Royal College of Psychiatrists in Northern Ireland Response to Department of Justice Consultation on Examining the Use of Expert Witnesses appearing in the Courts in Northern Ireland

The Royal College of Psychiatrists in Northern Ireland welcomes the opportunity to respond to this Consultation on examining the use of expert witnesses appearing in the Courts in Northern Ireland.

The Royal College of Psychiatrists is the statutory body responsible for the supervision of the training and accreditation of psychiatrists in the UK and for providing guidelines and advice regarding the treatment, care and prevention of mental and behavioural disorders. Among its principal aims are to improve the outcomes for those with mental illness and to improve the mental health of individuals, families and communities.

The College has 370 members in Northern Ireland, including doctors in training. These doctors provide the backbone of the local psychiatric service, offering inpatient, day patient and outpatient treatment, as well as specialist care and consultation across a large range of settings.

This is submitted on behalf of the Royal College of Psychiatrists in Northern Ireland Executive Committee.

The comments in this response fall into 3 broad categories: general comment on the document, specific comments regarding contents of the document and responses to specific questions posed.

General Comment

Our comments are made from our standpoints as psychiatrists with specialist experience and knowledge that is required by the Courts. In both these capacities we wish to see the development of efficient and effective arrangements. We believe that over the years there has been improvement in the arrangements to obtain input from expert witnesses and also that there remains scope for further improvement.
We consider this consultation document identifies and addresses a number of important issues and it adopts a generally reasonable manner and a constructive tone. We believe that greater understanding and more satisfactory solutions could be found through a process of dialogue with psychiatrists rather than imposing measures that may jeopardise their contributions.

The Courts rely on the services of expert witnesses. There are many legal situations where justice demands input from expert witnesses and in many instances this requirement is underpinned by statute, such as the various requirements for evidence from medical practitioners approved under Part II of the Mental Health (NI) Order 1986 [in practice, consultant psychiatrists]. The Courts require a range of experts who have knowledge and understanding of both their own field of expertise and also of the Court system. Experts are often required to respond flexibly and in short timescales to facilitate the Courts. We believe it is important to devise arrangements that are satisfactory for the range of parties involved in the legal processes, including the expert witnesses, and for the wider community.

It is noteworthy that 97% of the budget for Legal Aid is spent on costs other than expert witnesses. The Legal Aid fees paid to experts have remained static for many years, gradually making such work progressively less attractive to experts who, typically, have a range of options for exercising their expertise. Furthermore it is important to appreciate that a good deal of work done by experts is without charge. There are many time-consuming activities that attract no fee, such as making preliminary contacts, providing estimates of fees, informal discussions with lawyers and arranging diary dates. Indeed, Court dates cancelled at short notice
are not uncommon and costs can be extremely hard to recover in relation to such cancellation, likewise with appointments that result in non-attendance or late cancellation. In addition, expert witnesses incur substantial costs such as room hire, secretarial expenses and ever-increasing fees for professional indemnity and regulation. We believe it is essential to appreciate that the current ‘headline’ hourly rate paid to expert witnesses is much greater than the amount the expert actually receives for the essential services provided to the legal system.

At present a substantial amount of the legally-aided medicolegal work done in Northern Ireland relies upon a small pool of Consultant Psychiatrists who have retired early from NHS practice. Those working within the NHS have found that the exigencies of job planning have made medicolegal practice much more challenging, as they can no longer respond to the Courts with the flexibility the Courts require. Consequently there is a strong trend away from doing medicolegal practice among younger consultants. Changes in terms and conditions of employment for these younger consultants mean they no longer have the same options for early retirement as were available to their predecessors. We believe that this combination of circumstances creates a precarious situation where there is a very real danger that there will not be a sufficient number of suitably experienced expert psychiatrists to meet the needs of the Courts.

**Specific Comments**

We believe there is an error in the document in relation to fees payable in the Republic of Ireland. Our experience is that €120 per hour is usual for reports done by Consultant Psychiatrists, who are,
of course, 'Consultant Medical Practitioners'. We believe that there is a typographic error confusing Psychologists and Psychiatrists. This is a common error.

