The President of the Family Division Working Group on Medical Experts in the Family Courts Final Report

October 2020

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Introduction

1. In Autumn 2018, The President of the Family Division, Sir Andrew McFarlane established a working group to identify the scale of the problem of medical expert witness shortages in the family courts, to look at the causes and to identify possible solutions. Mr Justice Williams was appointed to Chair the Group with representation from the legal profession and Royal Medical Colleges and other interested parties. The list of the members of the working group is

   Mr Justice Williams, Chair

   Rebecca Leharne/Renee Singh (Secretary)

   Dr Alison Steele (RCPCH and Co-ordinator, medical sub-group)

   Dr Adam Oates (RCR and Co-ordinator, medical sub-group)

   HHJ Kharin Cox (Co-ordinator Legal sub-group)

   Melanie Carew (CAFCASS)

   Dr Mark Corcoran (BMA)

   Eleanor Druker (Legal Aid Agency)

   Dr Alison Firth (RCPCH)

   Sharon Segal (ALC)

   Alistair Henderson (Royal Medical Colleges)

   Dylan Jones (Law Society)

   Frances Judd QC (now Mrs Justice Judd) (FLBA)

   Samantha Little (Resolution)

   Lisa Dorstek

   N Madderson (FLBA)

   Caroline Makin (Resolution)

   HHJ Gillian Matthews

   Rachael McKeown (RCPCH)

Jo Revill (RCPCH)

Rachel Rogers (Resolution)

Nadia Salam (Resolution)

HHJ Malcolm Sharpe

Rebecca Stevens (Law Society)

Jan Wise (BMA)

Renee Zapata (BMA)

Jaime Craig a psychologist and member of the Family Justice Council was invited to become an ad hoc member of the WG in early 2020 and has provided valuable input.

2. The impetus for the establishment of the working group was the feedback the President of the Family Division had received arising from his nationwide progress around the family courts following his appointment in July 2018. That feedback identified a particular problem with the availability of medical experts in relation to the cause of injuries the subject of fact-finding hearings. The results of the surveys identified a wider problem with the availability of medical and allied professions in particular psychologists. Earlier recognition of this aspect of the problem would have widened the composition of the Working Group but ultimately the survey and consultation allowed for any deficit in the composition of the Group to be remedied.

3. The Working Group decided to adopt the following process.

    a. Survey the medical and legal professions to establish an evidential foundation in respect of the extent of the problem, perceptions of causes and potential solutions. To that end medical and legal sub-groups were formed.

    b. A symposium to discuss the survey results

    c. A draft report to be sent out for consultation in Winter 2019

    d. Consultation to close in January 2020

    e. Final Report to be presented to the President in Spring 2020

The timetable was put back by the intervention of the Covid 19 pandemic. We are aware that the pandemic has also had an adverse impact on the availability of some experts

and the timescales for reporting. The Covid Recovery Group led by Lord Justice Baker is aware of the issue. Given the stage that our work has reached we have not sought to address in detail the impact of Covid but have no doubt that the work of the Family Justice Council in seeking to implement our recommendations will take this aspect of the problem into account.

4. The Group sits within the broader structures and work promoting child safety and protection. We believe that health and other professions play an important role in providing expert opinions to the Family Courts to assist the Court in making the essential decisions for both the welfare of the child but also to protect the rights of the carers. Both health and legal professions have long shared concerns regarding the relative paucity of medical expert witnesses willing to participate in family cases involving children.

5. Providing reports to the family courts is hugely time consuming and requires meticulous scrutiny of medical records and radiological imaging. Psychological assessments often require consideration of medical and social services records. With the complexities and demands of practicing in the modern NHS, it is perhaps not surprising that few individuals are willing to take on the challenges of being a medical expert. However, the role of the expert in the Family Court can be greatly rewarding and clearly the protection of the vulnerable child is the responsibility of all.

6. Proposed solutions to the challenges faced by expert witnesses are listed at the end of the report. Recommendations within the remit of health have by and large been the product of the medical and health subgroup. Recommendations that are outside the remit of health have by and large been the product of the legal subgroup. However there has of course been substantial overlap and cross-fertilisation, therefore ultimate recommendations are those of the full working group rather than the subgroups.

7. Although the working group was satisfied that the survey had reached an appropriate cross-section of experts and legal professionals working within the family justice system the working group recognised that a number of the recommendations impact upon and would require implementation by various stakeholder bodies at national and regional level and so before finalising our recommendations the Working Group recognised that it was essential that the draft recommendations were put out for

consultation in particular to those agencies who would be most affected and whose input into the crafting of the solutions would be so essential.

8. The consultation closed on 31st of January 2020 and the feedback received has been incorporated into this report and the recommendations. A list of those who responded, and a summary of the responses is included at appendix 4. The final report was delayed by the intervention of the Covid 19 pandemic which led me to take the decision to delay the finalisation of the Report given the competing demands on the time of those involved, particularly the health professionals.

9. The Working Group discerned a silver lining in the Covid-19 cloud and that was that the response of the Family Justice system to the epidemic in terms of the approach to remote hearings demonstrated the real advantages that video conferencing apps could bring whether in terms of making the attendance of experts at court hearings less disruptive of their clinical practice but also in terms of the convening and recording of experts meetings or multi-disciplinary meetings.

10. Although the working group was established principally to consider the shortage of medical experts in fact-finding hearings, a theme which emerged throughout, in the survey, in the symposium and in the consultation, was a broader concern about shortages of a wide range of experts including medical but also allied health professionals and independent social workers. The working group accepts that the problem of shortages does indeed extend beyond medical experts and whilst we recognise that the membership of the working group has not included representatives from other significant stakeholders such as the BPS and the BASW we hope that the process we have adopted has allowed both bodies and individuals with an interest in the issue to be heard.

11. We hope all the recommendations will be capable of being actioned to ensure expert witness work is attractive to health and other professionals and that experts are appropriately supported to provide this work. Some of the recommendations may also be relevant to health and allied professionals giving evidence not as experts but within their professional capacity. Some are capable of relatively rapid implementation and at the time of writing are in the process of being implemented. Changes to the process of applying for prior authority and in the administration of payments to experts by the Legal Aid Agency is one example. The acceptance by the Family Justice Council of the

merits of a subcommittee and its establishment in May 2020 with associated administrative support is another example. Tentative steps towards liaison with the Family Justice Board itself have already been initiated. Others may be long-term goals which will need to be taken forward by the subcommittee of the Family Justice Council whilst monitoring and supporting the implementation of short and medium-term measures.

12. The progress that has already been made and the endeavours of the members of the working group and the offers of support from around the country in promoting the implementation of the recommendations are most welcome and provide solid foundations for the implementation of the recommendations in the medium to long term.

13. Ultimately, a strengthened expert witness workforce will together with the legal and other professions deliver the best outcomes for children, young people and families.

14. I would like to express my thanks in particular to the members of the working group but also to all those who responded to the survey, attended the symposium, responded to the Consultation or who have otherwise contributed to this report. To those bodies who were not initially approached I hope that the process the working group has adopted has allowed the concerns which relate to shortages of experts in non-medical fields to be assimilated at least in part into this Report. It has been a considerable undertaking and as ever has relied upon the generosity of time from those who have so little time to spare in their busy working and family lives.

Mr Justice Williams

September 2020

Executive Summary

15. The survey of the medical and legal professions was responded to by 709 individuals (412 + 297) achieving good geographical and specialisation coverage. The working group was satisfied that the survey results provided a reliable evidence base from which to gauge the extent of the problem, the actual and perceived causes and to identify solutions that were likely to have real effect. The survey results were consistent with the concerns expressed to the President of the Family Division which led to the formation of the working group and with the experience of the members of the working group. Although there were some observed gaps in the response rate of some branches of the medical profession, the working group concluded that this was almost certainly a product of variations in the means by which the survey was notified to the professions rather than a lack of interest. The working group was also satisfied that those gaps did not affect the validity of the results. The consultation responses provided further corroboration of the concerns.

16. The results of the legal survey and consultation confirmed that difficulties in securing expert witnesses were experienced across the country and in a wide range of specialisms. It also emerged that the shortages were not confined to medical experts but to other allied professions in particular psychology and independent social workers. The impact of the shortages was principally in creating delay although there were also concerns about the quality of some expert evidence which appeared likely to be linked to the shortages. The detrimental impact of delay is enshrined in statute and in particular in relation to children under the age of three, where delay may have a direct detrimental impact upon the success of future placement, the working group were satisfied that the shortage of experts was likely in some cases to be harmful to children. The main shortages identified were

    a. Child and Family Psychiatrists and Psychologists

    b. Paediatricians

    c. Radiologist and Neuroradiologists

    d. Neurosurgeons

e. Ophthalmologist

f. Haematologists

g. Neonatologists

h. Geneticists

17. The results of the medical survey and consultation supported the conclusion that the pool of experts, in particular in some areas of specialism, was diminishing and a combination of factors was causing those who had previously reported to cease reporting and were acting as a disincentive to senior registrars or consultants considering taking on expert work in the future.

18. The main factors which were identified as barriers or disincentives were

    a. Remuneration linked

    b. Court processes

    c. Lack of support and training

    d. Perceived criticism by lawyers, judiciary and press.

19. Some interesting variations appeared as between the lawyer perspective and the medical perspective. The most commonly expressed barrier amongst both groups is the Legal Aid Agency prescribed rate[1] but interestingly the lawyers identified this as a more significant barrier than the experts did which suggests the lawyers lacked a full understanding of the extent of the barriers. Other elements of concern about finances included delays in payment, the payment system (multiple invoices and having to submit invoices through solicitors and not direct to the Legal Aid Agency) and the tax/pension implications. 58% of medics expressed concern about criticism in the press, by the judge or in cross examination. 38% of medics identified inflexibility in court timetabling (including scheduling witnesses) as an issue and 37% the volume of material. Significantly 35% of medics identified lack of support from NHS Trusts. The

[1] This is prescribed by Statutory Instrument and would require ministerial agreement and a negative SI to change.

most significant disparities in terms of perspectives were in relation to legal aid rates and other aspects of finances, lack of support from NHS Trusts and the volume of material.

20. The wide range of barriers identified means that solutions will need to cover a wider range of areas than might initially have been thought and will require engagement at senior level with Department of Health and MoJ as well as the NHS at a senior level. The range and nature of the disincentives might seem to indicate a gloomy outlook in terms of effecting real change, but the working group considers that this is not so. Firstly, there are some court process related factors which ought to be capable of effective resolution even in the short-term. Other potential solutions which are more structural and long-term in nature are also capable of resolution by action which is largely within the gift of the medical and legal professions. Other matters lie outside the power of those involved in the working group being in the hands of commissioning agencies (contract linked issues) or the Treasury (pension linked tax consequences) and will require more concerted action. The BMA amongst other are actively engaging the Government on this matter. However, the working group are optimistic that even some of these changes are within reach given the compelling evidence and the enthusiasm of the agents of change.

21. Reassuringly there was considerable interest expressed by the medical profession in undertaking expert work and those conducting the work identified many positives both in terms of their clinical practice but also public service from doing so. There was also considerable support from the survey respondees to being involved in any initiatives which arose from the working group.

22. The working group has identified 22 Recommendations to reduce the shortages by removing disincentives and creating incentives. The principal recommendations include;

    a. Action by the Royal Colleges/Professional bodies to create online resources to support expert witness work and to increase awareness of existing training in

the field provided by organisations such as the Academy of Experts and the Expert Witness Institute.

b. Encouragement to the Royal Colleges/Professional bodies to engage with commissioners and or trusts to promote a more supportive environment to medical professionals/allied health professionals who wish to undertake expert witness work.

c. The Royal Colleges/Professional bodies and the FJC to engage with NHS England and clinical commissioning groups to seek changes to contracting arrangements to enable healthcare professionals to undertake expert witness work within the parameters of their employment contracts.

d. Amending the Legal Aid Agency's guidance in respect of the granting of prior authority and payment to experts to simplify the process to enable an expert to render one invoice.

e. Seeking changes to the rates of remuneration for certain experts and the prescribed number of hours in respect of some categories of assessments to more properly reflect the amount of work involved.

f. Ensuring legal professionals including judiciary adhere to the provisions of FPR Part 25 in relation to expert instructions.

g. Ensuring that the instruction to experts was more efficiently undertaken to ensure only the necessary paperwork was sent to the expert to consider and a unified point of contact to ensure more effective and efficient communication.

h. Ensuring that experts were only required to give evidence where the court was satisfied an issue existed in relation to their report, to guarantee if their participation was required that it was fixed and not susceptible to last-minute change and to enable experts to attend by video conferencing app or video- link as the default position unless personal attendance was necessary.

i. Ensuring that experts are treated appropriately during court hearings, within judgments and thereafter to support constructive engagement and feedback.

j. Creating a sub-committee of the Family Justice Council to support and maintain the implementation of the recommendations by a programme of on-going

liaison with other stakeholders such as the Royal Colleges, Professional bodies NHS commissioners, the Legal Aid Agency, training organisations and by over-seeing and supporting regional committees.

k. Creating regional committees based on Family Division circuits and NHS regions to promote interdisciplinary cooperation, training and feedback.

l. Create greater training opportunities for medical professionals/allied health professionals including mini pupillages with judges, cross-disciplinary training courses with medical and legal professionals, and mentoring, peer review and feedback opportunities.

m. Promote greater awareness within legal professionals including by means of training, of best practice in relation to expert witnesses

23. The FJC sub-committee will be taking forward the invitations extended by a number of organisations to discuss various issues of mutual interest including ways in which existing programmes can interact with the work that the FJC and regional committees will undertake.

24. Some suggested recommendations – the Centralised Register of Accredited Court Experts were felt at present to be beyond the capacity of the WG or the FJC to currently progress although it is a subject that that we believe should be further considered by the FJC. Various initiatives over the years have been explored – the Northern Circuit Expert Directory and the EWI Directory of Expert Witnesses amongst others. How such a register would be funded and would operate would need careful exploration.

Medical Survey: Analysis of Responses

25. This report outlines the results of a recent survey of medical and allied health professionals, which sought to further understand and quantify the perceived problem. Although the original aim was to explore barriers medical expert witnesses faced, a major finding from the survey was that a range of health professionals provide expert witness work and face similar challenges in doing so – throughout the rest of this section of the report, we will refer to health professionals to encompass both medical and allied health colleagues.

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Survey methodology

26. The aim of the survey was to investigate health professional's experiences of providing expert witness work, the perceived barriers they face and any changes that would encourage them to take on expert witness work in the future. There were 16 questions in total (listed in Appendix A), which were devised by the working group and were aligned to questions asked within a separate survey provided to the legal profession.

27. The intended target audience for the survey was medical professionals practicing in England and Wales (in accordance with the area the Family Division of the High Court operates[2]). The primary scope was to consider shortages within family cases involving children and so the survey was targeted to health professionals working within the field of paediatrics and child health.

[2] https://www.gov.uk/courts-tribunals/family-division-of-the-high-court

28. The survey was hosted on Survey Monkey for one month (April to May 2019).

29. There were 412 total respondents to the survey, although there were different response rates to individual questions. It has not been possible to quantify an accurate response rate to the survey, as it is not known by the working group how widely it was distributed. It was shared with the membership of: Royal College of Paediatrics and Child Health (RCPCH) via eBulletins and social media (Twitter), the Royal College of Radiologist (RCR) monthly newsletter, the British Society of Paediatric Radiology (BSPR), the Academy of Medical Royal Colleges (AoMRC), the British Medical Association and the Consortium of Expert Witnesses.

30. The survey results were analysed by two senior medical consultants (a paediatrician, Dr Alison Steele and a radiologist, Dr Adam Oates) and a member of the RCPCH Policy team (Rachael McKeown).

Demographics of survey respondents

31. The majority of survey respondents (75.7%, n=309) were medically-qualified professionals, although a considerable number of allied health professionals (22.1%, n=90) also completed the survey, indicating that this issue is not solely in the sphere of medical professionals. Of the medical profession the biggest groups represented were paediatrics, psychiatrists, radiologists and general practitioners (see Table 1). The largest allied health group represented was psychologists.

32. The low response rate recorded from surgeons (n=2) is surprising considering the important role neurosurgery and orthopaedic surgery play in cases of childhood head injury and fractures, respectively.

Table 1: Respondent's Medical Royal College or Professional Association (qualitative responses have been coded and incorporated into this analysis)

	Number	Percentage (%)
Medical professionals	**309**	**75.7**
Royal College of Paediatrics and Child Health (RCPCH)	132	32.4
Royal College of Psychiatrists (RCPsych)	82	20.1
Royal College of Radiologists (RCR)	46	11.3
Royal College of General Practitioners (RCGP)	29	7.1
Faculty of Forensic and Legal Medicine (FFLM)	6	1.5
Royal College of Surgeons (RCS)	2	0.5
Royal College of Pathologists (RCPath)	2	0.5
Royal College of Physicians (RCP)	2	0.5
Royal College of Anaesthetists (RCA)	2	0.5
Royal College of Ophthalmologists (RCO)	2	0.5
Royal College of Paediatrics and Child Health (RCPCH) and Faculty of Forensic and Legal Medicine (FFLM)	2	0.5
Royal College of Surgeons (RCS) and Faculty of Radiologists	1	0.2
British Medical Association (BMA)	1	0.2
Allied health professionals	**90**	**22.1**
British Psychological Society (BPS)	51	12.5
Health and Care Professions Council (HCPC)	14	3.4
Health and Care Professions Council (HCPC) and British Psychological Society (BPS)	13	3.2
Association of Family Therapy	3	0.7
UK Council for Psychotherapy (UKCP)	2	0.5

British Psychological Society (BPS) and UK Council for Psychotherapy (UKCP)	1	0.2
Association of Clinical Psychologists (ACP)	1	0.2
British Psychological Society (BPS) and Association of Clinical Psychologists (ACP)	1	0.2
Royal College of Midwives (RCM)	1	0.2
Faculty of Public Health	1	0.2
Association of Child Psychotherapists	1	0.2
Chartered Forensic Psychology	1	0.2
None (or not clearly specified)	9	2.2

33. Just over half (50.6%, n=204) of survey respondents identified themselves as working within child health only and a further 1.2% (n=5) covered both adult and child health services. However, it should be noted that a number of respondents did not specify whether their practice covered child or adult health (see Table 2).

Table 2: Respondent's specialty area (medical students / trainees / junior doctors have been removed from this analysis)

	Number	Percentage (%)
Child	**204**	**50.6**
Consultant paediatrician	115	28.3
Child / child and family psychologist (inc. neuropsychologist & educational psychologist)	56	13.8
Child & adolescent psychiatrist (inc. family & perinatal)	26	6.4
Specialist in community paediatrics (inc. SAS)	4	1.0
Consultant neonatologist	2	0.5
Paediatric emergency medicine	1	0.25
Adult	**81**	**20.1**
Adult psychiatrist	51	12.6
Adult psychologist	30	7.4
Adult and child	**5**	**1.2**
Psychologist	5	1.2

Specialised consultant	**59**	**14.6**
Consultant radiologist (inc. neuroradiologist)	44	10.8
Consultant neurologist	3	0.7
Consultant anaesthetist	2	0.5
Consultant surgeon (inc. specialty doctors in surgery)	2	0.5
Consultant ophthalmologist	2	0. 5
Consultant pathologist	1	0.25
Consultant haematologist	1	0.25
Consultant toxicologist	1	0.25
Consultant gastroenterologist	1	0.25
Consultant nephrologist	1	0.25
Consultant in genitourinary medicine	1	0.25
Primary care	**28**	**6.9**
GP / primary care	26	6.4
Academic GP	2	0.5
Forensic	**12**	**3.0**
Forensic medical practitioner	9	2.2
Forensic psychiatrist	2	0.5
Sexual offences examiner	1	0.25
Allied health professionals	**8**	**2.0**
Psychotherapist	3	0.7
Family therapist	2	0.5
Psychotherapist and social worker	1	0.25
Maternity safeguarding lead	1	0.25
Play Therapist and social worker	1	0.25

34. The majority of survey respondents (89.9%) were based in England although there was a relatively even distribution recorded from the UK devolved nations. Comparison of the England-based respondents with the 2011 census data[3], indicates that there was

[3] https://www.ons.gov.uk/census/2011census/2011censusdata

comparatively even representation from each region (see Table 3); although with relative over-representation from London (24.3% survey respondents compared to 15.4% in population census) and under-representation from the East of England (7.7% survey respondents compared to 11.0% in census).

