

General Observations:

1. The Family Justice Council ("FJC") is profoundly concerned at the shortage of experts willing to provide opinion evidence in family cases. The pressure which has been placed on medical experts, particularly paediatricians, following recent widely publicised criminal cases, has had a direct effect on family cases. That pressure exacerbates an already difficult situation in which experts have been deterred from engaging in this work by reason (for example) of the time involved, the lack of effective training, the fear of complaint, and, we are advised, the lack of proper funding.
2. The situation is undoubtedly grave.
3. The FJC has prioritised this issue in its early deliberations, forming a sub-group which has been mapping the various initiatives addressing the current problems in the supply and quality of expert witnesses in family cases.
4. One such initiative is that which was announced by the Minister for Children in June 2004, on the availability of medical expert resources to the family courts. That initiative has been carried forward by a 'working party' chaired by Sir Liam Donaldson, the Chief Medical Officer. Sir Liam Donaldson is soon to be reporting to the Government (expected to be "early 2005"), following his wide consultation on the issues raised by his detailed terms of reference.
5. The FJC is concerned that no steps are taken now which would add a further disincentive to any expert who is considering undertaking this work, or who had been undertaking the work but is now ambivalent about continuing.
6. We note that it is:
"The commission's long-term aim... to arrive at a position where all experts, who are regularly instructed in Commission-funded cases, are accredited".
We acknowledge the Commission's recognition of the risk that "accreditation proposals may discourage experts in specialisms, where there is a shortage of those willing to carry out forensic work, from doing so", we nonetheless wish to register our concern that accreditation across the board will be a major disincentive to experts considering engaging in medico-legal work. Moreover, while accreditation may have a place in respect of experts who provide opinion evidence on past events and causation, we doubt its place in the field of expert opinion on future placement and management.
7. We note that the Commission is not advocating compulsory accreditation, but are concerned that it should not consider that those who are not accredited will not be paid, or not be paid at the same rate, as those who are accredited.
8. This response has been prepared on behalf of the Family Justice Council, and has been expressly approved by the President of the Family Division, Chair of the Council and The Right Honourable Lord Justice Thorpe, Deputy Chair of the Council.

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Use of Experts in Family Cases:

9. Shortage of quality experts in family cases: We understand the commitment of the Legal Services Commission to delivering services that meet the needs of clients, and deliver value for money to the taxpayer.

10. We welcome the recognition that "there is a shortage of experts in some specialisms - particularly of doctors who are willing to work in family cases". We associate ourselves entirely with the concern expressed in the same paragraph that registration procedures with the Council for the Registration of Forensic Practitioners may act as a "further deterrent to carrying out such work, thus exacerbating the shortage".

11. We are re-assured that the LSC does not regard "the compulsory registration of all expert witnesses as practicable", and we do accept that while accreditation will not completely rule out the possibility of deficient expert evidence being given in the future - nonetheless accreditation will reduce the likelihood, and will be of general benefit to the good administration of justice.

12. We recognise that the Consultation Paper is dealing with the use of experts in all publicly funded fields. We would urge the view that many of the proposals are not appropriately applied in respect of experts in family courts.

13. As the Legal Services Commission is undoubtedly aware, those involved in the delivery of family justice are more concerned than ever about the shortage of experts in all disciplines prepared to undertake the work. The high-profile cases of Smith, Patel and Cannings have done little to ease the pressure.

14. One way of easing the supply would be to encourage specialist registrars to become involved in the work. The President's Inter-disciplinary Committee has striven to ensure the future supply of experts by encouraging specialist registrars to become involved in the work. The committee introduced a mini-pupillage scheme for specialist registrars and consultants in the fields of paediatrics and psychiatry. This scheme has been widely used by the Royal Colleges and a significant expansion of the scheme is planned.