It is important to recognise that Medical Consultants are more heavily regulated now than they ever have been. This regulation is costly in terms of time and money, especially for those whose work is both in Northern Ireland and the Republic of Ireland, as each system is independent. We believe there is no appetite for further regulation such as another register of experts and the complications associated with this.

**Specific Questions**

Q1. Are there more effective means by which expert evidence can be sourced and provided which would avoid the need to appoint additional experts and how should the 'diagnostic' effort be remunerated?

In our opinion, efficient case management is essential. Instruction is a function of solicitors, barristers and judges, but there could be a role for psychiatrists at an early stage in helping to triage cases. In our experience, multiple reports can derive from a starting point that is too narrow, so that initially an expert is engaged who lacks the necessary qualifications or who has insufficient breadth of expertise to make comment on the full range of issues that arise. Later it becomes apparent that a wider psychiatric assessment is needed to consider issues such as diagnosis, functional impairment, aetiology, prognosis, risks and capacity to participate in legal procedures. We believe that the Courts could often avoid a piecemeal approach by engaging at the outset an expert who has the full range of competencies required and who can signpost any
further specialist work that needs to be done without repetition of the work that has already been undertaken.

It seems reasonable to consider an initial discussion with a Part II approved Consultant Psychiatrist in order to facilitate an informed overview of the case, allowing targeted instruction and thereby facilitating prudent case management. Naturally such expertise and time would require appropriate remuneration, but this could be more than offset by elimination of unnecessary expenditure on inappropriate referrals.

We also believe there would be advantage in joint training and updating for legal professionals and expert witnesses to improve their understanding of the issues and to enhance their capacities to work together efficiently.

Q2. Has there been any impact on experts arising from the increased development of protocols and Court directions?

We welcome initiatives such as Scott Schedules, practice directions and “hot-tubbing” that help identify and resolve areas of disagreement between experts and reduce time spent in court.

We believe that there is scope for improving communication with expert witnesses such as psychiatrists, to ensure that they are aware of developments such as practice directions.

Q3. What are your views on a single joint expert in criminal and other cases? In what circumstances might a single joint expert, whether appointed by the Court or chosen by agreement by the
parties, be sufficient in delivering expert witness services? In what services would this not be appropriate?

In general, we believe that the adversarial system helps achieve a higher quality of reporting than with a single joint expert. The adversarial system provides useful checks and balances and it helps avoid potential complacency or reduction in standards that may otherwise emerge with the passage of time. That said, in low value litigation, less serious criminal cases and in some family cases, the potential benefits of a single joint expert are worth considering.

Q4. Is there scope to utilise a single Court appointed expert? When would that be appropriate? In what circumstances would a single Court appointed expert not be appropriate and why?

The response to Q3 also addresses this question.

Q5. Presently there is little or no uniformity to fees paid to experts performing similar functions. Is it appropriate to set fixed fees for expert witness services under legal aid?

Setting fixed fees may be appropriate for some services, such as performing and interpreting standardised laboratory tests, but in psychiatry the length of time required to assess one case may vary greatly in comparison with the time required by another case; for example one case may involve reading a huge volume of papers, notes and records and in another case the available documentation may be minimal. We believe that setting fixed fees in psychiatry could lead to “a race to the bottom” in terms of the quality of reports; in other words it could create a perverse incentive to produce a large volume of poor quality reports. Such an
arrangement is likely to alienate those of us who wish to continue to provide high quality assessments. We already know of many doctors in Psychiatry and in other specialisms who will not undertake legally aided work because of the current low level of remuneration relative to private clinical work and non-legally aided medicolegal practice. We expect that setting a fixed fee would very likely add to the exodus of skilled and experienced practitioners available to the Courts in legal aid cases.

Q6. Is it appropriate to remunerate expert witnesses at a fixed hourly rate under legal aid? Is additional flexibility required in setting appropriate fee rates?