Figure 1: Geographical spread of respondents

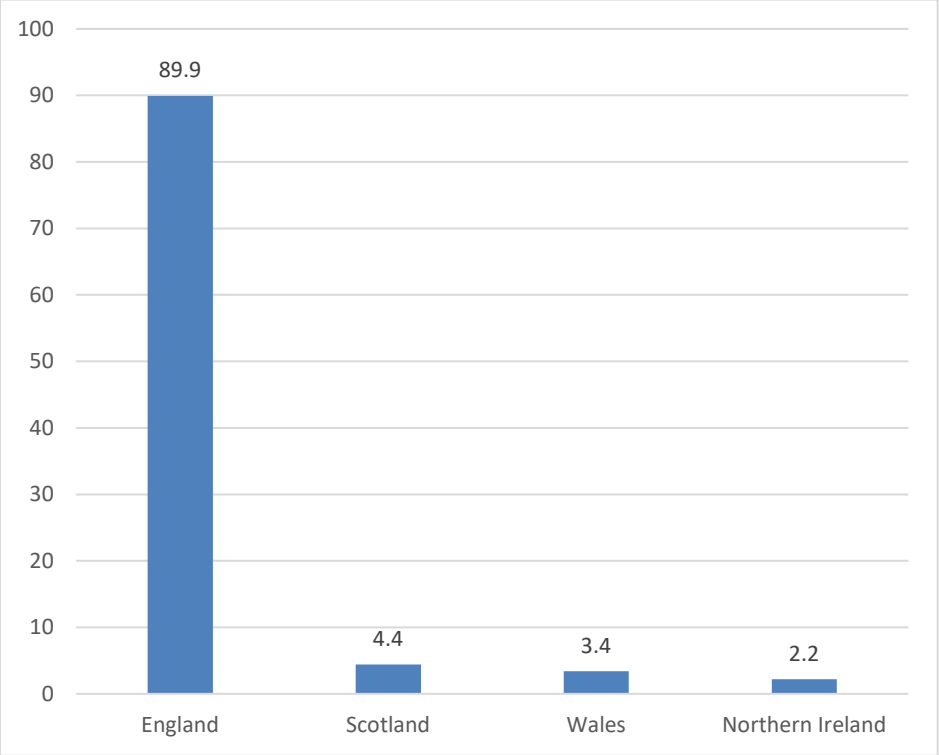


Table 3: Regional spread (England) of respondents

England	**(n) 366**	**Survey %**	**Official %**
London	89	24.3%	15.4%
Midlands	66	18.0%	19.2%
North East and Yorkshire	54	14.8%	14.9%
North West	48	13.1%	13.3%
South East	41	11.2%	16.3%
South West	40	10.9%	10.0%
East	28	7.7%	11.0%

35. Analysis of these demographic responses indicates that the targeting of the survey was largely successful in eliciting responses from health professionals working in child health from England and Wales. Furthermore, we feel that the geographic distribution of respondents is likely to provide a reliable base for the subsequent analysis.

Barriers facing Professionals completing Expert Witness Work

Previous experience of expert witness work

36. The majority of respondents (58.4%) stated they had not provided expert witness evidence within the previous 12 months. However, of these respondents 54.3% (n=171) had, at some point, previously provided this work. A further 45.7% had not previously provided expert witness work. Arguably, the lack of recent engagement implies that health professionals face barriers preventing them conducting and returning to this work.

37. Encouragingly, respondents demonstrated good knowledge of the role of expert witnesses, with 95.2% understanding the difference between the duty to the court as an expert witness and that of a treating clinician. Furthermore, 69.4% hade at some point previously provided a written report in court as an expert. These results may be indicative of the nature of survey respondents, who have an interest in this line of work and a survey of general medical membership may elicit different responses. However, anecdotally it is felt that many doctors do not understand the Family Court processes or the difference between professional and expert witnesses and this result is likely to be due to the interest of professionals that responded to this survey

38. However, 29.9% of respondents reported that they have never provided a written report in court as a treating clinician. We feel that it is essential for professionals to provide a report as a treating clinician (and gain feedback) before they engage in expert witness work, which indicates that there was a large number of respondents who have very limited prior experience with this work.

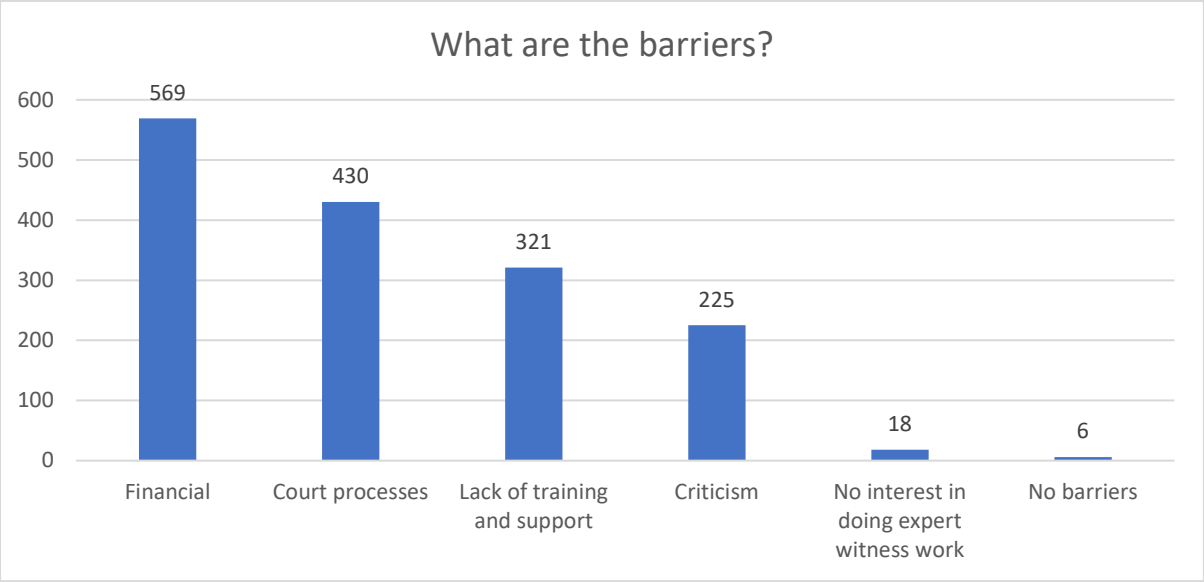
Overview of Barriers Faced

39. Respondents were asked to select the top five reasons (from a pre-determined list) preventing them from providing expert witness work. For ease of analysis, we have grouped the most frequently reported barriers into closely aligned themes (see Figure 2). A full

breakdown of all options from the pre-determined list and number of survey respondents can be found in Appendix 2. The main barriers indicated as faced by health professionals are: financial (n=569), court processes (n=430), lack of training and support (n=321), and perceived criticism (n=225). Each of these areas will be discussed in turn below.

40. It is important that these reported barriers are considered alongside results from the accompanying legal survey, which asked lawyers to indicate what they perceive the barriers for expert witnesses to be. Analysis indicates that there are discrepancies between what is perceived by legal professionals and what is experienced by health professionals.

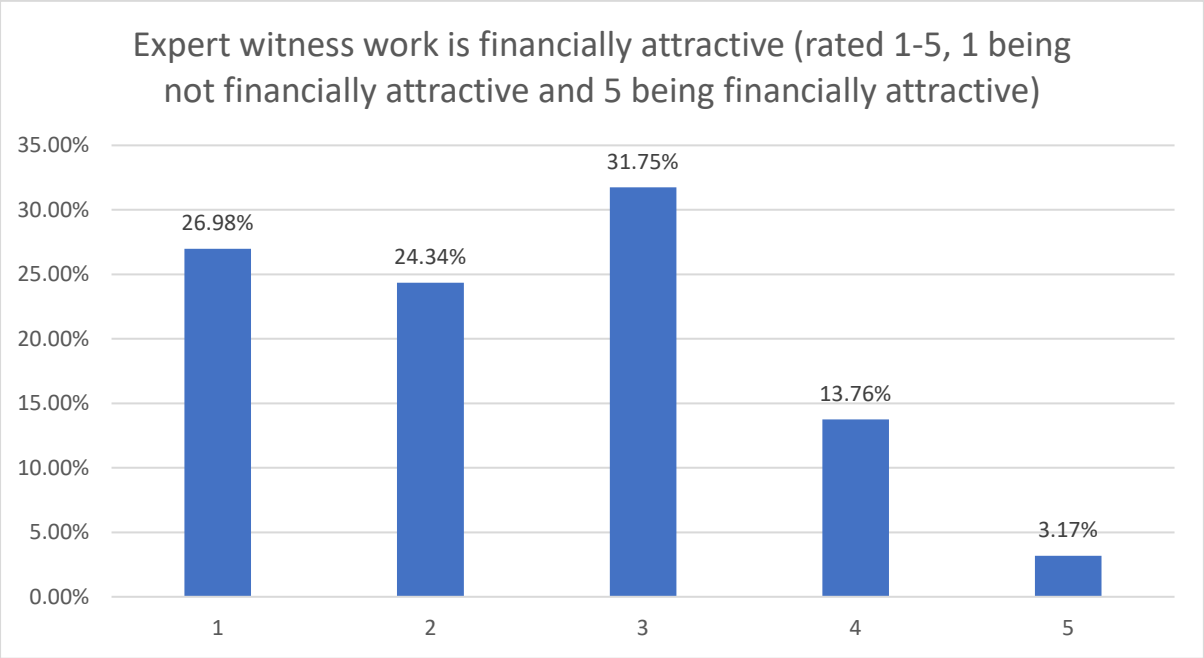
Figure 2: Response to 'What are the barriers for medical professionals?' (combined quantitative and qualitative responses organised into themes)



Financial

41. Respondents were asked to rank how "financially attractive" they found expert witness work on a scale from one to five (1=not at all attractive, 5=very attractive) (see Figure 3). In total, 83.05% of respondents did not report that expert witness work is financially attractive, with only 12 respondents who found the work to be very financially attractive.

Figure 3: Response to 'Expert witness work is financially attractive'



42. There were a range of different financial barriers faced by respondents, ranging from: inadequate rates of remuneration at current legal aid rates, an antiquated payment and invoicing system, slow receipt of payment and issues with pensions faced by many senior public-sector workers including the judiciary.

43. Qualitative responses expand on these barriers faced by medical and health professionals:

> "….in addition, rates of remuneration were significantly reduced so in the end I didn't think the effort, the stress involved in "putting one's head above the parapet" was worth it… So, I gave it up"
>
> "Having to invoice 4 or 5 bodies for a single underpaid report is off putting, one body should be responsible for payment"
>
> "Pay on receipt of invoice"
>
> "Less antiquated system of payment, payment on delivery of the report I would have thought was basic for any viable business plan."
>
> "Speed up payment"

Court Processes

44. Many respondents expressed concerns as to how to dovetail a busy NHS practice with the perceived inflexibilities of the court system. There were indications that expectations for expert witness work varied between judicial and geographical locations for example in terms of acceptable timeframes for filing reports and whether attendance at court was required in person or via video-link. Both the examples cited have a very significant impact on whether an expert is likely to be able to take on a case and combine with their often inflexible and complex NHS practice. It was repeatedly noted that lack of appropriate organisation i.e. late provision of bundles and last-minute cancellation of court attendance has implications on the time that health professionals have to dedicate to expert witness work.

45. The administration and organisation of Family Court bundles was a major concern for respondents. Bundles often contain vast quantities of information, frequently not well indexed. Health professionals noted an obligation to thoroughly read all information shared to avoid the potential of overlooking a key feature but, in reality, reviewing extensive contact reports (for example) are unlikely to be of relevance.

46. Respondents indicated that they wanted to provide expert witness work in order to improve outcomes for children and young people, however, were often left frustrated and disappointed when they were not made aware of the outcome of cases after their involvement.

47. These barriers noted led some respondents to suggest that lawyers had a lack of appreciation or understanding for the lack of time (not unwillingness) to provide expert witness work.

48. Qualitative responses expand on these barriers faced by medical and health professionals:

> "chaotic approach of some instructing solicitors and the absence of a standardised approach by solicitors which results in not receiving the relevant documents, getting dozens of emails with individual documents…"
>
> "Have the bundles reduced to what is relevant to the expert."
>
> "The work is emotive and distressing at times. You don't always get feedback regarding the outcome of the case. It's sometimes difficult in terms of planning the number of cases you have…"

Training and Support for Expert Witnesses

Training

49. The majority of respondents (66.1%) have previously undertaken expert witness training. However, there was a large appetite among respondents for more training (see Figure 4). 58.6% of all respondents were interested in attending a training session and this figure rose to 67.2% for respondents who have never previously provided expert witness work wanting to attend training. While this presents an interest in engaging with expert witness work, there remains a considerable number of respondents (41.4%) who are not interested in receiving training; perhaps indicating that other barriers are insurmountable.

Figure 4: Response to 'Would you be interested in receiving training to support expert witness work?'

50. Respondents were asked to outline what they would like from expert witness work within free text comment boxes. Responses fell into two broad categories: what the training should cover and how the training should be delivered.

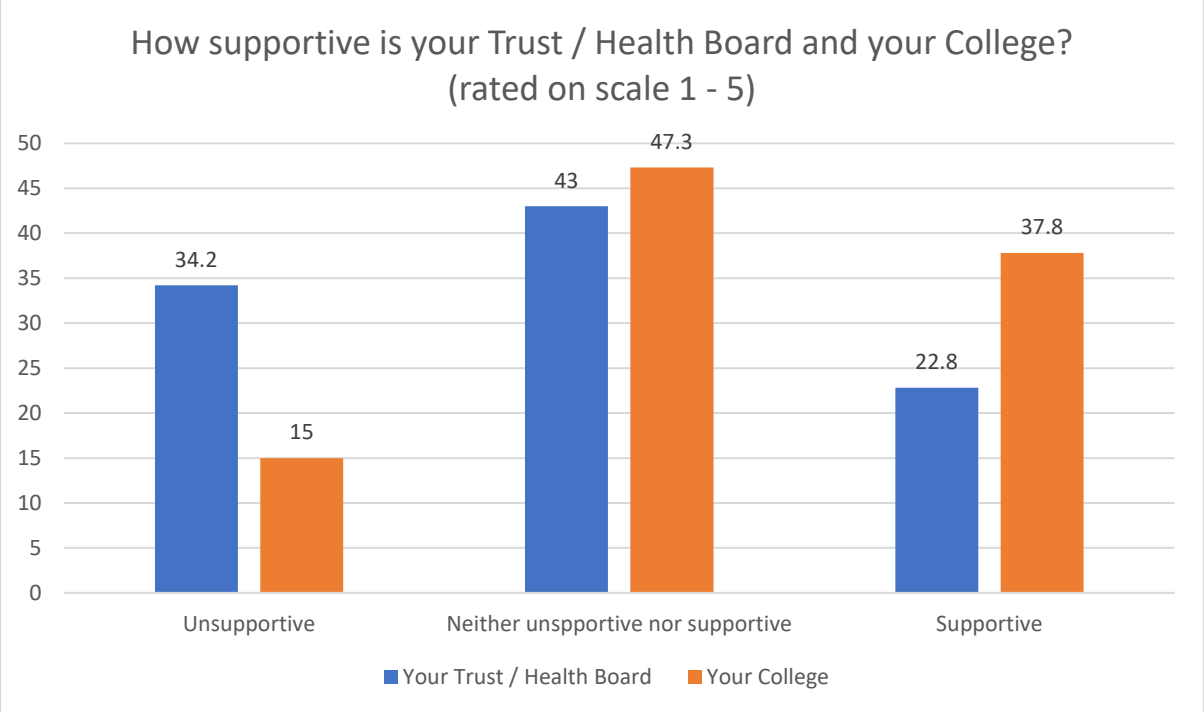
51. There was considerable demand for training on how to be an expert witness: how to prepare reports (n=54), how to give evidence in courts (n=53), what to expect courses (n=11). Alongside this, there was also appetite for refresher and update courses, which would cover developments in the law and medical diagnoses. These different responses indicate two different training needs, the former for less experienced professionals seeking to become expert witnesses and the latter for existing expert witnesses wanting to upskill and maintain their knowledge.

52. With relation to the delivery of training, a range of options was suggested by respondents. These included peer review, discussion sessions and mentoring schemes.

Support

53. The majority of respondents stated that they did not feel supported by their Trust / Health Board (77.2%) or by their Medical Royal College / Professional Association (62.3%) to complete expert witness work (see Figure 5). These findings indicate that NHS employing organisations and clinical commissioning groups (CCGs) / service planners should be engaged in order to alleviate some of the barriers preventing professionals from providing expert witness work. Furthermore, additional analysis is required to ascertain what support respondents would like from their Medical Royal College / Professional Association.

Figure 5: Response to 'How supportive is your Trust / Health Board and your College?' (respondents were asked to rank the level of support on a scale from 1-5, 1 being no support and 5 being fully supported. Responses 1-2 have been grouped as 'unsupportive' and 4-5 have been grouped as 'supportive')



54. Qualitative responses expand on these barriers faced by medical and health professionals:

> "Better support and awareness about the need from Trusts, and the College"
>
> "That trusts would recognise the value of the work and actively support it with training as it is challenging work"
>
> "Work between NHS Trusts and Family Court System towards an understanding that the needs of children and families are best met by supporting expert work"

Criticism

55. A number of respondents expressed a reluctance to engage with expert witness work due to anxieties surrounding unfair criticism, both within the judiciary and the media. It is worth noting however that fear of critique was heightened in those who had not previously completed expert witness work.

56. Constructive criticism is an essential part of modern healthcare practice. It is essential for health professionals to learn from mistakes in order to improve the care they provide for future patients. However, survey responses highlighted situations of perceived unjust criticism (by a judge and the subsequently the media) possibly secondary to a misunderstanding due to the complexity of a particular case. While clearly maintaining strict independence is essential, closer networks between the medical, psychological and legal professions, along with the judiciary may alleviate some of these concerns.

57. These concerns were borne out in qualitative responses from medical and health professionals:

> "I feel very nervous about taking on this work even though I regularly produce reports for court on patients…I am anxious about potential media coverage."

> "Better protection of expert witnesses from unjustified and unfair criticism by families, media and judiciary"

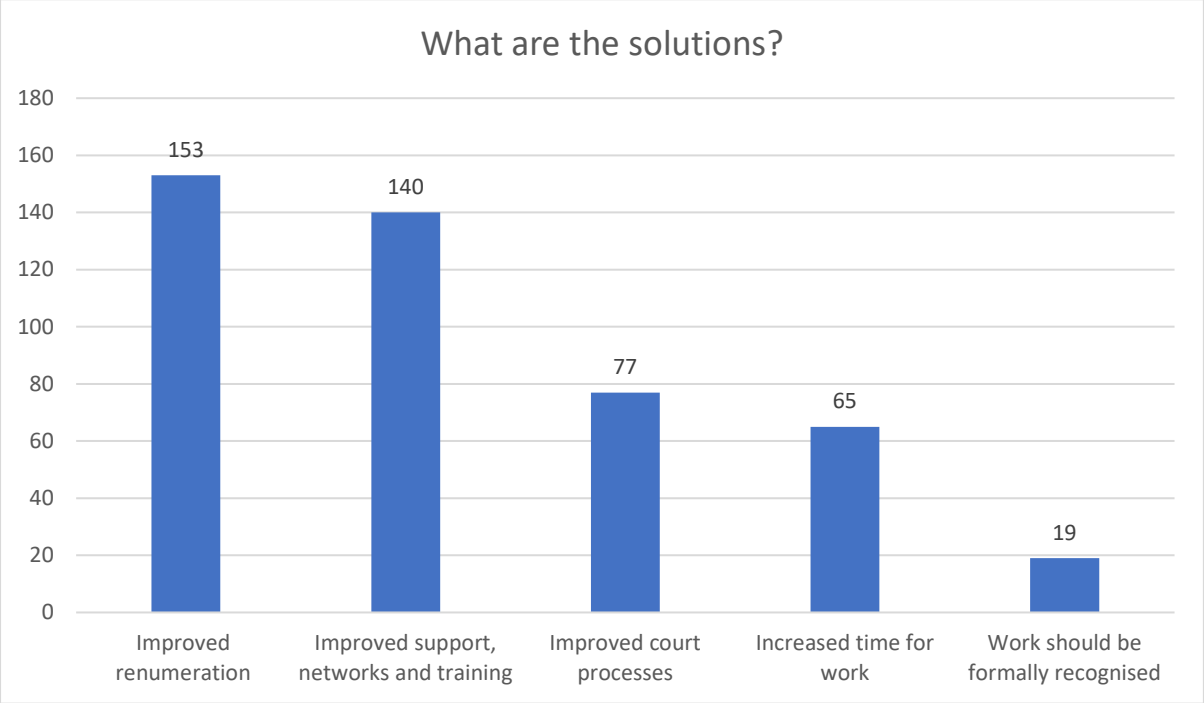
> "Currently undervalued work where clinicians put their expertise on the line and are likely to criticised by the media"

Proposed solutions

58. Respondents were asked to provide suggestions for solutions to overcome the barriers they face when acting as (or preventing them from acting as) expert witnesses; they recorded these suggestions in free text responses, which have been thematically coded for analysis here. Respondents may have offered multiple solutions.