15. Evidence of 'treating' experts: Many of the 'public law' cases before the courts derive from allegations of physical abuse of children. In many of these cases, children have been presented to hospital - either directly or on referral from their general practitioners - with injuries. In hospital the child is assessed and treated by consultants in a range of medical disciplines whose evidence is critical to the judicial investigation in subsequent 'public law' proceedings. This 'primary' evidence of treating experts is often of the highest calibre, and of significant forensic value. This 'primary' evidence can, in our view, be appropriately relied upon by the courts as 'expert' evidence.

16. We note the comments of Baroness Kennedy in her report on Sudden Unexpected Death in Infancy (September 2004) as follows:

"It is our view that paediatricians involved in the acute management of patients should not be expected to give expert testimony in cases involving those patients. It is a sine qua non that doctors treating patients must develop partnerships with them and with the immediate family to ensure the best medical outcome. This will inevitably result in a degree of intimacy and therefore subjectivity when evaluating the case as a whole. This is the opposite of what is required of the expert witness, who should be objective, impartial and detached".

We question whether these comments necessarily or appropriately apply to the family courts, which has substantial experience of invaluable contributions from experts of first referral. We could expand on this issue if that would assist.

17. Self-regulation: There is, in the family jurisdiction, an element of self-regulation in the instruction of expert witnesses.

This operates in a number of ways:

- The court can, and does, tightly control the number of experts instructed in a given case;
- The appointment of the single joint expert is widely endorsed;
- In public law cases, the experts are required to act in accordance with Appendix C to the Protocol for Case Management.

18. In more general terms, the self-regulation extends to the fact that the expert evidence in each case is subject to a judgment of the court, unlike the criminal court where there is no review, or critique, of the expert evidence. There is therefore an inbuilt review of each piece of work undertaken by an expert witness digested by those engaged in the process, and who are instrumental in the instruction of experts, solicitors and barristers.

19. We note the observation at paragraph 9.24 of the Consultation paper: "we question whether, particularly in public law family cases, the present arrangements concerning the use of experts are the most appropriate. It is the interests of the children that are paramount and, to that end, the court's role is quite interventionist. In proceedings where the court determines what expert evidence is required in a child's interests, it may be more appropriate for the court to fund the obtaining of that evidence. The courts already pay the fees of experts who attend court to give evidence in criminal proceedings."

20. We are far from convinced by this argument. At the first 'fact-finding' or 'threshold' stage of public law proceedings, the parties assume a largely adversarial position (see Charles J. in *Re R (Care: Disclosure: Nature of Proceedings)* [2002] 1 FLR 755). While the court regulates the instruction of experts, the parties nonetheless take adversarial or quasi-adversarial positions, and should be enabled - within the limits of proportionate case management - to obtain expert assistance in the formulation of the case. We doubt the practicalities which would be involved in the court holding the purse for the funding of the experts.

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Looking at the questions:

21. We turn now to looking at some of the specific questions posed in section 4 of the consultation paper.

Question 4.3: Do you consider that accreditation will generally raise the quality of forensic services provided by experts?

22. Not necessarily. We note that on the website of the CRFP, there are few disciplines currently listed which will have relevance to family proceedings.

Question 4.11: What are your views on 'proportionality' of costs in family cases?

23. Because the court retains control over the number, and type, of experts instructed, it will rarely be the case that a set of proceedings acquires an unnecessary, or disproportionate, number of expert witnesses.

24. We do not accept the proposition at para.9.21 of the consultation paper:

"Expert medical reports are likely to be less justifiable when the details of contact are in issue than when residence is in issue"

25. This comment fails to reflect the often profound complexities of the contact disputes - either viewed alone, or when compared with residence disputes. Contact disputes often engage consideration of whether there should be any form of ongoing relationship between parent and child at all - an issue driven sometimes by the parent with whom the child lives, and sometimes by the parent seeking to maintain or establish contact. Psychiatric or psychological evidence (of child &/or adults) is often indicated.