At present psychiatrists prepare reports at an implicit fixed fee. It is worth noting that solicitors are finding it increasingly difficult to obtain psychiatrists available and willing to prepare psychiatric reports. As noted above, with the increasing pressures placed on NHS Consultants together with job planning and reduced flexibility, younger consultants are less likely to develop a medicolegal practice. A significant proportion of medicolegal reporting is currently done by Consultant Psychiatrists who have retired from the NHS. We strongly believe that changes to NHS terms and conditions that have already been implemented will ensure that the pool of psychiatrists who are available to act as expert witnesses will continue to dwindle. If legal aid work is made too unattractive it will become even more difficult to find suitable experts to fulfil the functions required by the Courts. Once the pool of available experts has been depleted it will take time and additional expense to replenish it; during that transition justice will undoubtedly suffer.
Q7. It has been suggested that experts can find themselves outside their area of designated competence. How can such circumstances be avoided? Are there circumstances where a diagnostic report (and specific fee) would be more appropriate than commissioning a full report in the first instance, perhaps where designated competence may become an issue?

Psychiatrists are aware of the case of Kumar vs GMC [2012] EWHC 2688 in which Dr Kumar, Consultant Psychiatrist, was unsuccessful in his appeal to overturn the decision in which he had his license to practice suspended after behaving in a ‘reckless’ manner for declaring a level of competence inconsistent with his experience. Our indemnity insurance has been increased as a consequence of this case. The new practice declaration is also explicit regarding competence to complete the reports to which we sign our names.

It is also important that those instructing experts are clear about the qualifications necessary to fulfil the role required; for example we have seen situations where reports have been sought from non-psychiatrists on issues such as fitness to plead, yet the law specifically requires the opinion of a medical practitioner approved under Part II of the Mental Health (NI) Order 1986.

As indicated in response to Q1, a discussion with a Part II approved Consultant Psychiatrist should help streamline the process of commissioning and facilitating clarity of instruction. We are also concerned that by breaking down the assessment into multiple components, lawyers may engage multiple ‘single issue’ experts, whereas the engagement of one expert, such as a consultant psychiatrist who has a broad biopsychosocial overview, can address many or all of the relevant issues.
Q8. Would there be any additional benefits to be derived from the Department developing an additional register of experts? If not, are there ways in which the current register could be improved upon?

At present Consultant Psychiatrists have annual appraisal with their designated body, revalidation through the GMC, necessary attendance at 50 hours of CPD per annum at least (much of which is self-funded) that has to be logged with the Royal College of Psychiatrists (and also logged with the Irish College of Psychiatrists for doctors who also work in Republic of Ireland), regular application to be on the Part II register with RQIA, audit of their practice and 360-degree feedback. We believe that the majority of psychiatrists would not welcome yet more burgeoning bureaucracy and another register.

We suggest the current register should be made accessible online to those experts whose names are on it so that they can check and update their personal details.

However we believe there is a greater need for improved communication between the legal and medical professions so that in a small jurisdiction such as Northern Ireland, expert witnesses are generally known to referrers and they can also help referrers by signposting experts with particular types of specialist knowledge and experience.
Q9. Regarding the use of technology in the delivery of expert witness services, are there opportunities to improve the take up of this service and are there any ways to improve the existing system? Are there any particular challenges to increased utilisation of video technology for the delivery of expert evidence?

In Psychiatry, the face-to-face contact of the interview is important. In such meetings the ‘feel’ of the interviewee cannot be underestimated, similar to the way the judge and jury get a ‘feel’ for a witness. Nonverbal communications and nuances such as changes of affect and emotion when key issues are discussed, are not readily noted via telecommunication. In attending and giving evidence in Court, it is very helpful to engage in informal discussions where permitted and also to hear the evidence of others to enable a more complete understanding of the key issues. The in vivo situation of the Court may be a significant influence on experts’ evidence.

In some specific situations we believe there may be a role for giving evidence by video-link; for example in uncontested cases it may be satisfactory to give the oral evidence that is required to make a Hospital Order.

Name: Dr Diana Day-Cody (Chair)

Organisation: Royal College of Psychiatrists in Northern Ireland

Email Address: tmckeever@rcpsych.ac.uk

Address: Clifton House, 2 North Queen Street, Belfast BT15 1ES

Telephone: (028) 90278793