59. The proposed solutions offered by the respondents largely mirror the findings for the barriers they experience (see Figure 6). The top solutions health professionals would like to see are: improved remuneration (n=153), improved support, networks and training (n=140), improved court processes (n=77), and increased time to partake in expert witness work (n=65).

Figure 6: Response to 'What are the solutions?' (Qualitative responses have been thematically coded)



60. Qualitative responses expand on these barriers faced by medical and health professionals:

> "Appropriate remuneration paid on time when work complete. Better case administration by legal teams. More consideration to other work schedules by Court. Seek advice from the Consortium of Expert Witnesses to the Family Courts."

> "The fee could be paid to instructing solicitor who could pay it all in one go; payment could be released to instructing solicitor at point of approval"

> "More realistic timescales. I have been asked to prepare complex reports within a month - I cannot do justice to the report."

> "Financial remuneration should reflect the expertise, actual time taken to write reports and skill required in this work."

> "Trusts benefit by increasing quality standards in the department and enhancing reputation and paediatricians are given time to spend on intellectually challenging, interesting and important work… Courts then also get real experts acknowledged by their peers, actually doing the clinical work on a day to day basis"

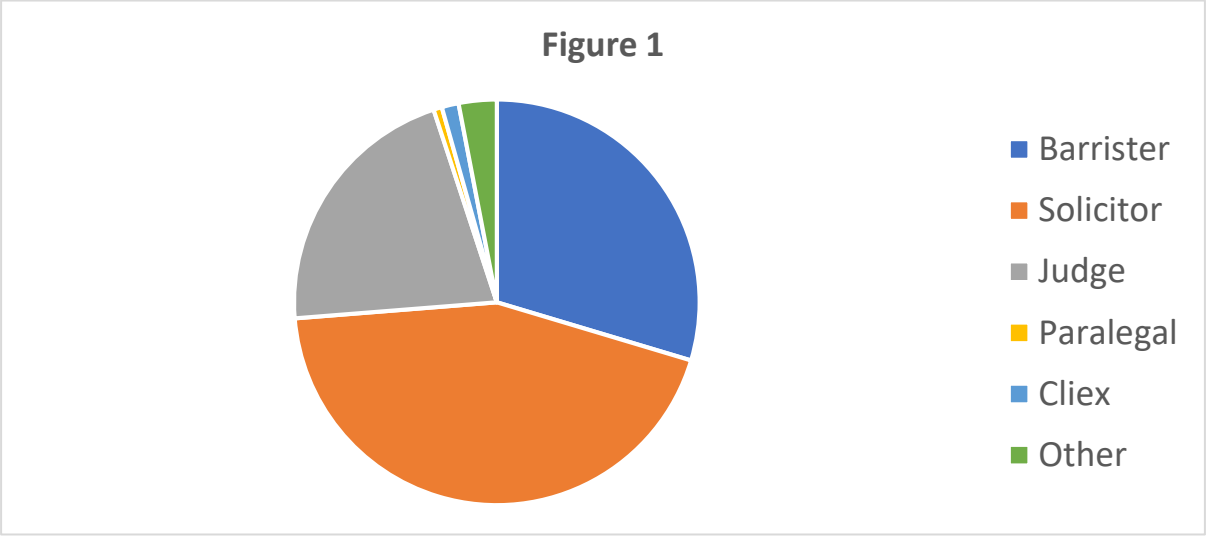
Legal Survey

61. The Working Group devised a set of 12 questions for legal practitioners. We sought to investigate and gather information as to the anecdotal, but widespread, perception of a shortage in medical expert witnesses in both public and private law cases throughout the country.

62. We aimed our survey at Family Law Practitioners working within the Family Justice System and the Judiciary. It has not been possible to calculate a response rate to the survey. Family law practitioners were made aware of the survey via their professional body whether Resolution, the Family Law Bar Association or the Association of Lawyers for Children. Those professional bodies have vast membership, not all practice within the public and private law children arena; some professionals are a member of one or more of those organisations. Some professionals were notified of the survey via their individual firms, or chambers and/ or social media.

The Statistical Material

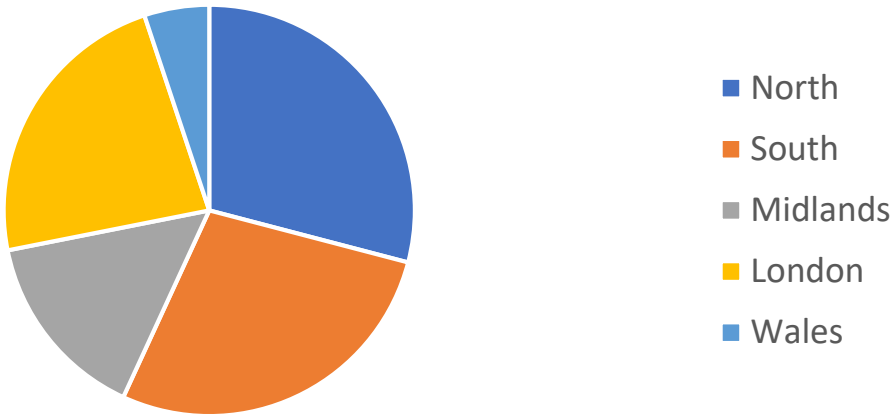
63. The legal survey had 297 responses: Barrister: 88 (30%), Solicitor: 131 (44%), Judge: 63 (21%) and Others: 15 (5%) [Figure 1]



64. We considered the number of responses and were of the view that the spread across the professions, and as shall see, across the country, was such that the results were likely to provide a reliable base from which to draw conclusions.

65. Respondees were asked in what area of the country they mainly practised in. The results suggested that some respondees worked in more than one region. There was a wide spread of responses from across the country. Some 31% (*n*= 91) of respondees practised mainly in the North of England, 29% (*n*= 87) in the South, London accounted for 72 respondees (24%), and 16% worked mainly in the Midlands. We had 16 responses from Wales (5%) [Figure 2]

Figure 2



66. **An overwhelming majority of those who responded to the survey, 92.5%** (*n*= 275) **had experienced a shortage of medical experts in their cases. It was described by one respondee as a "looming crisis"**

67. Respondees were asked to indicate in which medical discipline a shortage had been experienced and the geographical area. The results are expressed as a % of the overall national %. [Table 1]

Role	North	South	Midlands	London	Wales	England and Wales
Child / child and family psychiatrist	21.89%	17.17%	9.43%	13.80%	4.38%	66.67%
Child / child and family psychologist	21.89%	17.17%	10.10%	12.46%	3.70%	65.32%
Adult psychiatrist	11.78%	10.10%	5.05%	8.42%	1.68%	37.04%
Adult psychologist	1.68%	1.68%	0.34%	1.68%	0.34%	5.72%
Consultant dermatologist	2.69%	2.36%	1.35%	1.35%	0.34%	8.08%
Consultant ENT surgeon	0.34%	0.67%	0.34%	0.67%	0.34%	2.36%
Consultant endocrinologist	3.70%	4.38%	2.36%	2.69%	0.34%	13.47%
Consultant general surgeon	1.01%	2.69%	0.34%	0.34%	0.34%	4.71%
Consultant geneticist	6.06%	5.72%	4.04%	3.70%	0.67%	20.20%
Consultant haematologist	7.41%	6.73%	4.38%	3.37%	1.35%	23.23%
Consultant neonatologist	7.41%	4.04%	2.02%	3.37%	0.34%	17.17%
Consultant neurologist	11.11%	5.72%	4.38%	4.04%	2.02%	27.27%
Consultant neuroradiologist	14.14%	12.79%	6.06%	8.08%	2.36%	43.43%
Consultant neurosurgeon	12.46%	7.07%	3.37%	5.72%	1.35%	29.97%
Consultant obstetrician	1.35%	2.02%	0.34%	0.00%	0.00%	3.70%
Consultant ophthalmologist	7.74%	6.40%	2.02%	2.36%	1.35%	19.87%
Consultant paediatrician	23.57%	16.50%	9.43%	12.46%	4.71%	66.67%
Consultant pathologist	4.04%	4.38%	0.34%	1.68%	0.00%	10.44%
Consultant plastic surgeon	0.67%	0.67%	0.34%	0.34%	0.00%	2.02%
Consultant radiologist	14.48%	13.47%	8.42%	9.09%	2.69%	48.15%
Consultant toxicologist	3.03%	1.35%	0.34%	0.67%	0.00%	5.39%
Risk assessor	10.44%	8.08%	4.71%	7.07%	2.69%	33.00%
Other	2.36%	1.68%	0.34%	2.02%	0.67%	7.07%

68. The main shortages identified by the lawyers which were consistently reported across the country were:

- Child and Family Psychiatrists and Psychologists (67% (*n*= 198) /65% (*n*= 194)
- Paediatricians (67% (*n*= 198))
- Radiologist and Neuroradiologists (48% (*n*= 143/43% (*n*= 129))
- Neurosurgeons (30% (*n*= 89))
- Ophthalmologist (20% (*n*= 59))
- Haematologists (23% (*n*= 69))

- Neonatologists (17% (*n*= 51)
- Geneticists (20 % (*n*= 60))

69. A shortage of child/ child and family psychiatrists and psychologists was widely reported throughout the country. As Table 1 demonstrates, adult psychiatrists too were in short supply across England and Wales (37% (*n*=110)). Risk assessors were also identified by a wide number of respondees (33% *n*=98) to be limited across the country. These experts are often considered to be "necessary" at the "welfare stage" in public law proceedings and in assisting the court in providing evidence as to mental illness, personality disorder, attachment issues and risk to a child. This shortage of experts self-evidently has significant implications; it is usually an assessment that cannot be undertaken by another professional within the proceedings.

70. Equally worrying is the picture painted, countrywide, of those experts who are more likely to be instructed at the fact-finding stage of public law proceedings.

71. Whilst by no means in every case, it is not unusual, in a non-accidental head injury case to require the joint instruction of a Consultant Neuroradiologist, Consultant Paediatrician and Consultant Ophthalmologist. Shortages across the country have been identified in each discipline. It means it is overwhelmingly likely that there will be difficulty in finding at least one such expert in a NAHI case. One respondee stated that it was their perception that "*Most of the ophthalmologists have stopped taking work." "There is only one neuroradiologist in the north and one in the south*".

72. Consultant Paediatricians are routinely considered by the court as necessary in cases involving NAI. Table 1 confirms that shortages were identified countrywide. 23% (*n*= 70) had experienced a shortage in the North, 16% (*n*= 49) in the South with 12% (*n*= 37) in London. The Midlands and Wales fared little better (9% (*n*= 28) / 5%(*n*= 14)).

73. Consultant radiologists are instructed routinely in cases involving fractures, they were described by one practitioner as "crucial" in an NAI case. The data shows that countywide 48% (*n*= 143) of respondees considered there was a shortage, the North (14% (*n*= 43)) and South (13% (*n*= 40)) suffering most clearly.

74. There is a significant shortage of experts who assist the court, often, with diagnostic testing: haematology, endocrinology and geneticists. Their expertise is often called upon by experts already instructed within the proceedings who seek further or different tests. We see this very often in our cases. The data is particularly troubling. 23% (*n*= 69) reported a shortage in Consultant haematologists; the North being in particular short supply. 20% (*n*= 60) reported a shortage in geneticists -the North (6% (*n*= 18)) and South (5% (*n*= 17)) being particularly affected. Consultant endocrinology was found to be lacking (13% (*n*= 40)) across the country, in particular the South (4% (*n*= 13).

75. Across the country and across disciplines shortages were identified. Wales fared best but still significant gaps in expertise across the medical spectrum were noted.

The Impact

76. Respondees identified that the inevitable impact of such shortages was delay and increased costs. Respondees commented that it "*Has made it very difficult and in some cases impossible to conclude cases within 26 weeks*", it meant "*Delay and increase in costs. Often experts refuse to accept instructions at legal aid rates and if the Legal Aid Agency refuses to pay the additional costs, the local authority will invariably bear these costs"*. One practitioner set this out clearly:

> *"I have one case currently standing adjourned to await prior authority for funding by the LAA. If the LAA refuses prior authority, then there will be further delay whilst the LA process is undertaken to see if the LA will fund the shortfall. If it refuses there will be a delay (currently of three months) whilst an expert who is available and prepared to work at LAA rates is instructed. In real terms it means the difference between permanency planning being decided for a baby in September or December 2019."*

Another said:

> "*Funding is a real issue in most cases - not simply the overall payment but the delays in receiving consent to fund the report of the expert for Public Funded parties. This creates significant practical problems with timetabling".*

> "*2 cases have been delayed because of the lack of radiologists/ neuroradiologists who are willing to report at legal aid rates. Those that are*

willing have a backlog of work and cannot report within the 26 weeks causing the timetable to be extended. There are a number of local child and family psychologists who are willing to report at the appropriate rates but again a backlog of work sometimes means the timetable has to be extended in public law proceedings and private law proceedings become protracted which delays the resumption of contact between parent and child…"

77. One respondee states that "*We recently were unable to find a paediatric radiologist. A case in June 2018 had a radiologist being able to report in November 2018*". This was something of a theme in the narrative responses: "*We searched the length and breadth of the country looking for a paediatric radiologist without success and two case management hearings had to be adjourned because no expert could be identified. Children were subject to ICOs for an additional 4 months with no progress".* Another stated "*we are unable to identify any Consultant Paediatricians who will accept work and can report within the 26 weeks, resulting in a number of cases having to be extended*."

78. Example after example was given where a shortage of experts was impacting directly on the timetable for the case. One respondee stated that "*whilst it can be difficult to identify an expert within timescales, I have not had a case that was unable to utilise an expert",* another said "*Case today: hospital clinicians approached to provide overview in a bruising case, having undertaken such work before - said could no longer assist in this way. Of about 10 independent experts then approached or considered, all but 1 were either recently retired, unresponsive or too busy. The one who has agreed has pushed the case timetable back by 6 weeks, as unable to report sooner".*

79. Concerns were not limited to public law proceedings. One respondee reported their experience that in a private law children case (not publicly funded) where "*the court wants expert adult psychiatric evidence provided in 8 weeks, the experts I have contacted have all said that they would struggle to produce a report in that time frame and the costs estimate if in the region of £5,000. The parties can't afford the report which won't be released until paid and if instructed the burden would be on my firm to pay for the report if the parties failed to do so".*

80. There were concerns that the pool was small, *"shrinking*" and that " *There is a real lack of younger members of these professions who are willing to undertake such work. This will*

only serve to exacerbate this problem over the next few years as the existing experts retire". This was reiterated by others "*Experts of quality do not seem to be given the time or the encouragement to advocate to younger colleagues the advantages of providing forensic evidence.", "good experts (are) retiring and not being replaced."*

Reason for the Shortage?

81. We gave respondents a choice of answers as to the perceived barriers to medical experts in undertaking medicolegal work. They were able to pick five as being the most applicable to their perception. Some respondees did not know the reason, they commented that "*I don't know why they aren't doing it anymore. We just make enquiries and are told no*". Of those who were able to give reasons for the perceived shortage, Table 2 below demonstrates:

82. **84%** (*n*= 249) **of respondents considered that the shortage was due to medical experts being unable/ unwilling to work at the prescribed LAA hourly rates**. Over 100 people in the narrative responses considered the issue of fees to be the main, or part of the problem. One stated "*The family court cannot rely upon the commitment and goodwill of specialists to ensure that the system continues to function in the face of continued cuts."*

83. One respondee stated "*Most experts*" or "*many consultants*" approached were "*simply not prepared to do work at LAA rates", "Almost without exception medics are not willing to undertake work at rates prescribed by legal aid agency leaving shortfall to be met by local authorities*". Another stated "*Experts reporting in most areas of expertise will not work to legal aid rates. The delays in seeking prior approval can add weeks/months to the timetable. If prior approval isn't received, the instruction only proceeds if the LA pays the shortfall*".

84. It was reported that "*Good experts are not willing to work at LAA rates causing long delays. In a recent case concerning a baby with multiple skull fractures sustained in January 2019 the only expert radiologist (out of 10 contacted) who would undertake the work at LAA rates could not report until August".* Another respondee stated *"Experts which were previously willing to do work within LAA rates are now stating they will only do work above that. In some cases where experts are clearly necessary, and in order to complete a case within a reasonable time the LA have ended up paying the excess, it simply shifts the problem from LAA to Local Authority meeting the shortfall".*

85. This was a consistent theme in responses:

> "*Local Authorities are constantly being required, out of extremely stretched budgets, to meet the shortfall in fees or hours spent above those allowed by the LAA".*, further that "*The main issue is medical experts who are unwilling to work at LAA rates and/or hours. This leads to additional court time being used arguing about costs and the practice of the local authority being asked to "top up" the costs. Topping up has become routine and is clearly not what was intended when the rates and hours cap was introduced. Invariably the court decides that the LA should top up as it has no other recourse*.", with the overriding view "*Why should local authorities be expected to pay more?..", "Physician instructed charging considerable hourly rate over LAA rate and LA having to bear £5000 shortfall."*

86. One person considered that: *"The payment of such fees has a direct impact upon the finances of LAs and their ability to fund other services for children in an already overstretched system".*

87. **40%** (*n*= 119) **believed that the inflexibility of timetabling by the court (26 weeks led to the shortage),** this led to respondees stating that "*I am aware of an (eminent) paediatric neuroradiologist indicating that the demands placed by the current timetables for resolving these cases is unrealistic. His concern is that he gives realistic timescales for doing work and then receives a court order directing an earlier report.".* One practitioner stated, *"Court imposing timeframes that are too short meaning experts were not available to commit to the work as they could not work to the timescale*". Others stated that expert witnesses do their best to comply with the court timetable but there needed to be discussion with individual trusts to support the work and allow time.

88. **39%** (*n*= 115) **perceived that medical experts were simply not interested in the work.**

89. **35%** (*n*= 103) **considered that a concern about adverse criticism by a judge or critical cross examination had limited the pool of experts**. Over 20 respondees commented on

this in their narrative responses. One respondee reported "*I have been told (anecdotally) of a well-known expert radiologist and well-known expert paediatrician who have apparently each said that they would be unwilling to take any further expert witness work after they each had a bad experience in court - under cross examination and feeling criticised by a judge".* Another reported that "*Two close friends who would be strong candidates to undertake expert work for court have told me the rates do not compensate for the poor treatment they perceive that experts get in the Family Court. They tell me this is a widespread view amongst medical clinicians".*

90. Others reported that "*In another case a Paediatric radiologist refused to take on any further new instructions following judicial criticism of her evidence.* "; another stated "*We also lost an expert frequently instructed in this area following a particularly brutal cross examination*". One said, "*The consistent reason given is that the hourly rate on offer combined with critical cross-examination/criticism from the judge do not make it a worthwhile exercise".*

91. Another stated *"I am aware anecdotally that experts are becoming very wary of criticism from the courts. I am aware of a number who no longer take on legal aid work because of the rates/amount of reading/lack of preparation time within the 26 week timetable but of those who continue to do so, there are some who are very reticent about taking on legal aid cases because they are concerned about criticism from judges (not least following recent judgments criticising experts for not reporting on time, which are - to be frank - deeply unhelpful in a climate where finding a good expert willing and able to report within the 26 week timetable can be a real achievement)".*

92. **Criticism in the press was another perceived reason for the shortage** (22% (*n*= 66)). One respondee thought that "*Given that judgments are now longer anonymised, experts are also concerned about criticism in the press (especially in relation to issues that are hotly contested in the media, such as transgender issues). In my experience, experts tend to be more willing to become involved in such cases if they feel that the judge in question is likely to give a balanced judgment: experts are perceived to have been the focus on unfair criticism in some recent judgments, particularly when lawyers are not necessarily held to the same standards in relation to professionalism and timekeeping".*

93. **28%** (*n*=85) **were of the view that delays in payment led to shortages**. One respondee stated "*Otherwise the main issue is those who are just fed up with working for the Legal*

Aid Rates and/or having the hassle of the invoices being split and waiting for payment etc". Another stated "*The Legal Aid Agency is very difficult to deal with when experts fees/hours are outside guideline rates. For instance, in a case expected to conclude within 26 weeks, the LAA took 8 days to refuse a prior authority decision and when asked to review the decision I was informed that it would take up to 22 days. Experts being kept in limbo for this amount of time is unreasonable.", "A Consultant Radiologist has recently told us that he is no longer willing to undertake work for family cases due to delays in payment. He confirmed that the delay was not on the part of the local authority but of the legally aided parties".*

94. **Other reasons were identified. There was a perceived concern about reports being used in the criminal justice system (5%**(*n*= 16)**),** it was said that "*There is one consultant paediatric ophthalmologist who explicitly says that he will no longer work in certain geographical areas because the CPS have sought to rely on a report that he produced when it was disclosed from family proceedings without prior agreement or consultation. He puts a warning on all reports that if it is disclosed into and relied upon within criminal proceedings, he will stop taking further instructions in that geographical area."*

95. **There were concerns about the amount of material experts had to read (22%**(*n*=65)**)**." *The amount of material that an expert is expected to read in any set of family proceedings to give an accurate opinion on any case within legal aid rates is unreasonable for any professional subject to questioning through the family and potentially criminal courts. The inflexibility and time constraints for NHS employed experts to complete reports to high standards is extremely difficult and must dissuade a number of experts".*

96. Our legal practitioners did not consider that a lack of College support (0.34% (*n*= 1)) , a lack of support from peers (0.67%(*n*= 2)) or obtaining CPD recognition for the work (0%) significantly affected the shortage. Similarly, only 15 respondees considered that financial (tax/ pension) implications of doing this work accounted for the shortage (5%), and only 3% (*n*= 8) thought that a lack of support of job planning from individual trusts was to blame.