26. We remind you that Wall J. in *Re O (Contact: Withdrawal of application)* [2003] EWHC 3031 (Fam) [2004] 1 FLR 1258 said that:

"Disputes between separated parents over contact to their children are amongst the most difficult and sensitive cases which judges and magistrates have to hear. Nobody should pretend that they are easy, or that there is any one-size-fits-all solution".

27. In *A v A (Shared Residence)* [2004] EWHC 142 (Fam) [2004] 1 FLR 1195 Wall J. referred to the "complexity of cases of this nature". Similar comments were made in the Court of Appeal in *Re S (Contact: Promoting relationship with absent parent)* [2004] EWCA Civ 18, [2004] 1 FLR 1279. We could give you many other similar comments from the judiciary about the difficulties of these kind of cases, and the value to the judiciary of the expert evidence adduced in them.

28. It is impossible to apply 'proportionality' arguments to the instruction of experts in public law proceedings - how is it possible legitimately to grade the relative seriousness of emotional abuse, or neglect, as against sexual or physical abuse so as to provide some 'proportionality' scale for the instruction of an expert? The flaw in the illustration contained within the consultation paper of 'contact' cases being less likely to justify expert assistance than residence cases we believe underlines our observation.

Question 4.12 Do you agree that, like lawyers, experts should keep a detailed record of the work they perform (and of the time taken) and what do you think are the benefits and drawbacks of doing this?

29. We consider that this would be right.

Question 4.15: Which view of an experts obligation to the court do you feel most accurately reflects the current position? If neither, please state your view of the obligation?

30. In the family jurisdiction, the experts' overriding duty is to the court at all times. The family court expects that duty to take precedence over any obligation to the person from whom he/she has received instructions or by whom he/she is paid: see Appendix C: Code of Guidance for Expert Witnesses in Family Proceedings.

Question 4.19: Do you agree that the number and cost of experts reports in public law Children Act cases have increased significantly in recent years? Do you consider that the assessment work undertaken (or not) by local authorities and the approach of a local authority towards payment of experts' fees has a significant impact? If so, please explain by reference to examples.

31. We acknowledge that the number and cost of experts reports in public law Children Act cases has probably increased in recent years. We are advised that this may in part be because there is a high turnover of social workers; fewer people are applying for vacant social work posts, deterred by the salary. Many people doing social work have portfolios and don't wish to work as employees of a local authority. We believe that this may have the consequence that 'expert evidence' is being called for in cases where competent evidence-based reports from social workers should be sufficient.

32. Many public law cases involve issues of enormous complexity; specific expert evidence is essential - often across a range of complementary disciplines - in areas of medical science in which the state of knowledge is ever-increasing. The family courts are appropriately concerned that proper enquiry is undertaken of the issues so to achieve a true outcome.

33. In relation to the apportionment of costs, the LSC will be aware of the approach of Bodey J. in *Calderdale M.B.C. v S* [2004] The Times 18th November.

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Annex G - Particular Difficulties in Children Cases

34. We consider it important that the Legal Services Commission should work together with the courts "to find a way forward" in relation to the appointment and funding of experts in public law proceedings.

35. We would like to make comments about two observations in Annex G:

(a) it is said that "there is perceived to be a shortage of some types of expert". There is undoubtedly a shortage of many types of expert prepared to be engaged in family law cases; there is compelling confirmation of this issue from the many disciplines assembled in the Family Justice Council;

(b) it is said that there can be a difficulty in apportioning experts' fees; we consider that this may be less problematic since the judgment of Bodey J. in the Calderdale case (above)

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Annex H: Draft Terms of Appointment:

36. As the LSC well knows there is a comprehensive 'Code of Guidance for Expert Witnesses in Family Proceedings', (annexed to the Protocol for Judicial Case Management in Public Law Children Act cases) with which strict compliance is expected. The requirements set out there are indeed more exacting than the guidance contained in the consultation paper.

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