used lies with the Court, as, particularly in family proceedings, the primary purpose of the expert's involvement is to assist the Court to make its decision.

8.8 Examination of the issues around the quality and supply of experts underpinned the (then) Chief Medical Officer, Sir Liam Donaldson's, proposals published in *Bearing Good Witness* in 2006. The LSC is currently working with the Department of Health on a pilot of commissioning multi-disciplinary teams of health professionals from the National Health Service and other public, private or voluntary sector organisations to provide jointly instructed health expert witness services to family courts in public law childcare proceedings, as proposed in *Bearing Good Witness*. In line with the *Bearing Good Witness* focus on quality and supply, rather than cost, the pilot is testing the benefits of using multi-disciplinary teams, including whether a team consensus gives reassurance to the Court that the appropriate conclusions have been reached; and whether the potential for the Court to be heavily influenced by an individual in the courtroom is reduced.

Proposals for the Reform of Legal Aid in England and Wales

8.9 The majority of experts paid for by the LSC are psychiatrists and psychologists, principally those participating in criminal and family proceedings. A number of steps have been taken in recent years to attempt to control the costs of experts in family proceedings in particular, including

removing payment for residential assessments in care proceedings (where families stay in medical facilities for psychological/parenting assessments) from the scope of legal aid. Reductions in experts' travel payments were introduced in the new crime contract from July this year. The use of experts in family proceedings also falls within the scope of the Family Justice Review, which is due to report next year. The Review will, however, not specifically examine the amounts paid to experts.

Previous consultation on expert witness fees

8.10 In 2009, the consultation paper *Legal Aid: Funding Reforms* invited comments on proposals intended to prioritise better what we spend on legal aid, including on experts' fees. The proposals focused on fixing a set of hourly rates for experts in regulations, based on Costs in Criminal Cases Regulations 1988. Respondents to the consultation argued that these rates were well below what experts were usually paid, and that implementing the proposals could lead to serious problems with the supply of experts, particularly in family cases. It was also argued that some experts might respond to the implementation of a simple hourly rate by increasing the time taken to prepare reports and carry out assessments. It was, however, widely recognised that action should be taken to regulate rates charged and make costs more predictable for all concerned.

8.11 The consultation response recognised that greater control of expert witness expenditure was still needed but that additional analysis of this complex area should be undertaken to inform any future fee proposals. A project 'Analysis of expert witness fees paid in legal aid work' is currently underway to increase understanding of the type of work experts undertake and the current rates paid. This involves additional data gathering, in the form of a file review exercise, and in-depth interviews with expert bodies. Two advisory groups – a Working Group and a larger Reference Group – made up of representative bodies and other interested parties have been set up to assist

in the interpretation of the findings of the file review and to discuss emerging recommendations.

8.12 Data gathered from the file review and interviews appear to confirm that there is a wide variation in fees charged by experts for the same or similar work, and supports the concern that the LSC is not currently achieving best value for money in this area. Most experts appear to charge by the hour, and for the key areas of expenditure examined so far the median level of charges appears to be in line with the benchmark rates applied by the LSC.

Proposals for reform

8.13 In the long term, the Government wishes to build on this existing work to put in place a new set of fees for expert witnesses, wherever possible made up of fixed fees, graduated fees (where specific totals are set for particular activities) and a limited number of hourly rates. This fee structure will build on the information received from respondents to the previous consultation, the outputs of the recent file review, interviews with members of the Working Group and Reference Group and responses to this consultation. During and after this consultation we will be continuing to discuss the various options with the Working Group and, where appropriate, the wider Reference Group. Subject to this further work, the Government proposes to consult further on the proposed amount of the new fees within the new structure. This will however, be in the context of any changes that, for example, come out of the Family Justice Review.

8.14 In the short term, however, the Government proposes that the benchmark hourly rates currently applied by the LSC when considering whether experts' charges are reasonable, should be codified and subject to a 10% reduction (consistent with the approach adopted to fees in civil and family proceedings). The rates would be the maximum allowable for the type

of expert charge, subject to exceptional circumstances (see below). These proposed rates, representing the benchmark rates less 10% are set out in Annexes H and I.

8.15 In some cases, the benchmark rates paid in London are lower than those paid outside London. This reflects the greater supply of experts in London, which allows more competitive rates to be paid. The 'benchmark' rates were developed by the LSC on the basis of the experience and expertise of case workers dealing with experts' bills. Although there are limitations on the data collected in the file review (due to the diverse nature of experts and their work), it does show that the median level of fees charged by experts in some key categories is in line with the LSC's benchmark rates. We believe that codification (and the accompanying publication) of the rates will increase clarity and transparency, and ensure that experts carrying out the same type of work are consistently paid at the same rates.

8.16 It is envisaged that the new rates (and, in due course, the new fee structure) will bind the Court to prevent expert costs from increasing at the assessment stage (see paragraph 8.7 above), and that the LSC should have discretion to authorise that they be exceeded in 'exceptional' circumstances. At this stage, it is suggested that 'exceptional' circumstances should be defined as those where: the experts' evidence is key to the client's case; and either the complexity of the material is such that an expert with a high level of seniority is required or the material is of such a specialised and unusual nature that only very few experts are available to provide the necessary evidence. The intention is that in the short term the codified hourly rates and, in the longer term, the new fee structure, will achieve more transparency in the management of public expenditure, and provide greater clarity and certainty for experts and for the solicitors who engage them, and that these factors will help ensure that supply is maintained. The Family Justice Review, and other work to improve proceedings in civil and criminal cases, is looking at how experts can be used more effectively in proceedings (the codified rates

proposals in this chapter are not though dependent on the outcome of that work).

8.17 At Annex J is an initial outline of the proposed fee structure to be applied in the longer term. This consists of a list of experts and the work that they do, with an indication whether the fee (to be specified) is proposed to be fixed, graduated or hourly. The categorisations in Annex J are based primarily on in-depth discussions with members of the Working Group and the Reference Group. In general terms, the Government's intention is:

- i) to provide a set of fixed fees where an activity is 'routine' and one-off – such as a General Practitioner's report or a straightforward DNA analysis;
- ii) to provide a separate fee for each activity, where the expert's involvement in the case is more extensive, and involves several different activities – for example, where they are asked to carry out an assessment, to provide a written report on the results, and to give evidence of the results in court.

8.18 The proposed fee structures will not include publicly funded Independent Social Work (ISW) because ISW rates were the subject of a separate consultation as part of the *Family Legal Aid Funding from 2010* consultation. As set out in the response to that consultation, publicly funded ISW fees will be capped at rates charged by the Children and Family Court Advisory and Support Service (Cafcass) and CAF/CASS Cymru with the introduction of the new Civil Contracts, which has been delayed by the successful Judicial Review of the LSC's recent tender for Family legal aid contracts.

February 2011