97. A summary of the data is set out below [Table 2]:-

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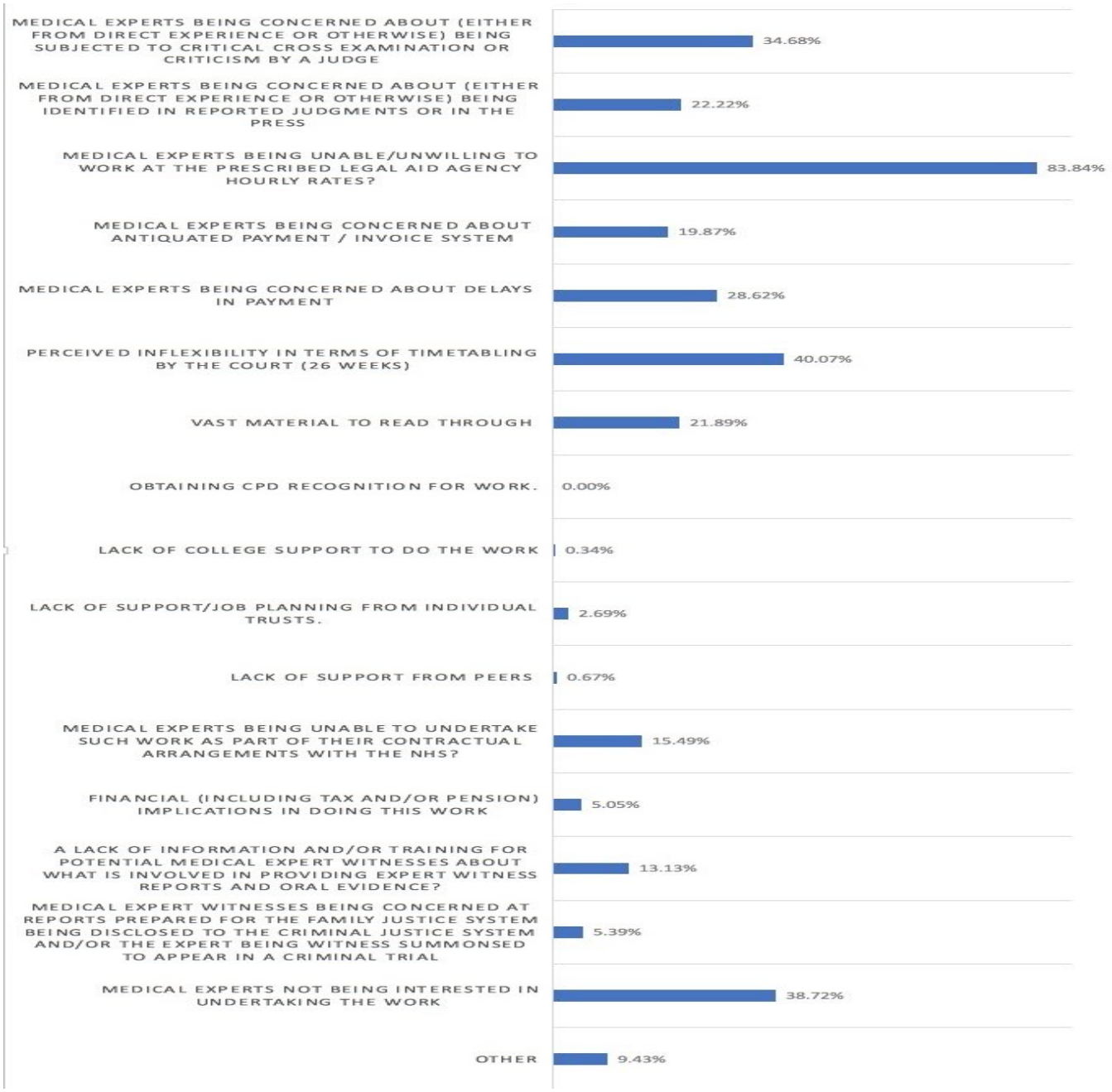

98. We asked if respondees were aware of medical specialists who were unwilling to become expert witnesses or provide expert opinion evidence (as opposed to purely factual material such as medical records or material). Just over half of those who responded to this question, answered in the affirmative. Some respondees stated that such clinicians "*refuse to be instructed as a SJE, saying they have neither time nor the training to provide an expert*

report. To avoid delays in final hearings, I am increasingly having to cross examine the treating clinicians at a longer IRH and then advocates are required to agree a note of the evidence. …". Others stated that "*treating clinicians are unwilling to give opinion evidence they have informed us they do not have the correct insurance...*". Many reported treating clinicians were "*reluctant"* to be instructed as an expert witness. Paediatricians in particular were singled out by some.

99. We also asked respondees if they were aware of medical specialists who will provide a report as a treating clinician but are then not willing to participate in experts' meetings or to give oral evidence to the court. This was a regular experience of our respondees. Over 100 people stated they were aware of this (38%). One stated that treating clinicians were "reluctant *to be drawn on their initial findings or to attend court to give evidence*", it was described as a frequent problem. Some had experience of clinicians stating they did not give permission for their reports to be used in court. Some cited the impact on their "*professional commitments (e.g. NHS clinics which have to be moved as witness timetables change/run over at short notice*)".

100. Others said they had experience of treating experts being very willing to come to court to give evidence on factual issues only.

Decline in Quality

101. We asked if respondees had noted a decline in the quality of expert reports. 54% stated that they had. We sought to better understand if this was a countrywide problem and whether one discipline more than another was affected. The data revealed the following trends [Table 3]:

Role	North	South	Midlands	London	Wales	England and Wales
Child / child and family psychiatrist	6.7%	6.4%	1.7%	6.7%	0.7%	22.2%
Child / child and family psychologist	10.4%	12.1%	3.0%	7.4%	0.7%	33.7%
Adult psychiatrist	4.0%	5.7%	2.0%	6.7%	0.3%	18.9%
Adult psychologist	1.0%	0.3%	0.3%	1.0%	0.0%	2.7%
Consultant dermatologist	0.0%	0.0%	1.0%	0.0%	0.0%	1.0%
Consultant ENT surgeon	0.0%	0.3%	0.0%	0.0%	0.0%	0.3%
Consultant endocrinologist	0.0%	0.0%	0.0%	0.3%	0.0%	0.3%

Consultant general surgeon	0.7%	0.3%	0.3%	0.3%	0.0%	1.7%
Consultant geneticist	0.7%	0.3%	0.3%	0.3%	0.0%	1.7%
Consultant haematologist	0.0%	0.3%	0.3%	0.3%	0.0%	1.0%
Consultant neonatologist	0.0%	0.0%	0.0%	0.7%	0.0%	0.7%
Consultant neurologist	1.3%	0.3%	0.3%	1.0%	0.0%	3.0%
Consultant neuroradiologist	1.7%	1.0%	1.0%	0.7%	0.0%	4.4%
Consultant neurosurgeon	1.3%	0.3%	0.0%	0.3%	0.0%	2.0%
Consultant obstetrician	0.3%	0.0%	0.0%	0.0%	0.0%	0.3%
Consultant opthalomologist	1.0%	1.0%	0.0%	0.7%	0.0%	2.7%
Consultant paediatrician	12.5%	5.4%	2.7%	4.7%	1.0%	26.3%
Consultant pathologist	0.7%	0.7%	0.0%	0.3%	0.0%	1.7%
Consultant plastic surgeon	0.7%	0.0%	0.3%	0.3%	0.0%	1.3%
Consultant radiologist	3.0%	2.4%	0.7%	0.7%	0.0%	6.7%
Consultant toxicologist	0.0%	0.3%	0.3%	0.0%	0.0%	0.7%
Risk assessor	3.0%	4.4%	1.3%	2.7%	1.0%	12.5%
Other	1.0%	1.0%	0.3%	0.3%	0.3%	3.0%

102. Child/ Child and Family Psychiatrists / Psychologists and Paediatricians were most frequently mentioned by respondents to this question, and as before, although Wales fared better than the rest of England, there were concerns in all areas of the country and across disciplines. Others commented on the "*extremely capable and competent experts reporting and the quality of their reports has not reduced. The problem is obtaining a report from them within timescales as they are invariably very much in demand".*

The Solution?

103. We asked our respondents what they considered could be done to encourage more experts to assist the courts. There were a number of themes evident in the narrative responses received, and in line with data as to the perceived reasons for the shortages.

104. **Fees:** many responses were encapsulated as follows: "*The Family Court cannot rely upon the commitment and goodwill of specialists to ensure that the system continues to function in the face of continued cuts*". Many respondees considered funding was the main issue. There were a number of calls to "*increase rates*" to "*higher rates*". That there had to be changes to the LAA rates. There should be "*proper pay*". The current rates were described as "*not fit for purpose for experts".*

105. In the absence of a rise in fees, other respondees considered that time should be made available to practitioners to undertake the work as **part of their NHS duties**. Others

suggested that "*Perhaps the Royal Colleges could be approached to form a Faculty of Expert witnesses and come to some arrangement with the NHS that in return for an increment on salary members of the Faculty would provide expert evidence as part of their NHS contract on the basis that a proportion of the experts fee is paid to the NHS*", that there needed to be "*discussions with individual trusts to support the work and allow time",* that their "*NHS contracts should allow for them to be expert witnesses in family matters", "The principal obstacle is now the T and Cs imposed by Heath Trusts who do not support their consultants doing this work. This requires addressing at a strategic level with the D o H".*

106. **Criticism by the Judge / Hostile Cross Examination.** 35% (*n*= 103) of respondees had identified this as a reason for the shortage in expert evidence and this was a theme in the narrative responses. As one respondee stated "*Experts at the top of their field are used to being valued and respected. This contrasts with the treatment they sometimes receive from the court. The Family Justice system could work to correct that".*

107. A number commented upon the need for a reduction in critical judgments of experts. Time and time again, respondees cited what they considered to be unnecessarily critical judgments which will put others off taking on work in the family court. The recent judgment of HHJ Bellamy was cited by a few respondees in particular. One describing what they considered could be seen by medics as a "*climate of criticism at court*". It was felt judges should do more to ensure that "*those charged with cross examination are not allowed to (a) barrack the witness and (b) interrupt the witness".*

108. **Training:** respondees considered that "*There needs to be proper support, nationally and locally, to identify best practise, to provide exchange of information and training and to encourage clinicians to see this as a core part of their work*." Further:

- "*There needs to be encouragement to them to train juniors to begin preparing for such work".*
- *"Professionals who are interested in providing expert court reports (should be allowed) to sit in on family courts to understand the process and how expert evidence is handled".*
- There should be "bespoke training" about the court process.
- There should be sharing of good examples of expert reports.

- There should be liaison between the professions.
- *Family Justice Boards should encourage sitting in and experience of courts to reduce anxiety.*
- There should be Awards to *recognise contributions to medico-legal matters.*
- There should be a *dialogue with the relevant College and Medico-Legal society.*

109. Some respondees spoke of some success with some local training initiatives. In particular, some referenced the training course with the Royal College of Psychiatrists. One respondee spoke of setting up a local group which encouraged the police and the local authorities to have closer liaison about the choice of experts so as to avoid the duplication of the work within the Family and Crown Court. There was mention of the Northern Circuit running an expert witness course in which young barristers learn advocacy skills with young medics as their 'witnesses'. One had experience of an initiative in Liverpool where the court allowed hospital doctors employed in roles involving child protection to observe public law family court proceedings. There was reference to a local interdisciplinary group in Manchester including experts; there was local judiciary engagement with experts. One respondee considered there should be regular Family Justice days to which experts would be encouraged to attend.

110. **Expectations**; practitioners felt we had a duty to support experts by "*clearer and less onerous instructions*", to consider what papers the expert really needs, there needs to be "*an understanding about what the court experts from the experts"*. Although others considered that paring down the instruction "*in an attempt to save money… means it is not possible for a professional to maintain integrity and professionalism if they accept the instruction",* on this theme one responded that *"I have recent experience of an ophthalmologist who was unwilling to accept instructions if the court would only permit a concise report (i.e. the instructions included that the expert should not repeat all the evidence that he had read etc when providing his report). He would only accept instructions on the basis that he was permitted to produce a report in the format that he professionally thought he should. …It did seem to me that the courts are running a risk that in trying to cut down the volume of papers (and repetition) that can occur when there are a number of expert reports, we are not permitting the experts to do their job in the way that they would professionally wish to do, and thus potentially putting some experts off doing the job at*

all". One respondee commented that "*Many reports take the same, medically orthodox points, about causation and timing of injuries and it ought to be possible to develop a baseline or template of currently accepted medical knowledge which builds in any well founded differences of medical view and which could then be utilised as a starting point for the family court. If that could be done, a process of ordering shorter, tighter reports focusing on the facts of the case might be possible, with the caveat that the parties could put additional written questions challenging the views expressed (as now)"*.

111. One practitioner stated that "*more could be done to illustrate to medical professionals how their reports are a valued and essential part of the justice system*". A number of respondees were clear that judgments should be sent to the expert with some feedback. It was also felt there could be greater use of video link.

112. Others said there should be less timescale pressure. Judges should not impose "*timetables which cause them difficulties in also fulfilling their obligations to their "day" job*.", "*The limits on the hours that can be spent, and the rate per hour does not encourage good experts into the field. It's becomes not financially viable for them to do it or reduces the incentive for them to want to put themselves through the tough processes and timescales of the court process"*.

113. Some considered it would be useful to have a centralised register of accredited court experts.

Commentary

114. Barriers preventing health and other professionals from providing expert witness work are not necessarily a new phenomenon. The shortage of witnesses has been discussed within the literature elsewhere, with solutions for practice proposed[4], many of which mirror the findings from the survey presented here. However, arguably, this working group

[4] Oates, A. et al. (2019) 'Shortage of paediatric radiologists acting as an expert witness: position statement from the British Society of Paediatric Radiology (BSPR) National Working Group on Imagine in Suspected Physical Abuse (SPA)', Clinical Radiology.

represents the first time that a number of Medical Royal Colleges, professional bodies (such as members of the British Psychological Society) and the Family Court have pooled their experiences to come together to develop joint health and legal solutions to address the problem.

115. Results from the medical and allied health survey have identified resource pressures preventing health professionals from conducting expert witness work (namely: lack of time, money and support). It is necessary for the importance of this work to be communicated to health professionals and their employers to motivate and support individuals. The survey identified that there is an interest amongst health professionals, who recognise the benefit in improving outcomes for children and young people ("*I have a deep interest in this meaningful work and so I am going to continue doing it*"), but the barriers need to be addressed if health professionals are to meaningfully engage in future expert witness work. Furthermore, it should be encouraged that providing expert witness work improves discipline and practice, which professionals can bring back to the clinical setting as a form of quality improvement.

Existing Guidance and Support

116. It is important to note that there is existing guidance for health professionals to support them in understanding the role of expert witnesses:

- **RCPCH & Family Justice Council.** 'Paediatricians as expert witnesses in the family courts in England and Wales' (August 2018)[5]
- **Academy of Medical Royal Colleges.** 'Acting as an expert or professional witness: Guidance for healthcare professionals' (May 2019)[6]

The *GMC, in particular,* noted that the Academy of Medical Royal Colleges guidance for those acting as a professional expert or witness is aimed specifically at medical professionals who act as an expert witness in courts or tribunals and reflects the GMC guidance and details the standards, training and behaviour expected when acting as an expert witness. Furthermore, the Consortium of Expert Witnesses exists to support health professionals providing expert witness work and should be involved in future work. As noted below (paragraph 21) a number of expert organisations exist which provide (at a price) support and training.

[5] https://www.rcpch.ac.uk/resources/expert-witness-guidance
[6] https://www.aomrc.org.uk/wp-content/uploads/2019/05/Expert_witness_0519-1.pdf

- Family Justice Council (FJC) and the BPS- *Psychologists as expert witnesses in the Family Courts in England and Wales: Standards, competencies and expectations* (2016).
- *Psychologists as Expert Witnesses: Guidelines and Procedure 4th edition* (Revised 2017).

117. **Best practice example – Northern Heads** The "Northern Heads" safeguarding peer-review meeting was established in 2017 by the child protection multidisciplinary team at Royal Manchester Children's Hospital, building on the success of their previous quarterly joint peer review sessions with Alder Hey Children's Hospital, Liverpool. The meeting is a cross - speciality peer-review session across specialties (predominantly paediatricians, radiologists and neuroradiologists, but with contribution from ophthalmologists and neurosurgeons) for tertiary centres across the North of England and Scotland, with participation from Manchester, Liverpool, Birmingham, Sheffield, Leeds, Newcastle and Glasgow.

118. The day long meetings are held quarterly. Each centre is invited to present a selection of cases of children investigated for suspected inflicted head trauma. The clinical presentation, radiological imaging, medical photographs along with the conclusions from the treating clinician's written report are collectively reviewed. The setting allows for open, constructive discussion and challenge in a supportive environment between peers and colleagues.

119. All specialties with an interest in child protection are encouraged to attend and the meetings have been well-received from all attending specialties from the senior trainees to the very senior consultant.

120. While the purpose of the meeting is not primarily to encourage our colleagues to take on expert reports for the Family Court, we believe the discussion of complex neuro-trauma cases in a non-judgemental and open forum is a firm foundation for promoting and developing sound practice and for supporting each participating consultant's practice development. Ultimately, we believe this can only benefit the care provided to the child and their family and may instil confidence to those medical professionals considering becoming a medical expert for the Family Court and allow them to take the next step. The knowledge that a court appointed, jointly instructed expert is an active participant in

specialist peer review of this nature, can provide a degree of assurance to the court that the expert's report will be in keeping with mainstream clinical opinion in the field.

121. Meetings such as "Northern Heads" require minimal funding, the success lying in the enthusiasm of the participants to actively engage in the process because of the benefit and professional support it provides them in this challenging area of paediatric practice. We believe this meeting is an exemplar which could be replicated in each region in the country.

122. Those responding to the survey reported a "crisis", with a "creaking" system. Where medical evidence is at the heart of the case "relying on poor quality or insufficiently experienced experts" (or we would add not being able to instruct an expert) can result in real injustice. The impact on the children who are the subject of the proceedings and the families before the court "is irreversible".

123. The legal members of the working group broadly had the same views and experiences as those who responded to the survey. Family Courts often require experts to assist in determining complex issues and there is a general consensus in the legal profession that those experts are increasingly disenchanted with the work. The volume of paperwork involved in writing reports and the tight timescales imposed by the court is a significant disincentive. These issues are exacerbated by rates of pay, the cumbersome process of securing their remuneration and what some perceive to be the hostile environment of the Family Court.

124. The responsibility placed upon experts in cases is high, albeit the judge is the individual who decides. The consequences of 'getting it wrong' can be severe, for the child or children concerned, or indeed for the expert. The legal group had experience of experts pointing out to them that there was very little incentive to take on the work, and risk being 'named and shamed' sued, or investigated by the GMC or other regulators.

125. All these matters have a direct bearing on the available pool of experts.

Treatment of Experts

126. We noted that some 35% of the respondees to the legal survey considered that the pool of expert witnesses had narrowed owing to a concern about adverse criticism by a judge or

critical cross examination. There was concern, by lawyers, that experts feel poorly treated by the court, and that they should not be "barracked" and "interrupted". That was confirmed by the medical survey which suggested that some 25% of the respondees felt that such treatment was responsible for a shortage. Anecdotally there is a growing increase in experts fearing criticism, not only from the lawyers but from the very people they assess. This adds to an ever-growing reluctance to accept instructions.

127. The symposium considered this issue in more detail. Some medical professionals expressed surprise as to the level and type of questioning in the family court; others were more sanguine about their experience noting the importance of the issues at stake. The lawyers pointed out that advocates must be able to test the evidence and that they have a legal duty to their client. The issues at stake in family proceedings could not be more important, and therefore a forensic analysis of expert evidence is only to be expected. Consequently, experts who provide reports for family proceedings should anticipate that their work will be scrutinised, and that questions will often be put to them which seek to explore and sometimes directly challenge their approach, conclusions and opinions.

128. We consider that more could be done to prepare expert witnesses. There was widespread support from across the respondees for bespoke training for experts about the court process and the giving of evidence, whether as an instructed expert or a professional witness. The purpose and importance of giving such evidence needs to be emphasised to the Royal Colleges, NHS trusts and all the professional bodies involved and there should be a proper budget for such training.

129. There are organisations such as the Expert Witness Institute and the Academy of Experts, which provide accreditation, support and training. These do come at a cost for experts, however, and the difficulty is to persuade reluctant would-be experts to pay for this. Commercial bodies also provide training.

130. Although the RCPCH provides training in court skills (which is highly valued by those who have attended), and there is a successful mini-pupillage scheme for experts run by the Family Justice Council, training for expert witnesses is somewhat ad hoc both in London and across the country.

131. The Working Group acknowledges that the existing organisations fulfil many of the training and support functions which are identified as a cause for the shortages of experts, but their availability is of course subject to a financial gateway. The cost of membership of some of the commercial entities or the costs of courses or certification as an expert may present an obstacle for some experts when rates of remuneration and other financial issues already make expert witness work relatively unattractive.

132. Information packs could be created to assist them to understand the court process better. Ideally the pack should be prepared in consultation with experts who have significant experience of giving evidence. The Consultation responses emphasized the existing range of resources available to experts. It may be that raising awareness of existing resources would be better than the development of entirely new material. A review of the existing material, the identification of any deficiencies and the development of material to plug any gaps together with better sign-posting would go a long way to resolving this issue.

133. We believe that training would, amongst other things, assist in preparing experts for the realities of giving evidence and the nature of the forensic and inquisitorial process in family proceedings which may not otherwise be fully understood. We are particularly conscious that expert witnesses are in short supply, the demands on their time are great and they increasingly feel the pressure of the 26-week deadline as has been found in our survey. That is exacerbated by the frequency with which experts are now, more than ever before, called upon to give oral evidence. For those just starting out in their medico legal careers, there is little time between cases to reflect and hone their skills.

134. Over the years a number of schemes have been proposed or implemented to develop a 'Register' of expert witnesses. Examples include

134.1. The Academy of Experts

134.2. Directory of Expert Witnesses (Expert Witness Institute)

134.3. The National Register of University Certificated Expert Witnesses (Cardiff University Bond Solon Expert Witness Certificate)

134.4. Directory of Expert Witnesses (British Psychological Society)
134.5. UK Register of Expert Witnesses (J S Publications)

135. Responses to the consultation suggested that a Centralised Register of Accredited Experts might address the issue of the quality of experts as well as assisting parties and courts in locating relevant experts and thus reducing delays. We considered that there is much to commend a national and centralized register but the logistics of creating and maintaining such a Register and whether it would be provided by a commercial entity or through a not for profit entity meant that we did not feel it appropriate to make a recommendation other than to invite the FJC sub-committee to further explore the issue.

136. It appears to the Working Group that the variety of resources could be better publicised in order to ensure experts are aware of the different sources of training, their relative merits and costs. There may be a role for the FJC in providing a resource which assists in sign-posting as well as actively providing or promoting training.

137. We consider that the Family Justice Council should be invited to extend the mini pupillage schemes for both professional and expert witnesses. Currently there is a scheme open to specialist registrars but there is variation across the country; it operates principally in the Royal Courts of Justice in London. It is felt that this scheme should be rolled out nationally so as to foster a transparent approach between experts and advocates and to capture a wider variety of experts who work with children. This would increase understanding of each professional's working environment, to address misconceptions about respective roles in practice. The mini pupillage scheme should be revived and standardised across England. It should be directed at senior trainees but also, perhaps most importantly, consultants who have a few years of experience working at senior doctor level. We believe it is important to recognise, that a fundamental aspect of being a "good" doctor is having seen and being continuously exposed to large number of varied cases. This can only be achieved with time/experience and is essential in providing a considered and sensible opinion to the Court. Some of the observation of court proceedings could be done remotely, although we would stress that this would not be sufficient by itself.

138. Likewise, the development of a scheme to allow legal professionals to experience medical practice in a pediatrics or intensive care unit would promote better understanding amongst the judiciary and lawyers of how medical professionals practice.

139. Whilst it is recognised that the Family Justice Council might wish to set a national standard and uniformity of approach to the regional FJCs in each respective geographical area; there ought to be a mechanism whereby the communication works both ways. The regional practices should be able to communicate aspects relating to experts in their particular region to the central FJC. The sharing of information in this way could lead to an improvement in services, implementation, and statistical information gathering. In any event given that we recognize that there may not be a one size fits all in terms of regional groups given the variations in activities of LFJB's and other groups the approach of the FJC should be sufficiently flexible to allow for this. We do not believe that it is necessary to be formulaic in the development of the regional groups but rather to seek to build upon existing resources where applicable.

140. So far as advocates are concerned, the group considered that the FLBA, ALC and Resolution should be encouraged to offer training to their members as to the cross-examination of experts. This comes at a time when training is required for the treatment of vulnerable witnesses in the Family Jurisdiction. It is perhaps a welcome point to consider both.

141. Peer support networks both within the medical profession but also between legal and medical professions would also be a valuable addition to the range of solutions which would support both existing experts but also new entrants. Structures for peer support and mentoring are more commonplace in the medical professions whereas in the legal profession after the completion of mandatory training for new practitioners there is no formal peer support or mentoring albeit much occurs informally. Support from the legal professions and the Judiciary to support the establishment of peer support networks and mentoring opportunities for medical and allied health (particularly psychology) expert witnesses could be part of the function of the Regional FJC Committees. The network could enable peer review and anonymous space to discuss cases confidentially, which will enable

a mechanism for medical professionals to receive appropriate and timely feedback from the judiciary on cases. We do not believe that such networks should give rise to issues of conflict or breach of confidentiality. Those involved are all subject to their own professional obligations relating to confidentiality and it should be possible to maintain such obligations whilst allowing a support forum to operate. The network could via the FJC Regional Committees also provide links to training and job shadowing schemes.

142. Existing regional safeguarding peer review networks should be developed to include multi-professions and lawyers. We highlight the exemplar model of the "Northern Heads" peer-review meeting, originally established at Manchester and Alder Hey Children's Hospital. This meeting provides the opportunities for a range of medical disciplines to discuss suspected cases of abusive head trauma in non-judgmental environment to aid learning and share experiences.

143. We believe there should be the means for a structured ongoing dialogue between the Family Court and representatives of medical and allied health experts to address issues that may arise and promote education. The establishment of the FJC sub-committee and Regional FJC Committees would be a sensible approach to oversee such a scheme.

144. In court, it is important that experts are treated with courtesy and respect (as all witnesses) and judges should intervene if they are not. This does not mean that an expert should not be challenged, and their opinion tested or that any gaps, inconsistencies or faults in his or her evidence should not be the subject of questioning, but there are ways of doing this without interrupting or being rude. Those in the legal group did not have personal experience of witnessing this, but it was raised by the experts themselves. The consultation responses emphasised the importance of the ability to challenge expert evidence which could have a significant impact on the outcome of a case. Consultation responses also emphasised that training should include awareness of the importance of challenge to expert evidence by lawyers.

Overall the responses to the consultation did not consider that it was either appropriate or necessary for the judge to explain to the expert at the commencement of their evidence why they were required to attend and the issues in relation to their evidence. The Council of Circuit Judges considered that where particular issues in relation to expert evidence were identified at the IRH that the expert could be notified. Other respondees thought that the process of instruction, expert meetings, consideration of other evidence would be sufficient to alert the expert to the issues.

145. The group also believe that beyond setting out reasons why they accept or do not accept the evidence of an expert, judges usually are and should be slow to criticise the professionalism and expertise of an expert publicly without good reason. The consultation responses identified that where an expert has failed to comply with their duties to the court, failed to adhere to their professional ethical duties or given evidence outside their expertise it is right that they should be criticised. Bearing in mind the effect that calling into question an expert's professionalism will have upon not only that expert, but the message it sends to other experts, such a power should be used appropriately and only where it is necessary to do so.

146. The consultation respondees considered that areas of criticism should be addressed with the expert in their oral evidence so that they had the opportunity to explain or clarify their position in relation to any issue. If that were done the expert would not need to be asked to comment on a draft judgment. If criticism were to be made upon which the expert had not had the opportunity to comment, then the respondees considered that the expert ought to have the opportunity to comment on such proposed criticism. We consider that it is difficult to envisage a situation where potential criticism has not been identified in advance, where it has been supplemental questions may be asked. In any event at the latest criticism should be apparent at the time Position Statements and Skeleton Arguments are lodged. These should be provided to experts. The issue can then be explored in evidence. In the rare case where, potential criticism emerges after an expert has been completed their evidence supplemental written questions can be put or the expert recalled. Given the impact criticism might have on the weight a judge might place on the evidence it is difficult to envisage a situation where it would not be appropriate to address the matter with the expert even at such a late stage. In cases where a judge proposes to name and criticize an expert in their

publicly available judgment and those criticisms have not been raised in evidence the expert should be entitled to be made aware of the criticism and comments on it or see a draft of the judgment in advance of publication and have the opportunity to make representations to the judge. The representations should include any concerns on the fairness of the comments and whether they should be named, prior to any publication taking place. The current Transparency Guidelines of 16 January 2014 provide that experts be named in published judgments unless there is compelling reason not to.

147. The consultation responses did not identify or support the need for some form of informal complaints process. The regulatory bodies for the professions have complaints mechanisms. The proposals in relation to training and mentoring would contain some element of informal feedback which might assist experts but there were many reasons why an additional layer of complaints process was considered unhelpful.

148. The provision of the final judgment to the expert was considered to be a valuable form of feedback to the expert and it was the view of the respondees that those responsible for the instruction of the expert should provide the final written judgment to them. If no written judgment or transcript is obtained a summary should be provided by the lead solicitor.

The Expert Instruction

149. It is acknowledged that there needs to be an easier way of instructing experts especially when prior authority is required. Delay in payment or securing an expert can lead to an expert becoming unwilling to act again in the future. We considered, when drafting our report, that one solicitor might be responsible for making the application on everyone's behalf, and our wider consultation confirmed that that was either good practice in certain areas of the country or was widely supported as a recommendation. Certainly, and in communication with the expert there needs to be a single point of contact. The LAA is adopting the single prior authority model. The certification by the court of the necessity of the report should allow prior authority to be granted. This point is considered in the Payment and Legal Aid section below.

150. A number of experts commented upon the volume of paperwork they were sent. In our consultation, some said that the large amount of paperwork created additional work and

that they should just be provided with essential and relevant information only. However, others considered that knowing what is "essential" and "relevant" is far from straightforward and that a sift by lawyers may mean that the likely relevance of a piece of evidence is missed. Lawyers too expressed concern of being asked to determine what was relevant information for an expert, and it was felt that if evidence is not provided then the expert may have to qualify their report to the court.

151. It is obvious that the papers sent to medical experts should be proportionate to the issues in the case, but there was understanding within the legal group that it is often difficult for advocates to identify (from voluminous papers) what documents are relevant at the time the instruction is agreed. Counsel (particularly leading counsel) may only be instructed at the last minute. That was reflected in our consultation. Some stated that practitioners should be paid for a shift in the papers as it created, they said, an additional burden of complex work.

152. We continue to be of the view that the blanket sending of all the documents, including (for example) all police and third party (nonmedical) material should be deprecated. There needs to be active consideration at the point of instruction to the documents to be sent to the expert. This may result in all the papers being sent, or this may result in some agreement that certain documents are simply not going to be relevant to certain experts. The court should be asked to approve the index of documents to be sent. If it is determined that not all case papers need to be sent, then the expert must be provided with a full index with a specific direction to consider whether further papers are required. This request should be made within 14 days of receipt of instructions to avoid delay Experts should be asked if they seek hard copies of documentation, if not e-bundles shall be the default. All records and case papers must be paginated before they are sent to any expert.

153. The working group noted that there are a number of agencies who provide a service of collating, organising and indexing medical records. We considered that, in cases where there was a large volume of medical evidence (for example in cases of factitious illness), such indexing would be a more efficient use of medical experts' time and potentially have costs savings. The hourly rate for this administrative service should be cheaper if performed by a service provider with experience in collating medical records than the hourly rate for

a solicitor or consultant medical expert both in term of the cost of misapplied expertise and in terms of speed (so less hours needed). Medical experts should not be required to undertake what is a clerical administrative task. Solicitors leading the instruction of expert witnesses should not perform a task which is both clerical but requires familiarity with medical record keeping. It might also 'free-up' time for experts which would make taking on such work more attractive or allow them more time to conduct the analysis itself. The LAA can and does give approval on an application for prior authority for scheduling of medical notes and it should be more widely considered for very complex cases.

154. The requirement that questions to experts need to be relevant and should be approved by the court where the expert is instructed should be strictly adhered to. The FJC should periodically review their standard template of questions to ensure they are still relevant and appropriate. The standard questions and pro forma LOI that is produced by the FJC is utilized and used by the Law Society. https://www.lawsociety.org.uk/en/topics/family-and-children/instructing-experts-in-family-and-children-court-proceedings.

155. The impact of Covid-19 and the dramatic change to ways of working in the Family Justice System emphasised to the Working Group the potentially significant difference that remote forms of working could make to the impact on an experts' professional practice of undertaking expert work. The ability to give evidence from their hospital desk by remote video conferencing applications hugely reduces the time commitment and intrusion into clinical or other professional commitments. A linked benefit is the possibility of expert's meetings taking place by Zoom or Teams or Skype and the video being available to the parties and the judge to view. In addition a transcript/note of the meeting would save a lot of time and stress to agree a note and seems pointless work now as it can be recorded.

156. If experts are required to attend final hearings for cross examination, it was widely considered that there needed to be a flexible approach to agreeing times and dates for their evidence to be given. Robust case management should be exercised, if necessary, interposing or interrupting other witnesses, to ensure that expert evidence is heard on the date identified. Experts too often recalled considerable inconvenience to their clinical practice by last minute changes. To this end, proper consultation prior to the IRH as to availability should take place. Remote giving of evidence should become the norm for

experts unless in person attendance is necessary for good reason. Whilst the Working Group recognised that single joint experts should not be required to attend court (whether remotely or in person) to give evidence unless there was a purpose in them doing so the Group acknowledge that a purpose may not require the court to identify a particular issue where their evidence is challenged in particular in the most serious cases where the impact of the expert evidence may be significant and where the parents or others may be entitled to have the case proved.

157. It is acknowledged that it is extremely difficult for some complex public law cases to remain within the 26-week time limit. Some evidence will be available when the case commences but often relevant evidence is only filed once the proceedings are established. Additionally, it takes time for counsel to be instructed and for solicitors and counsel to master the paperwork. Strict time limits pursuant to Part 25 will only be realistic if the lawyers have sufficient time, once instructed, to carry out the task of identifying which papers should go to the expert (and as set out above that can be more difficult than is sometimes appreciated), what experts are required, and what questions they should be asked.

158. We have carefully considered whether the 26-week track is a realistic timescale for the resolution of proceedings in cases requiring expert evidence. We are particularly mindful of feedback from medical experts as to the difficulties and delays in obtaining medical records, delays in being sent case papers and letters of instruction and then a compressed timescale for the filing of their report. We are also mindful of the fact that many cases with expert evidence are capable of resolution within 26 weeks.

159. Having consulted widely, we do not consider that cases with expert evidence should automatically be removed from the 26-week track. There continues to be a need to resolve cases as swiftly as is possible. However, we do consider that active consideration be given to whether it is possible to resolve a complex case in that timescale taking into account the evidence that is required to resolve the case justly and the expert's reasonable timescales and, if it is not, to give more realistic thought to what is achievable. We were particularly mindful of the feedback from circuit judges favouring a case by case approach as to whether resolution is possible within 26weeks.

160. We set out below our specific recommendations as to the court process for expert instruction. It was clear from the results of the survey that issues pertaining to the manner of their instruction and receipt of papers, whilst not in the front rank of reasons for a declining number of willing participants were matters which had some impact upon their involvement and yet were matters which were far more easily resolved. In summary: a) To ensure only necessary documents were sent to the expert. b) To dissuade experts from being asked a 'dripping roast' of questions at odd stages of the proceedings. c) To allow a reasonable time for consideration and answering of questions, particularly to avoid requests to answer a question within a few days or even less. d) To ensure that experts' participation is only where necessary and in accordance with the issues still requiring adjudication. e) To ensure that experts participate rather than attend unless clear reason for requiring the latter. f) To ensure that the timing of the "live" expert evidence it is respected by all, including when attempting to maintain court business. The solutions essentially lay in allowing lawyers sufficient time to prepare, to adhere to the requirements of Part 25 and ensuring sufficient flexibility in the 26 weeks where necessary.

Payment and Legal Aid

161. The Working Group (on which the LAA was represented) has noted the concerns about legal aid remuneration rates and the method of payment, as well as practical issues around legal aid administration (e.g. applying for prior authority) made by both experts and lawyers working in the family justice system.

162. In this area some changes have already been made. In relation to other views expressed, these will form the basis of discussions that will need to take place in the future and would also need to involve the MOJ and policy issues.

163. The group agreed that practicalities of how experts are paid are too cumbersome and cause delay and that the LAA's Guidance on the Remuneration of Expert Witnesses

(current version is from April 2019[7]) should make it easier to obtain prior authority to instruct an expert. The process for prior authority should be reviewed as to whether it is needed in some circumstances and the process should be simplified. At the least, one prior authority approval made by one nominated party's solicitor should apply where an expert is jointly instructed, and the expert instructed should only have to issue one invoice to obtain payment. It should be possible for one prior authority application to be made on one occasion in relation to the instruction of multiple experts.

164. Issues around the numbers of hours allowed by the LAA for experts should be addressed, including for some larger assessments and for dealing with any questions, experts' meetings or other work further to the filing of experts' reports. Preparation of the main report and then additional work is to be expected.

165. Some of the lower legal aid payments for experts, particularly the removal of the London/non-London differentiation, should be reviewed.

166. The Working Group notes that as a direct result of the Survey and the feedback received that discussions have already taken place between the Legal Aid Agency and solicitors' bodies which has resulted in progress being made on legal aid issues. The changes will be set out in the revised Guidance on the Remuneration of Expert Witnesses to be published shortly, but in summary the changes are:

166.1. it has been agreed that one party alone can apply for prior authority and the result will apply to all the legal aid certificates in the case as long as those details are provided in the lead application.

166.2. A solicitor can make one application for prior authority for multiple experts

166.3. There is to be a list of commonly used experts whose rates are not included in the statutory instrument but for which the LAA won't expect an application for prior authority

[7] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791497/Guidance_on_the_Remuneration_of_Expert_Witnesses_April2019.pdf

166.4. There will be some harmonisation of London and non-London rates.

166.5. The LAA does not expect an expert to issue multiple invoices and an expert can issue one invoice with the details of all paying parties on it.

166.6. There will be further guidance on the number of hours for large assessments which will remove the need to apply for prior authority for larger assessments

166.7. The guidance also includes some other clarifications on matters such as GP record fees, police disclosure fees and translation costs

167. The responses included many other views and comments about payment and legal aid which will need to be considered but it is acknowledged that the responses have provided valuable information to form the basis of future discussions. Areas for future consideration and discussion are set out below

- The LAA and the MOJ are not currently able to look at any rate changes for experts either for the higher paid experts or in relation to the London/non-London rates (other than those referred to above which can be agreed at this time). This is a policy issue and will therefore require review by the MoJ when the issue of expert rates is next being reviewed.
- The LAA and the MOJ are not proposing any other changes to benchmark hours or times for assessments (other than those referred to above) but the consultation responses will be considered further.
- The LAA has noted that it has been asked to consider if there is a way to pay experts by reference to the size of a bundle when it is outside a certain number of pages. It has also been asked to consider that if the courts limit the pages to be read, would the LAA accept the court's assessment on the number of pages to be read?
- In relation to recommendation 11, the LAA already considers applications for prior authority for the scheduling of medical notes in complex cases. It cannot agree that these can simply proceed in the absence of prior authority given the potential volume and cost. This is something that can be considered further particularly in relation to the rates that these companies use which currently do not appear on the codified list of experts.
- The LAA and the MOJ has been asked to consider approving expert's invoices when submitted for payments on account, rather than waiting until the end of the

case, as this results in experts having been paid and then being asked to pay money back if there is an overpayment.

- The LAA and the MOJ are not currently considering any mechanism to allow experts to contact the LAA/MOJ direct rather than go through solicitors. On this subject, the LAA has previously considered a process where experts bill and are paid directly by the LAA. There were a number of issues with this approach, including substantial and costly changes to existing IT systems and increased administrative resources to process additional claims. They stated that a number of contract changes would also be required and consideration as to whether further right of assessment applies to consider the experts costs within the claim overall. There would also be an impact on funded clients where the statutory charge applies or where the certificate is revoked. The LAA will consider this issue again as part of its Transformation programme however the focus over the last few months has been to address Covid related issues and this is likely to continue for some time.
- The LAA will look into how they may provide clearer guidance for experts detailing its requirements and whether they introduce some training for experts on YouTube

168. There are some other factors relating to payment and legal aid which are noted here having arisen from the consultation and bear comment: -

- There is a practical issue that it is difficult for an expert to give an accurate estimate before seeing the papers. Consideration needs to be given as to how we provide information to experts at the point of enquiry (and this will link in with the work on how experts are instructed).
- All solicitors should be reminded of the payment on account mechanism so that experts are paid promptly. An expert can ask a solicitor to make a claim on account for the full amount (up to any level of prior authority) as soon as the cost is incurred.
- A draft invoice could be designed, and solicitors asked to pre-populate it when instructing the expert
- The pro forma LOI produced by the Law Society could be amended to include a reference to the need for the invoice within x weeks and pointing out that if not rendered, the expert may forfeit payment.

- Further work is needed around cases with litigants in person given the concerns and anxieties about payment. Some experts ask litigants in person to pay before the assessment commences.
- It may be that even if the LAA/MOJ removes the requirement for prior authority when codified rates are exceeded, solicitors will still wish to apply to have security for the rate.

Other Matters

169. A number of experts expressed concern that their reports would be disclosed between criminal and family proceedings and having agreed to act as witnesses in one set of proceedings they found themselves required to give evidence in another. The Group recognises the need for Family Courts to be clear about the status of 'experts' and 'professional' witnesses[8] and that the cross-over from an expert in a criminal case to an expert in a family case is appropriately identified and directions as to remuneration etc given. This may be something that should be addressed in the instruction and in training, but it is also vital to ensure experts are properly paid for all their work.

Supporting and Sustaining Change

170. A number of consultees indicated a desire to develop a closer relationship with the Working Group and to have been consulted earlier in the process, including BPS, . BASW, the Expert Witness Institute and the Academy of Experts,

171. The EWI expressed *"a willingness and commitment to engage with the working group and to help build a suitable infrastructure to provide relevant training and support and to create a larger pool."* The use of a directory of expert witnesses was identified as a possible model for a single centralised register of accredited court experts. (see above).

[8] Sunderland CC v AB (Re-hearing: Fact-Finding: Expert or Professional Evidence) [2019] EWHC 3887 (Fam)

172. The WG considers that there will be an on-going need for a body to oversee the implementation of the recommendations of the WG. Some of the recommendations are longer term which will involve a process of consultation, negotiation and implementation with stakeholders outside the umbrella of those involved in the WG for instance NHS commissioners, DoH, MoJ and LAA. Other recommendations where the process of implementation can begin immediately will need support in the implementation phase and monitoring and support on an on-going basis particularly with making changes from lessons learned.

173. The Family Justice Board was set up to improve the performance of the family justice system and to ensure the best possible outcomes for children who come into contact with it. The Board aims to take a cross-system approach to family justice and is jointly chaired by Ministers from the Ministry of Justice and Department for Education. Its members are senior stakeholders from across the family justice system. The Family Justice Council is a sub-group of the FJB who provide expert advice to the FJB and develop practice guidance for the family justice system. The WG considers the Family Justice Council (FJC) to be the most appropriate body to take on the function of supporting and maintaining change. As the body whose foundation is to promote inter- disciplinary working in family justice the WG's recommendations are perhaps a paradigm example of an inter-disciplinary function. The FJC also has administrative support which would be necessary to support both the operation of the committee and more specifically functions such as the mini-pupillage scheme, organizing and supporting regional committees, liaising with other training providers and working with other interested parties on the wide range of issues which we have identified as impacting on expert work. There would appear to be some overlap between the possible functions of the FJC and those of the Family Justice Board in respect of the FJB's remit in respect of the performance of the family justice system and its responsibility for making recommendations aimed at improving performance at national and local levels and the WG would suggest that some mechanism for liaison between the FJB and the FJC is considered. The Regional Groups could report annually to the FJC Sub-Committee who would then report annually to the FJC and FJB. A representative of the RCPCH or RCR or other Royal College could be co-opted onto that Sub-Committee. The Consultation responses supported the creation of such an FJC sub-committee with its Chair providing a national lead on the issue. The Family Justice Council has accepted this recommendation and a sub-committee is being formed. That committee will be comprised

of members of the FJC and members of this Working Group. The terms of reference will be settled by the committee itself but is expected to provide sufficient flexibility to allow action in support of all the recommendations made by this Working Group. Collating information on the range of resources available to experts, administering the mini-pupillage scheme, supporting regional committees and liaising with other bodies including the FJB, commissioning agencies, professional bodies and the expert organisations all require on-going, probably medium to long term input. Regional committees could report to the FJC sub-committee which could provide a function of providing a lead to and provision of support to regional committees and receiving feedback and disseminating information about regional committee activities or best practice to the other regional committees.

174. Implementation on the ground of the training recommendations, including medical mini-pupillages, mentoring and feedback/discussion would best be done in our view at a local, probably regional level. The WG considers that setting up an entirely new structure would be over ambitious and that it would be preferable to make use of some existing structures. Some consultees felt that the regional committees should be a sub-committee of the LFJB. It was thought that a 'National lead' would be required. The WG considers that some form of framework based on large regional areas would probably be the most effective approach rather than a be based on individual courts or NHS trusts. The logistics of smaller scale committees would be very difficult to set up and maintain. Regional committees on the other hand would in the WG's view be likely to be more manageable and to attract sufficient committed individuals to develop momentum and longevity.

175. Both the NHS and the Family Courts have some element of large Regional organisation.

Family Division Areas	**NHS Areas**
North (Manchester, Liverpool, Carlisle etc)	North West
North East (Newcastle, Leeds, Teesside etc)	North East and Yorkshire
Midlands	Midlands
Wales	*NHS Cymru*
East Anglia (Cambridge, Norfolk etc)	East of England

Western (Bristol, Portsmouth, Cornwall etc)	South West
London and Thames Valley	London
Kent, Surrey, Sussex	South East

There are 41 Sustainability Transformation Partnerships / Integrated Care Systems, which sit within these regions. These are responsible for: managing resources, delivering NHS standards, and improving the health of the population they serve.

https://www.england.nhs.uk/integratedcare/integrated-care-systems/

Within each legal circuit are 'clusters' of courts and Designated Family Judges responsible for a court or group of courts. and improving the health of the population they serve.

176. Local Family Justice Boards vary in their level of activity and functions but could usefully play a role in this regional committee. It is understood that some LFJB's already undertake some training responsibilities.

177. Although Family Courts operate on a more local level with several DFJ's per Region a group of courts fall under the umbrella of a regional circuit with a Family Division Liaison Judge as the judicial lead for family justice.

178. Both the FLBA and Resolution have Regional structures and those regional groups could be approached to provide professional representatives who would then be able to draw in their membership both to give and receive training.

179. The WG considers that The Family Division Liaison Judges for each circuit might be best placed to Chair such regional committees. The WG appreciates the already extensive duties of the FDLJ. It might be that the FDLJ could delegate some responsibility to another FD judge or a DFJ or be the Patron of the committee with a judge and expert from the region being co-chairs. One of the functions of the FDLJ is supporting the effectiveness of the family courts and the implementation of the WG recommendation is likely to be an important element of improving the delivery of family justice. This proposal received a mixed response with concerns being expressed by some that adding to the already extensive responsibilities might undermine the effectiveness of the regional committee whereas others considered it the obvious choice.

180. Some consultees expressed concerns about seeking to set up additional regional committees both in relation to the level of work already required of LFJB's and duplicating systems already in place. Mentoring within regional committees caused some concerns as to conflicts of interest. The WG acknowledges these as valid concerns. At present the existing schemes for reasons which are not entirely clear do not seem to reach all those who might wish to avail themselves of them and the WG considers that regional committees may raise awareness of existing resources as well as supplementing them. Mentoring is intended to be more general in its nature rather than being case specific which would give risk potentially to confidentiality issues in any event and the WG therefore consider that conflict issues are unlikely to arise both because of this and because experts would be expected to be alive to any such issue if they sought or gave mentoring on a specific case.

181. The WG concludes that Regional Committees reporting to the FJC sub-committee appears likely to be the most effective vehicle for implementing the training and mentoring aspects of the recommendations. The Patron should be the FDLJ as the senior representative of the FJS for that region but with two co-chairs, one legal, probably a circuit Judge and the other a medical or other expert. The co-chairs would in effect be the 'champions' for the committee at a regional level and could play the lead role in implementing programmes. For the judiciary this might require some 'protected' time to enable them to undertake this.

182. Apart from FDLJ the Committees would require representation from Circuit Judges, District Judged and possibly Magistrates. The FLBA and Resolution could provide representatives for the legal profession. On the Medical side it seems to the WG that regional representatives from one or more of RCPCH, RCP, RCS, RCR and BPS or any other person who was considered a significant contributor in that region would be appropriate. Some form of system to engage or cascade information to all other interested medical colleges or other expert groups would need to be considered.

183. The FJC Sub-committee and Regional Groups with admin support from FJC (which would almost certainly be required) would be primarily responsible for;

a. Setting up and delivering training to experts and lawyers including mock trials and discussion forums for judges, experts and lawyers to meet and exchange ideas.

b. Setting up and delivering a medical mini-pupillage/Marshall's scheme to enable experts to attend court to experience medical experts in the court arena and possibly a reverse scheme to enable judges to visit a paediatric ward.

c. promoting inter-disciplinary respect and co-operation through promoting feedback from judges and lawyers to experts and vice versa and through mentoring and peer discussion of cases in an anonymous environment. It might be possible to consider some form of formal channel for feedback including where concerns were expressed by a judge about a report or evidence given as an intermediate step rather than matters being referred directly to the GMC.

d. providing annual feedback to the FJC and FJB and regional groups to the FJC Experts in the family justice system' committee who in turn would report back annually to the FJC and perhaps the FJB.

Meetings might be accommodated in the main Family Court for the region or within a hospital setting if such were possible.

Recommendations

184. A number of the recommendations we make maybe relatively easy to adopt in particularly as to how the Family Courts deal with matters such as the material provided to experts, the necessity for attendance at or participation in hearings and scheduling of expert evidence within a Witness Template. This would require a concerted effort from the senior judiciary, a degree of training and joined up working with the legal professions. Other recommendations such as the creation of a structure to support training and mentoring and its implementation are more ambitious although we believe achievable. Others such as means, and rates of payment will require buy-in by the Ministry of Justice and the Legal Aid Agency – although initial indications on some of the issues are so far positive. The creation of an environment in which expert work becomes embedded into NHS practice through Commissioners and Trusts in England, Health Boards in Wales and the Medical Royal Colleges is more far reaching although we believe should be pursued and has benefits for the Commissioners and Trusts/Health Boards as well as the experts and the Family Justice System. It is important that solutions within the gift of the Family Justice System whether via the judiciary, the legal profession, HMCTS or the Ministry of Justice and the Legal Aid Agency are considered alongside those for Medical Royal Colleges, namely

commissioners and service planners need to pledge their support for expert witness work in order for NHS employers to engage. RCPCH and other Medical Royal Colleges are currently seeking conversations with NHS England to discuss what these solutions could be.

Medical Colleges

185. Following analysis of the medical and allied health survey and discussion with colleagues at a symposium, it is important for Medical Royal Colleges and other professional bodies (for example British Psychological Society) to recognise the need to better support their members to provide expert witness work. The following recommendations are suggested (however, the authors are only able to comment for their respective Royal Colleges):

Recommendation 1

186. RCPCH and other Royal Colleges/Professional Bodies to create an online resource checklist for healthcare professionals, which details what is expected from expert witnesses. The content of the resource will be agreed by the judiciary, to confirm that the knowledge, skills and expertise required of medical expert witnesses is standardised. Development of this resource would clearly outline the detail of the role, including (but not limited to): content of a court report, explanation of the Family Court, how to respond to a letter of instruction, how to track time spent on court cases. The content should be guided by existing education programmes and guidance. It is expected that this resource could be promoted among healthcare professionals to encourage more to become expert witnesses. RCPCH to share this resource with members, for example, through Paediatric Care Online (PCO). RCPCH to promote expert witness work through production of a webinar, which will be free to download for all health professionals.

Recommendation 2

187. Royal Colleges to increase awareness of existing training for healthcare professionals (e.g. RCPCH expert witness training and also the training offered by organisations such as the Expert Witness Institute and the Academy of Experts) and further develop combined training courses between different specialties (e.g. paediatricians, neurosurgeons and radiologists). RCPCH should consider expanding their expert witness training to run more

frequently throughout the year and explore the possibility of inviting other healthcare professionals. A specialist interest group of the British Society of Paediatric Radiology (BSPR) is running a workshop at its annual meeting (Leeds 2019) with a faculty composed of both the legal and medical professions, and input from a family court judge. The purpose of this workshop is to highlight the paucity of medical experts and attempt to demystify the process as a way to encourage more colleagues to become involved. The same specialist interest group of BSPR has published a consensus paper outlining its views as to how the situation may be improved. Although this focuses on the perspective of the radiologist, we believe there are many parallels with other disciplines and complementary solutions. (***Oates A, et al. 2019)***

Recommendation 3

188. There should be improved collaborative working between Royal Colleges to ensure that issues pertaining to expert witnesses can be discussed collaboratively. Royal Colleges could consider appointing a lead clinician / Officer for expert witnesses, to appropriately support members or an officer for safeguarding children issues which would include relating to court processes.

Commissioners and NHS Trusts

Recommendation 4

189. RCPCH, RCR and other Medical Royal Colleges to engage with commissioners and / or Trusts/Health Boards to enable their members to have conversations with their employers and encourage them to support expert witnesses to participate in this work. RCPCH to outline the value of expert witness work, in particular quality improvement and training aspects. RCPCH and RCR to write and share a letter with Medical Directors / Chief Executive of Trusts with a summary of report findings and recommendations to encourage staff members to provide expert witness work. Evolution within the NHS environment is often gradual and ensuring greater involvement of NHS/Hospital Trusts is likely to be a medium to longer term goal and requiring engagement at multiple levels including at individual Hospital Trusts and down to the design of individual consultant job plans. Raising the profile of the work, as this document seeks to do, along with discussions with organization such as the Children's Hospitals Association will provide impetus.

Recommendation 5

190. RCPCH and others to engage with NHS England and Clinical Commissioning Groups (CCGs) to promote expert witness work and consider the review of commissioning arrangements in England. NHS England should consider providing centralised payments for work through Trusts, who could be commissioned to undertake expert witness work. As the expert witness typically receives remuneration independently from the NHS Trusts by which they are employed, we feel that this area of work is often "forgotten" by commissioners and employers where in reality it is of such fundamental importance it should be at the centre of the way paediatric services are provided. While it should be considered as a long-term objective, Greater Manchester Local Family Justice Board Experts Subgroup Committee advocated that engagement with NHS commissioners is required to explore whether child abuse should be considered a "rare disease". The Rare Diseases Advisory Group (RDAG) makes recommendations to NHS England and the devolved administrations of NHS Scotland, NHS Wales and NHS Northern Ireland on developing and implementing the strategy for rare diseases and highly specialised services. Highly specialised services are provided to a small number of patients; usually no more than 500 patients per year. For this reason, they are typically best delivered nationally through a very small number of centres of excellence. Examples of highly specialised services include liver transplant services, enzyme replacement therapy and proton beam therapy for specific cancer treatments. RDAG makes recommendations to the Clinical Priorities Advisory Group (CPAG) about how highly specialised services should be commissioned.

Payment

Recommendation 6

191. The LAA's guidance for expert witnesses should make it easier to obtain prior authority to instruct an expert. The process for prior authority should be reviewed as to whether it is needed in some circumstances and the process should be simplified. One prior authority approval made by one nominated party's solicitor should apply where an expert is jointly instructed, and the expert instructed should only have to issue one invoice to the lead solicitor or, better still, directly to the Legal Aid Agency to obtain payment and avoid the requirement for submitting multiple invoices to all the respective parties

(sometime 6 or more). It should be possible for one prior authority application to be made on one occasion in relation to the instruction of multiple experts.

This may assist in expediting the process and also assist the LAA in ensuring value for money and that certain experts are not charging for excessive number of hours.

Recommendation 7

192. Issues around the numbers of hours allowed by the LAA for experts should be addressed, including for some larger assessments and so to appropriately reflect the amount of time producing the report and for dealing with any questions, experts' meetings or other work further to the filing of experts' reports.

Recommendation 8

193. Some of the lower legal aid payments for experts, particularly the removal of the London/non-London differentiation, should be reviewed.

The Court Process

Recommendation 9

194. Judges should be prepared to remove cases which require a number of expert witnesses from the 26-week track at an early stage, and to allow legal representatives to have time to master the paperwork in advance of the expert instruction. The Court order removing from the 26-week track should clearly record the reason(s) for this being done so as to enable HMCTS to track this issue.

Recommendation 10

195. All legal professionals including Judiciary to adhere to the contents of Part 25 and PD 25 with particular reference to the following:

(i) Instruction of experts matter for CMH (ie. early within the proceedings).

(ii) Questions are part and parcel of the application and must be approved by the court. They are not to be agreed out of court after the hearing without judicial approval.

(iii) The order should identify the issues to which the evidence relates as well as set out the questions to be asked which should be:

a. clear, focused and direct,

b. kept to a manageable number

c. avoid irrelevant detail;

(iv) The letter of instruction (as well as the instructions) requires judicial approval and should be submitted with the Part 25 application.

(v) For there to be proper co-ordination between the court and the expert when drawing up the case management timetable – the needs of the court being balanced with the expert who has a primary obligation / professional duty elsewhere.

(vi) To provide a bespoke (preferably electronic) expert's bundle and if that does not include the full case papers then a full index shall be provided to the expert for their consideration as to whether further papers are required. Active consideration must be given to what papers should be disclosed to the expert at the point of instruction and approved by the court. Unless otherwise agreed with the expert an e-bundle in an accessible format which can then stand as the witness bundle for the expert at trial. All papers shall be paginated.

(vii) Experts reports should be focussed on the questions and should not include detailed background material or verbatim notes of interviews save as appendices. The importance of compliance with timeframes should be emphasied.

(viii) Strict adherence to the 10-day rule for the purpose of unilateral questions seeking clarification of any aspect raised in the report; such questions to be channelled on one occasion through the single point of communication.

(ix) Experts' meetings:

a. 5 business days for the preparation and circulation of an agenda which includes questions to be raised which should avoid repetition of previously asked questions and which seek to pre-attempt likely cross-examination
b. 2 days for the distribution of that agenda to the non-legal participants
c. Exceptional circumstances for under two days and no allowance made for on the day or in the meeting questions

(x) Where it is proposed that an expert give oral evidence the court should establish the issue which requires the witness to be called. Enabling a mutually convenient date and time to be arranged for the expert to give evidence well in advance of the final hearing, such dates to be guaranteed to avoid disrupting clinical commitments and usually to be by a video conferencing facility.

(xi) Specific consideration of the use of appropriate technology (telephone, video link, Skype) to enable evidence to be given without the requirement to travel to court.

(xii) Requirement to file documents affecting the expert to be served on the expert within 2 days of receipt of that document.

Recommendation 11

196. Legal Aid public funding should be available without prior authority being required to fund a service provider to rationalise and order medical records chronologically prior to the medical records being dispatched to an expert witness.

Treatment of Experts

Recommendation 12

197. Part of the training of experts should include understanding the purpose of cross examination Where at an IRH particular issues in relation to an expert's evidence are identified they should be made aware of those prior to the hearing. It is accepted that however many training courses or well-prepared a "novice" expert witness is, the first few occasions in court will be daunting.

Recommendation 13

198. Whilst judges can and must disagree with expert evidence where justified this need not necessarily involve criticism. A judge should criticise experts where necessary, but where they intend to go beyond giving reasons as to why any of their evidence is not accepted, they must always question the purpose of doing so and the effect that such will have upon the expert in question and experts more generally. Criticism will be legitimate and appropriate where the expert has not complied with their duties to the court, has not complied with their professional obligations or has gone beyond their expertise.

Recommendation 14

199. When criticism of an expert become apparent which might lead to a judge giving a judgment which calls into question the professionalism or expertise of an expert, notice of the criticisms of the expert should be given. If a party wishes to criticise the conduct or probity of an expert (in circumstances where this could amount to a disciplinary complaint or breach of the expert's duties under Part 25) then, unless this was not apparent from reading the papers, the expert should be put on notice of such as soon as possible before giving evidence and permitted to respond. This could be either by (a) the asking of supplementary questions or (b) by the expert being provided with the Position Statement or Skeleton Argument prior to giving evidence. Such criticisms should be raised in oral evidence to enable the expert to clarify or explain their position and to enable the court to reliably evaluate the evidence. Where, unusually that has not been possible, that expert should be sent a copy of the draft judgment and given the opportunity to respond, whether in writing or by appearing before the court before publication.

Recommendation 15

200. A direction should be made, at the conclusion of any hearing where an expert has been instructed and has provided evidence to the court whether by way of written report or oral evidence, directing the lead solicitor for the instruction to send a copy of the judgment (or a summary if no written judgment or transcript is obtained) to the expert.

Training

Recommendation 16

201. A vehicle for Inter-disciplinary training, mentoring and feedback should be developed to deliver

201.1. Training programmes for legal and medical professionals on issues relating to expert witnesses.

201.2. To develop and implement mentoring schemes for medical experts whether they are within the medical profession or ideally with an element of inter-disciplinary mentoring.

201.3. A vehicle for feedback from the legal profession, in particular the judiciary to experts ranging from simple notification of the outcome of a case through to constructive criticism to aid professional development as well as informal 'complaints' as an intermediate level response to any identified failings in the provision of expert evidence which do not warrant referral to the GMC.

There should be a proper budget for such training.

Recommendation 17

202. Barristers, solicitors and judges should be approached to assist with witness training and consideration should be given as to whether this could be done in conjunction with organisations that provide accreditation and training in report writing and giving evidence for expert witnesses. Judges should be permitted to assist with training in working time and barristers and solicitors should be paid. The aim of this should not only be to assist the experts to give their best evidence, but also to dispel some of the anxieties many have about cross examination and the attitudes of the courts.

Recommendation 18

203. The Family Justice Council should be invited to extend the mini-pupillage scheme for expert witnesses to a national level and to include senior registrars and consultants to familiarize themselves with courts in order to fully understand their role as treating clinicians and as future experts, and for experienced consultants who are contemplating commencing expert witness work. To consider whether to recommend that such should be required training for all paediatricians with key safeguarding roles (Level 4 and 5) as per

Safeguarding children and young people: Roles and competencies for paediatricians and those experts who work with children.

Recommendation 19

204. Specialist organisations such as the Family Law Bar Association, The Association of Lawyers for Children and Resolution should review their advocacy training and how it covers the issue of effective cross examination of experts. Training should be done by practitioners, judges and experts themselves.

Recommendation 20

205. An expert witness handbook or information pack for experts and lawyers should be commissioned. This may be in conjunction with the Royal Colleges/Professional Bodies and other stakeholders such as Expert Witness Institute/Academy of Experts to ensure a standardization and clear understanding of the requirements of experts across disciplines. Clearly there will be a financial cost to bringing the parties together and this should be considered as medium-term goal.

Supporting and Sustaining Change

Recommendation 21

206. The FJC establishes a Sub-Committee with representation from the health and legal sides to oversee the implementation, monitoring, administration of the recommendations over the short, medium and longer term. The Committee would report to the Family Justice Council and to the Family Justice Board. The FJC should organize an annual symposium to promote wider involvement in the implementation of the Group's recommendations.

Recommendation 22

207. The working group recommends the establishment of regional 'experts in the family justice system' committees under the Patronage of the Family Division Liaison Judge with co-chairs from a judge and health/ medical expert in the region. The committee would be comprised of legal and medical/healthcare professionals in order to address the shortage of medical experts and to implement at a regional level the recommendations for training and interdisciplinary collaboration including mentoring and feedback forums.

APPENDICES

Appendix 1

Medical Survey Questions:

Question 1: What is your College?

Question 2: What is your specialty?

Question 3: What is your nation / region?

Question 4: Do you currently (within the last year) provide expert witness work to the Family Court?

Question 5: If no, have you previously provided expert witness work?

Question 6: Do you understand the difference between the duty to the court as an expert witness and being a treating clinician?

Question 7: Have you ever provided a written report in court as an expert?

Question 8: Have you ever provided a written report in court as a treating clinician?

Question 9: Please rate the below statements (1 being 'not supportive' and 5 being 'very supportive'): Your Trust / Health Board is supportive of its employees (including yourself) taking part in expert witness work; Your College is supportive of its members taking part in expert witness work.

Question 10: Please rate the below statement (1 being 'not attractive' and 5 being 'very attractive'): Expert witness work is financially attractive

Question 11: Have you ever had any expert witness training?

Question 12: Would you be interested in receiving training to support expert witness work?

Question 13: If yes, what sort of training? Please comment below.

Question 14: Even if you are not currently undertaking expert witness work, what (if any) do you believe are the barriers to doing expert work? Please select your top 5 choices only: criticism (unfair) in the media; criticism (unfair) from the judiciary; lack of adequate remuneration for the work at statutory rates; antiquated payment / invoice system; delay in payment; perceived inflexibility in terms of timetabling by the court; vast material to read through; obtaining CPD recognition for work; lack of College support to do the work; lack of training; lack of protected time / support / job planning from individual Trusts / Health Boards; lack of support from peers; not interested; geographical distance; technological barriers giving video evidence; financial (including tax and / or pension) implications in doing this work; use of family justice expert reports within the criminal justice system; there

are no barriers; other (please specify).

Question 15: Do you have any suggestions of solutions to overcome any of the barriers you have selected? Please comment below.

Question 16: Would you be willing to get involved in helping provide a solution? If yes, please provide your email address below and we will update you on progress of the working group and relevant future opportunities relating to expert witness work. This information will only be used for the purposes stated.

APPENDIX 2

Legal Survey Questions

1. Are you a Barrister/Solicitor/Judge/Other?
2. Which area of the country do you practice in?
3. Have you experienced a shortage of medical expert witnesses (including mental health experts such as psychologists and Child and adolescent psychiatrists) to assist the court in resolving public and private law Family cases concerning children?
4. If yes, in which medical disciplines have you experienced a shortage and where?
5. Please provide examples of what impact this has had on individual cases?
6. In your experience to what extent, if at all, is any shortage caused or exacerbated by?
7. If you are able to give any specific examples in relation to these (albeit if appropriate anonymising the identity of the expert) that would assist.
8. Are you aware of medical specialists who are unwilling to become expert witnesses or provide expert opinion evidence (as opposed to purely factual material such as medical records or material)?
9. Are you aware of medical specialists who will provide a report as a treating clinician but are not willing to participate in experts' meetings or to give oral evidence to the court?
10. Have you noticed any decline in the quality of the medical experts who are proposed as medical expert witnesses or a decline in the quality of the medical expert reports provided and if so in which areas of expertise?
11. If yes, identify the areas of expertise from the following
12. Are there any observations you wish to make about expert witnesses, and, if you do consider that there is a shortage of experts willing to assist the courts, what might be done to encourage them to do so?

13. Are you aware of any initiatives which have been taken to address the issue and are you able to provide any information about such initiatives and on the impact of such initiative?
14. Any other information or observations?

APPENDIX 3

Survey Extract

Answer Choices	Responses	
Criticism (unfair) in the media	35.26%	134
Criticism (unfair) from the judiciary	23.95%	91
Lack of adequate remuneration for the work at statutory rates	57.11%	217
Antiquated payment / invoice system	26.58%	101
Delay in payment	37.63%	143
Perceived inflexibility in terms of timetabling by the court	38.42%	146
Vast material to read through	37.89%	144
Obtaining CPD recognition for work	9.47%	36
Lack of College support to do the work	5.53%	21
Lack of training	19.21%	73
Lack of protected time / support / job planning from individual Trusts / Health Boards	35.00%	133
Lack of support from peers	4.21%	16
Not interested	4.74%	18
Geographical distance	6.32%	24
Technological barriers giving video evidence	6.05%	23
Financial (including tax and / or pension) implications in doing this work	23.42%	89
Use of family justice system expert reports within the criminal justice system	9.47%	36
There are no barriers	1.32%	5
Other (please specify)	23.95%	91

	Answered	380
	Skipped	32

APPENDIX 4

Consultation Questions

Medical colleges

1. Is it viable for each of the Royal Colleges who are significant stakeholders in terms of their members providing expert evidence to the family courts, providing an online resource checklist to support their members to understand family court processes and their duties as professional and potential expert witnesses? To what extent is this already done?

2. What mechanism would best ensure that the Royal Colleges were able to collaborate to share such resources and to avoid reinventing the wheel?

3. How best can Royal Colleges increase awareness of existing training for healthcare professionals involved in expert witness work. Are special interest groups or subcommittees a viable way of the Royal Colleges most effectively disseminating such information.

Commissioners and NHS Trusts/Health Boards

4. Do commissioners and NHS trusts agree that expert witness work is of value to the individual clinicians and to their employing organisations? How best can commissioners and NHS Trusts/Health Boards support their employees who wish to carry out this work?

5. What might be feasible in terms of changes to commissioning arrangements which would incorporate expert witness work within relevant contracts? Should this be done on an individual commissioning body/service planning basis or might a nationally commissioned service be a realistic goal?

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?

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?

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.

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.

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?

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?

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.?

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?

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?

15. Is it appropriate to give an expert a right to comment on a judgement 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 judgement stage?

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?

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?

18. What source of funds would support formal interdisciplinary training? Could the Royal Colleges and the Judicial College collaborate to training programmes? Should training incorporate formal training through the Royal Colleges and the Judicial College alongside less formal training provided by volunteers through regional committees? What should be the content of ongoing training?

19. How best can mini pupillages/mini marshals for medical professionals to spend time with a Judge/Barristers/Solicitor be utilised? Should these mini pupillages also include experiences within the criminal justice system? What administration would be necessary to implement such a scheme on a national/regional level? Who is best placed to deliver this? Can the Family Justice Council in collaboration with family division liaison judge's deliver this?

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?

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

Supporting and Sustaining Change

22. Is a sub-committee of the Family Justice Council the most appropriate and effective vehicle for carrying forward in the short medium and long-term the recommendations of the working group? How should the interplay between the family Justice Council and the Family Justice board be addressed? What administrative resources would be required and would be available to support the work of the subcommittee which in particular might play a role in managing the mini pupillage scheme (as it currently does)? What should be the functions of the subcommittee?

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, men touring 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?

APPENDIX 5
ANALYSIS OF RESPONSE TO CONSULTATION IN SUMMARY

1. Responses to the consultation as follows: -

    a. The Law Society
    b. The British Medical Association
    c. Family Subcommittee of The Council of Her Majesty's Circuit Judges
    d. British Association of Social Workers England ("BASW")
    e. LAA
    f. Resolution
    g. General Medical Council ("GMC")
    h. British Psychological Society ("BPS")
    i. Expert Witness Institute ("EWI")
    j. The Academy of Experts ("TAE")
    k. The Garden Court Family Law Team
    l. Regional Peer Group of Named and Designated Doctors for Safeguarding Children in Yorkshire and the Humber ("Designated Doctors – Yorkshire & the Humber")
    m. Greater Manchester Local Family Justice Board Experts Subgroup Committee ("GM FJB").
    n. Pupil (previously a doctor) ("pupil/doctor")
    o. (Retired) solicitor

2. The general response was one of gratitude for the work undertaken by the working group and of the thoroughness of the process. There was broad support for the proposals but a concern about where the resources for some of the proposals. That was felt to require further consideration (***Law Society***).

3. There was across the board support for improving the current situation recognising that medical experts fulfil a vital role in helping courts reach decisions that are in the best interests of the children. The ***GMC*** drew attention to two other reports with possible relevance: *The Independent review of gross negligence manslaughter and culpable*

homicide (2019) and *Gross negligence manslaughter in healthcare – a rapid policy review* (2018).

4. The ***pupil*** who responded (and who previously practiced as a doctor) stated that the low response from surgeons to the survey was unsurprising because of their lack of time. Similarly, the fact that a number of respondents did not specify whether their practice covers child or adult health was not of concern because for the majority of doctors who are not paediatricians or neonatologists, their practice will cover treatment of adults and children.

5. There was an acknowledgement from the stakeholders that cooperation between all those involved in these proceedings is essential and that legal aspects cannot be considered in a vacuum. The ***Designated Doctors- Yorkshire & and the Humber*** agreed with all 22 recommendations. They considered that many of them were relevant to any professional witness and felt strongly that the report and plans need to include all witnesses, not just expert witnesses, since professional witness work is usually the first exposure to working with the Family Courts.

6. The ***BASW*** considered that it would have been beneficial to consult other experts by profession including independent Social Workers as part of the review. They felt that the remit of the consultation gave limited consideration to a potential shortage of Social Workers who could provide services as expert witnesses. This includes Social Workers who specialise in mental health, forensic services, substance misuse and child mental health, although stated that the experience of Social Workers who do work in the family courts reflects some of the concerns raised within the results of the survey cited in the consultation. The group invited the President of the Family Division to meet with their Practice Policy and Education Group to discuss areas of mutual concern including practices in public and private law.

7. The ***EWI*** expressed concern that there was no reference in the report to the potential role of the Institute (or other training providers in this field) and that there has been no engagement or formal consultation with them over this work. They stated that "*Given that we specifically provide the kind of training and guidance recommended, it is disappointing that we were not identified as a national stakeholder that would be essential to the crafting of solutions. We hope that by submitting this consultation response, you will see this as a sign of our willingness and a commitment to engage with the working group and to help*

build a suitable infrastructure to provide the relevant training and support environment to create a larger pool of experts able to support the family courts". They welcomed a conversation to discuss the opportunities in more detail, looking to share the final report findings with their membership; possibly including a session at their Annual Conference in September.

8. ***EWI*** believed that a single Centralised Register of Accredited Court Experts is essential for the future. They currently have a Directory of Expert Witnesses (https://www.ewi.org.uk/find-an-expert/). Experts included have been fully vetted; checking their professional credentials and ensuring the reports they have written are compliant with appropriate regulations and are of excellent quality. This provides those using the directory with assurance that when they appoint one of the expert witnesses on the register, they are appointing an expert with the appropriate skills and experience. They have also recently launched a Certification Scheme. Applicants must demonstrate that they have an appreciation of the relevant rules, submit a compliant report, and are observed taking part in a mock meeting of Experts and mock Courtroom situation where they are examined and cross-examined. This has been set up using the Civil Procedure Rules, but the intention is to open this out to the Criminal and Family Courts.

9. The ***GB FJB*** confirmed that in the North West there is great appetite for interdisciplinary dialogue, collaboration to develop and improve practice, and to offer reciprocal training opportunities. A number of local initiatives are already in place. However, they expressed concern that the membership of the Working Group did not include a representative from the British Psychological society or any other of the professional or regulatory groups which represent or regulate psychological or psychotherapists and that some issues may therefore have been overlooked: -

   "*Psychologists are not medics and do not usually describe themselves as "allied health professionals" as we would see our own professional identity and paradigms as independent and not defined in relation to medics. This is not just a semantic point. Unfortunately, the membership of the working party did not include anyone from the British Psychological Society or any of the other professional or regulatory groups which represent or regulate psychologists or psychotherapists. That said, the survey included a good proportion of psychologists and some psychotherapists, so profession-specific issues have been highlighted through the survey."*

10. The ***BMA*** highlighted the lengthy and time-consuming aspect of preparing a court report. They confirmed that financial concerns are a key barrier or disincentive to taking on medical expert witness work. This commonly includes delayed payments, complex payment systems often requiring multiple invoices, and were concerned about the impact of pension tax rules for some senior NHS staff. For instance, the Annual Allowance, which limits the amount of tax relief on pension saving, has resulted in some members of the NHS Pension Scheme receiving large and unexpected tax bills and has also had a substantial financial impact on their non-contractual work. They considered that suggestions made about training, a smooth and speedy payment system and the timetabling of court appearances all seem potential solutions to help to improve the shortages of medical witnesses in Family Courts.

11. ***TAE*** stated that they have been accrediting applicants for full membership. Accreditation of 'expert witness status' is practical rather than academic in the sense that applicants must establish the appropriate academic and professional qualifications for their profession. There is *'The Code of Practice for Experts'* which has been endorsed by the Master of the Rolls and President of the Court of Appeal for use in the Civil and Criminal Courts respectively. The same Code has been adopted by Euro Expert (the Organisation of European Expert Associations) for use across Europe. The Academy would be pleased to participate further and to be involved as appropriate in matters relating to the use of Experts within the Family Courts.

12. The **Law Society** felt it would be of benefit if experts pass on their knowledge and skills to treating consultants. It also drew attention to the increased use of Artificial Intelligence in the context of Predictive Analytics. The concept relates to computers teaching themselves (machine learning) and relies on data, such as x-rays and scans being inputted into computer programmes which will, over time, learn to recognise any significant factors or variations from the norm. It was felt that technological models may well have an impact on the work of experts and lead to using the time of experts more efficiently, thereby reducing costs in the long term. And that the Working Group should factor in the legal implications such technology in their longer-term considerations of experts in family proceedings.

13. ***Resolution*** felt that 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. In particular that "*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".* They felt that there may need to be some guidance to help treating clinicians manage their role in the family court. They reminded of the importance of a central e-bundle.

14. The ***pupil/ doctor*** stated that many senior consultants currently working in England and Wales have English as their second language; and considered that during the training that the use of language expressed to experts should be kept as simple as possible to avoid confusion and encourage understanding so that all experts can answer questions put to them.

15. One response from a ***retired solicitor*** was critical of the report. Stated, in summary: there was no summary of the rules or the relevant underlying law, which governs expert evidence. There are no proposals in the report which urge any reform of the law or procedure to improve the role of experts. The question of children's 'views' and their 'wishes and feelings' are not mentioned at all. The law on the appointment of opinion witnesses is not dealt with Reference was made to Senior Courts Act 1981 s 70(1), for appointment of assessors in civil proceedings, and it was stated that "*There is therefore no reason why medical experts as assessors should not be appointed in appropriate cases in family proceedings. Save for the question of payment for the expert – at present judges or HMCTS have no budget for this (by contrast the tax-payer funds payment for children's guardians) – there is no reason why the expert witness, save perhaps in exceptional cases, should not be called by the judge. The effect of this would be that a single expert – or a number of single experts – called by the court would be the rule".*

CONSULTATION QUESTIONS: -

Medical colleges

1. **Is it viable for each of the Royal Colleges who are significant stakeholders in terms of their members providing expert evidence to the family courts, providing an online resource checklist to support their members to understand family court processes and their duties as professional and potential expert witnesses? To what extent is this already done?**

Responses:

There was broad agreement that this would be a good idea. It was considered that consistency between expert witnesses is important and the differing expectations of a medical expert is an area that would benefit from better guidance **(*Law Society*).** It was felt to be unhelpful if there were conflicting guidance or checklists and that perhaps these documents could be created or hosted in one place - Ministry of Justice website or through the Nuffield Family Justice Observatory - (***Law Society*).** It was felt that this "*would also assist in ensuring that practitioners whose area of expertise may not be covered by a relevant College can access the relevant information, as Practice Direction 25B1 certainly envisages compliance by all experts, including those who fall outside the main UK Health and Social Care Regulators*" A number of guides are already available , including those published by the British Psychological Society, Royal College of Psychiatrists, British Medical Association and the General Medical Council and it was felt they should be considered when creating new resources for use by all medical experts and clinicians (***Law Society***)

EWI stated that whilst it would be viable for the Royal Colleges to undertake to do this, this would represent a significant duplication of effort across the colleges and could, indeed, lead to different interpretations of the different process and the Expert's duties. It would make more sense for the Royal Colleges to link up with the EWI and promote guidance available via the EWI website.

The ***GM FJB***[9] stated that it would be a good idea to develop of faculty of medical experts within the colleges; further that "c*hecklist and resources is a good. it could , they said, include*

[9] The Paediatrician on the committee responded as the question was outside the remit of most members of the GM FJB

(i)Minimum standards for approaching an instructing an expert, (ii) Template pro forma for time keeping record, (iii) Timing and Process for submitting invoices , (iv)Evaluation and feedback form, (v)Standards for being informed of outcome, agreed approved note, written judgement, (vi) Regional contact details of professionals in speciality willing to give advice / support in securing mentorship, (vii)Governance standards – active participation in NHS governance e.g. peer review; advice to participate in peer debrief for expert work."

BPS stated recent specific guidance was developed by the Family Justice Council (FJC) and the BPS- *Psychologists as expert witnesses in the Family Courts in England and Wales: Standards, competencies and expectations* (2016). This is available as an online resource and includes much of this information – in particular in relation to duties as professional and expert witnesses. This guidance document needs to be included within the 'Existing guidance and support' section along with the RCPCH, FJC and other guidance. In addition, the Society has more general guidelines that are relevant for both civil and criminal proceedings *Psychologists as Expert Witnesses: Guidelines and Procedure 4th edition* (Revised 2017).

TAE stated that attention should be drawn to the need for variants applicable to specific disciplines and for specific court requirements. In principle the professional 'variants' should be dealt with by the appropriate Royal College or other appropriate body. It fully supports any initiative to 'remind' and make all professionals aware of both the need for training and its existence.

2. **What mechanism would best ensure that the Royal Colleges were able to collaborate to share such resources and to avoid reinventing the wheel?**

Responses:

*The **Law Society*** considered that this raised a number of practical issues including: *what would the status of the training be? Is it proposed that it would be mandatory? And if it were to be mandatory, would that be for all clinicians or just those considering expert witness work?* Questions were raised as to whether there would be a central training facility to ensure that all the training and resources are consistent, whether there would only be one prescribed core training programme and if so, given the number of courses already available, how a decision as to which course is the appropriate course would be made. Would the training be approved by the Colleges to ensure training to a sufficient standard? And issues around whether expert

witness training is provided within contract or as separately remunerated private would need to be resolved. Payment would need to be considered

BPS reminded the group that the BPS is not a Royal college. It would be beneficial if the terminology in the final version of this report could reflect this, possibly to include 'Royal colleges/professional bodies.' They stated that it would be helpful if this report, and indeed documentation produced by the Legal Aid Agency, followed the recommendations of the FJC/BPS (2016). Child, adult and child and family psychologists are not regulated professional categories. The FJC/BPS guidance (2016) recommends instructing practitioner psychologists who are registered with the HCPC (which regulates seven protected titles of psychologist: Clinical, Counselling, Educational, Forensic, Health, Occupational and Sport and Exercise) as experts in family proceedings. This assists with governance and the instruction of appropriate, competent, regulated psychologists. There are occasions when specialised expert evidence from a non-practitioner psychologist may be required, for example from a researcher or academic. There was, they said, good overlap in the work undertaken by the FJC on the development of Psychologist and Paediatrician guidelines, with the Psychologist guidelines as a forerunner and some members/ professionals contributing to both. This "*saved some effort and ensured a coherent approach. We believe that this would be a good model to build on, sharing learning from professional body representatives and members of the FJC. Ideally, guidelines would be as broadly applicable as possible but there is a need to have aspects tailored to specific professionals. The FJC appears the ideal central point to this work to ensure consistency of approach as a partner to professional bodies/Royal colleges".*

The ***pupil/ doctor*** stated that if the medical and legal systems want to work collaboratively in this area it is suggested that certain Royal Colleges whose members will be dealing with children incorporate a mandatory module as part of their training.

3. **How best can Royal Colleges increase awareness of existing training for healthcare professionals involved in expert witness work. Are special interest groups or subcommittees a viable way of the Royal Colleges most effectively disseminating such information.**

Responses:

It was considered that subcommittees and special interest groups could be an effective way of ensuring that information is disseminated (***Law Society***). With regard to support that could be offered within proceedings caution was noted by the ***Law Society*** given the confidential nature of the work.

The ***GMC*** supported those recommendations that touch on enhancing training opportunities for those acting as an expert witness and drew attention to their guidance to doctors about Acting as a witness in legal proceedings. This sets out what they expect from doctors who intend to act in court proceedings and explains how these principles can be used in practice. It states that doctors acting as an expert witness must:

- Make sure they understand exactly what questions they are being asked to answer.
- Only give expert testimony and opinions about issues that are within their professional competence or about which they have relevant knowledge including, for example, knowledge of the standards and nature of practice at the time of the incident or events that are the subject of the proceedings.
- Give an objective, unbiased opinion and be able to state the facts or assumptions on which it is based. If there is a range of opinion on an issue, they should summarise the range of opinion and explain how they arrived at their own view.
- If are asked to give an opinion about a person without the opportunity to consult with or examine them, they should explain any limits this may place on their opinion. They should be able to justify the decision to provide their opinion.
- If, at any stage, they change their view on any relevant matter, they have a duty to make sure those instructing them, the other party and the judge are made aware of this without delay
- They must respect the skills and contributions of other professionals giving expert evidence, and not allow their behaviour to affect their professional opinion.

The ***GMC*** noted that the Academy of Medical Royal Colleges has produced guidance about acting as a professional expert or witness. Aimed specifically at clinical professionals who act as an expert witness in courts or tribunals, it reflects the GMC guidance and details the standards, training and behaviour expected when acting as an expert witness. They considered it would be helpful to reflect this guidance in the President's report as a useful tool for doctors, the Family Division and the legal profession in achieving good practice. ***The Designated Doctors in Yorkshire and the Humber*** stated that the RCPCH runs a court skills course every year (but this sort of training needs to be more readily available "*There needs to be top-up refresher training, training around the UK not just in London").* They also recommended that each college needs an up to date list of who is doing this work, which will help avoid legal teams trekking round the country looking for experts.

The ***EWI*** said that they would prefer to see greater partnership working with the Royal Colleges and the EWI and that they would be keen to set up reciprocal agreements whereby members of the Royal Colleges would be encouraged to join the EWI so that they receive their 'Profession' support from the college and their Expert witness practice' support from EWI, they could offer reduced membership costs; enabling expert Witnesses to engage to gain support and access to training and networking opportunities. The ***GM FJB*** suggested, for paediatrics, targeting the National Network of Designated Doctors for Safeguarding Children.

BPS stated guidelines, training and experienced supervision are often cited as factors which might encourage psychologists to engage in expert witness work within the family courts. Within the BPS the *Expert Witness Advisory Group* provides general guidance to psychologists acting as expert witnesses and responds to individual member queries. Additional specific guidelines have been developed by the BPS in collaboration with the FJC, specific to family courts. Many psychologists will receive some training in working as an expert during their qualification. In addition, the Society provides a four-part training programme aimed at HCPC registered practitioner psychologists considering embarking on practice as an expert witness across various legal contexts Within psychology specialities, such as Forensic, there are specific CPD opportunities which are more focussed on the role of the psychologist expert witness in the family court context.

Commissioners and NHS Trusts/Health Boards

4. **Do commissioners and NHS trusts agree that expert witness work is of value to the individual clinicians and to their employing organisations? How best can commissioners and NHS Trusts/Health Boards support their employees who wish to carry out this work?**

Responses:

The ***Law Society*** stated that "*the reality is that experts undertake this work as a means of adding to their income. If it becomes part of the NHS contract to do this work, then there will no financial incentive to the individual expert as presumably it would be part of the work the consultant is expected to do. There could be some form of fee-sharing with the NHS, but this would require some initial significant funding from Ministry of Justice as there is unlikely to be any spare resources in the NHS to deal with it".*

The ***Designated Doctors for Yorkshire & the Humber*** stated that there could be more positive support from within the NHS e.g. if NHS Trusts could include this work in job plans, and (if desired) funds raised could be available for particular work-related projects or equipment. They opined that perhaps each trust depending on its size would support a percentage of their doctors to do this work.

It was the view of the Consultant Paediatric Neuro Radiologist on the ***GB FJB*** that child abuse should be categorised by the NHS as a rare disease, and a bank system of experts could replace the use of independent practitioner experts, with the ensuing benefit of clarity of both instructions and subsequent reporting. *The Rare Diseases Advisory Group (RDAG) makes recommendations to NHS England and the devolved administrations of NHS Scotland, NHS Wales and NHS Northern Ireland on developing and implementing the strategy for rare diseases and highly specialised services. Highly specialised services are provided to a smaller number of patients compared to specialised services; usually no more than 500 patients per year. For this reason, they are typically best delivered nationally through a very small number of centres of excellence. Examples of highly specialised services include liver transplant services, enzyme replacement therapy and proton beam therapy for specific cancer treatments. RDAG makes recommendations to the Clinical Priorities Advisory*

Group (CPAG) about how highly specialised services should be commissioned. This includes recommending which expert centres should be nominated (or should no longer be nominated) to deliver highly specialised services." The idea would be to centralise clinical care to regional centres (the main children's hospitals across England) of all children presenting with an internal head injury that requires a child protection investigation. This would mean they would be cared for by specialist multidisciplinary teams. This would give a more consistent standard of clinical care and child protection care. The reports from treating clinicians would better address the needs of the court, the opinions given would reflect consensus opinion of clinician's specialists in the field, who participate actively in relevant peer review. The structure would lend itself to collaboration between the NHS and the courts to develop a network of experts available to undertake independent expert work. The work could be spread more evenly so as not to burden excessively a small number of neuro radiologists, neurosurgeons, radiologists and paediatricians as currently is the case.

BPS noted that many psychologists acting as expert witnesses may not be employed by the NHS, either working in full time independent practice or for other agencies. Many psychologists working within Child and Adolescent Mental Health Services (CAMHS) or Adult services may struggle to persuade their trusts/commissioners of the value of this work alongside hugely demanding waiting lists. This clearly would have implications for the required timeframe required for submission of expert witness reports within the family courts. There would need to be consideration of contractual obligations regarding the funding and charging for expert witness services provided by NHS employees. This was also noted by the ***TAE*** who stated the Report appears to be predicated on the assumption that all experts work for the NHS.

5. **What might be feasible in terms of changes to commissioning arrangements which would incorporate expert witness work within relevant contracts? Should this be done on an individual commissioning body/service planning basis or might a nationally commissioned service be a realistic goal?**

Responses:

The ***Law Society*** suggested that a national list of experts could be produced as an aid to commissioning appropriate clinicians, but it was felt that there would be practical challenges involved in this, such as how an expert would be added to or removed from any list, who would monitor any list and who would deal with any regulation of the experts on the list. Commissioning services would require a system to be built and maintained, which would require significant financial investment. They suggested that an alternative idea is to register medical experts with the LAA, which would require less work to set up and maintain, or a private agency to provide a comprehensive service.

This was supported by ***BASW*** who stated, "*We would suggest that some consideration into the creation of a process to identify expert witnesses would be helpful*.". The ***GB FJB*** stated that anecdotal evidence from local paediatric experts is the difficulty in achieving a steady work flow, lack of information at the point of request regarding the availability of records etc. (which can influence the timescales of the given report), whether other experts are being instructed, and timely feedback following requests as to whether they have been instructed or not –" *One answer may be to set up a local registry of paediatric consultants prepared to undertake the work, hold availability information online centrally, including decisions pending on specific cases, ensure updated promptly when decision made to appoint / not to appoint and use time slots vacated when an instruction doesn't proceed, fora new case".*

The ***Designated Doctors for Yorkshire & the Humber*** suggested two approaches to recruitment – an optional, opt-in (as currently) for anyone who wants to do the work in addition to their NHS work, with simplified and streamlined payment system or commissioned through NHS trusts that currently do safeguarding work, and proportionate to this activity, and built in to job-plans. They considered that for either route, training pathways and peer support will be essential.

The ***GB FJB*** stated that "*In cricket, some players have central contracts from the ECB that helps their county clubs release them and manage without them when they're in the national team. A model that NHSE might lead on?"* Alternatively, *"There could be a model where expert agreement about the medical evidence forms part of the clinical management by networking and effective multi-disciplinary team working, that would reduce (perhaps even eliminate) the need for further independent expert instruction."*

BPS stated that previous attempts to bring medical expert witness work within the scope of NHS/Trusts (Department of Health (2006)) were met with mixed responses and failed to be implemented as hoped across the UK. There are some examples of such services such as the Attachment and Trauma Team, Great Ormond Street Hospital for Children NHS Trust. There are however, clear logistical challenges to a nationally commissioned service.

If experts were required to provide expert evidence as part of their contractual services, the Trust, rather than the expert, would receive the fee; caution was raised as to possible conflicts of interests if treating experts are involved from the same Trust (***Law Society***).

The ***pupil/doctor*** stated MTAS split the UK into sections for postgraduate education. England and Wales have 13 separate sections; each section will be overseen by a postgraduate dean. Each deanery will have a list of trainees who are nearing the end of their post graduate training and are soon to be consultants. All NHS staff must have a NHS email. A simple cost- effective suggestion of enticing more experts would be to raise awareness by sending out emails to these junior doctors. They also considered that the pool of locum consultants may help bridge the gap between the current small pool of medical experts. Further any doctor outside of a training pathway or a fixed role requires annual appraisals. As part of this they will need to have achieved 50 CPD over the course of the year. A further incentive would be if the training associated with becoming an expert and expert work in general could be recognised as education and therefore count towards CPD.

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?**

Responses:

There was concern, as expressed in our survey results that it is difficult to get certain types of experts to work at all under current LAA contracts, that acquiring prior authority from the LAA can cause issues often producing inconsistent results. The ***Law Society*** told us that some members have suggested that experts should have a direct line to the LAA and should be able to advocate themselves for additional hours, or, alternatively, the LAA should pay the experts directly (rather than through the solicitors). One difficulty noted was that time estimates are

given before an expert has seen the papers which can result in the expert being paid less than they should be for the work undertaken.

The ***Law Society*** reported that "*The LAA is already moving to having one person only apply for prior authority on CCMS. The LAA does recognise that if prior authority has been granted for one party then this would be honoured by the LAA for other parties, even if they have not obtained prior authority. This could be viewed as a change to commissioning arrangements that is working well*." They wondered about a fixed fee for certain work which had more predictable hours with a concern however that then these are never varied.

The ***Law Society*** stated that a regular complaint from experts is that it takes far too long to get paid and there should be no reason why a payment on an account should not be paid within 28 days in full. Each expert invoice could be assessed properly when submitted so that the expert is not at risk of having old invoices being picked over after they have been declared for tax purposes (***Law Society***).

The ***GM FJB*** responded that there should be a *simplified and uniform system: a standard invoice template could be sent out with the Letter of Instruction, pre – populated by the instructing solicitor's team with details of the legal representatives of the parties - name, firm, contact details etc.*

BPS considered that the provision of a single invoice mechanism would solve some of the challenge in situations in which all parties are legally aided or local authorities and reduce the burden on experts. However, a similar mechanism may be more challenging for those who are self-funding and those who are litigants in person. Some psychologists may find the administrative burden off-putting relative to the administrative requirements of other forms of private work. This additional financial complexity is one of the reasons why some psychologists may refuse to accept instructions where there are litigants in person. Crucially, it is unreasonable for the expert to carry the 'risk' in relation to fees. Some psychologist experts work as associates to expert witness organisations which provide them with both supervision and administrative support including billing and liaison with instructing solicitors and parties.

TAE felt that anomalies between expertise and London negative weighting need attention as does the restrictions on hours.

Resolution stated that it would assist if one solicitor can make an application for prior authority on behalf of all parties to instruct an expert where required; and for the LAA to accept one invoice for that expert, noting the shares and how it is to be split across each certificate. They suggest that the recommendation be tightened to reflect this. They understood 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. They did not believe that their 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. The 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".*

The ***LAA*** were clear that rates of pay are a matter for the Ministry of Justice policy team and not the LAA. They stated that they have been working with Representative Bodies to review the prior authority guidance and to simplify the process where possible. The revised guidance will be published in early February. The revised guidance will set out that:

- An expert need only produce a single invoice where instructed by multiple parties for the same work as long as all the parties are included in the invoice.
- A single prior authority application can be made for the instruction of multiple experts.

The LAA has also been investigating, as part of this work, a mechanism to allow a lead solicitor to submit one prior authority to cover the work undertaken by a single jointly instructed expert

covering multiple certificates/solicitors. The LAA has previously considered a process where experts bill and are paid directly by the LAA. There were a number of issues with this approach, including substantial and costly changes to existing IT systems and increased administrative resources to process additional claims. They stated that a number of contract changes would also be required and consideration as to whether further right of assessment applies to consider the experts costs within the claim overall. There would also be an impact on funded clients where the statutory charge applies or where the certificate is revoked. The LAA will consider this issue again as part of its Transformation programme. The LAA will look into how they may provide clearer guidance for experts detailing our requirements and whether they introduce some training for experts on YouTube.

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?

Responses:

Concern was repeated of practitioners who have experience with experts making a point of including all their time spent when submitting their final invoice but limiting their fee to that allowed by the LAA, indicating how the LAA's permitted fees are inadequate for the hours of work undertaken by experts and does, understandably, deter experts from giving their time. The ***Law Society*** wondered whether there could be a consideration of how many pages, documents, or medical records the expert needs to consider when completing his/her report and, if this exceeds a certain number, provision should exist for where this falls outside of standard allowances.

The ***GB FJB*** stated *"It is unclear to me why neuroradiology time is more expensive than paediatric time. There is no differential pay by departments in NHS Trusts, so this disparity would need addressing if work was to be commissioned direct from Trusts. There is however, a pay differential by seniority and this would need to be addressed if NHS clinician time is "bought". A consultant of 25 year' experience is paid a higher basic salary than a consultant of 10 years' experience and may also have merit awards, hence an experienced consultant could be financially disadvantaged if they were to give up NHS time for legal work if the latter is paid at a flat rate."* It was also considered that *"There is a spurious distinction made between child psychologists and adult psychologists (with differential legal aid pay rates)".* This was

picked up by the ***BPS***: There is a need to address the limitations on the number of hours suggested for expert psychological assessment given the typical instructions and requirement for a comprehensive reliable assessment. In particular, one concern in relation to the Legal Aid Agency (LAA) approach to family assessments and assessments of multiple individuals is noted in the guidance "*It is erroneous to assume there is any economy of scale when multiple family members are included in an assessment. This adds complexity owing to the increased requirement for synthesis of additional data sources and potential conflicts therein.* "The LAA suggests a 2 minute per page reading time. With a lever arch file holding approximately 500 pages, this would equate to over 16 hours reading alone. The benchmark figures suggest 5 hours per person. Many medical records are far in excess of this in complex family court cases. The assumed 'economies of scale' when multiple individuals are to be assessed are therefore unrealistic. It is not unusual to receive three or more lever arch files in family cases, with some psychologists reporting receiving up to seven. Responses to the BPS Expert Witness Advisory Group (EWAG) 2018 member survey indicated wide concern about the stated limits on the number of hours it takes to complete a thorough assessment.

The ***Subcommittee of Circuit Judges*** noted the frequency with which they are asked to assist with matters of pubic finding. They consider that if the court takes responsibility for ensuring that the number of documents to be considered is limited to only those that are necessary, it may be that the overall number of hours can be reduced. They stated it would be extremely helpful if the LAA was then prepared to accept the court's determination of how many hours was necessary and the hourly charges of that expert.

Resolution felt that 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 hope the revised experts' guidance document will provide further guidance for these cases. They suggested 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.

The ***LAA*** stated that the updated prior authority guidance has been updated in relation to the number of hours allowed for multi-party assessments.

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.

Responses:

The ***Law Society*** suggested that information about rates available via private/insurance funders would provide a useful starting point for the LAA to review their permitted rates. As part of this, it was suggested that it would be helpful to objectively compare the amounts experts are paid for the same work in privately funded cases with those paid by the LAA. They also suggested that in principle it would help to remove the difference between London and Out of London fixed fees. Another area noted by the Law Society was that the LAA does not allow solicitors to charge for administrative work and to allow experts to do so would require a major policy change.

BPS advised that in January 2018 the BPS Expert Witness Advisory Group (EWAG) undertook a members' survey of psychologists who work, or wished to work, as expert witnesses. Whilst not specific to family court experts, a quarter of survey respondents indicated that the change in LAA rates had affected whether they took on legal aid funded work. Almost two thirds (62.9%) of respondents reported that the LAA capped rates do not accurately reflect the work that they undertake as expert witnesses. The legal aid hourly rate has not changed for a number of years, with current rates of £93.60 for the assessment of adults and £100.80 for the assessment of children. This disparity is in itself somewhat incongruent, given that psychologists in family law cases are often required to assess the whole family. Prior to reform of the legal aid rates, the median hourly rate for psychologists was £130. In a recent survey of psychologists working as an expert in legal cases, 62% reported an average hourly rate in excess of £100 per hour; 38% reported an hourly rate in excess of £150 per hour. Current fees for therapeutic work provided by psychologists in independent practice are typically in the region of £100 - £130 per hour.

Resolution stated they would find it very difficult 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.

Responses:

The ***Law Society*** considered that it would be more helpful to remove these cases from the 26-week track. However, acknowledged the 26 weeks served a purpose and each case should be considered individually before being removed. The mere fact that numerous experts are needed, should not automatically remove it from 26 week track as there can be cases with a psychologist, psychiatrist and Independent Social Worker capable of keeping within 26 weeks. One practical issue causing delay is often the obtaining of medical records. The Law Society considered that adding a checklist to every expert application would be unnecessary and is likely to increase the administrative burden on solicitors. However, there may be some merit in considering this in the more complex cases. A standard form of order would assist.

Resolution welcomed the report making it clear that Part 25 and PD 25 should be adhered to. Experience of the removal or not of cases from the 26 week track is mixed. In practice, they were 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. They expressed concerns about whether there was time at court to settle the LOI, but agreed that at least the questions for the expert should be sorted out at court. Especially if the case involved a litigant in person. ***Resolution*** felt than 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. ***Resolution*** did not think that a checklist should accompany each application which is completed prior to orders being made, some members are of the view that some sort of pro forma part of the order may be more helpful.

The ***GB FJB*** stated that cases involving experts of whatever discipline routinely fall outside of the 26 weeks and there may be merit in removing them from the 26 week track. In part this arises because of the limited pool of experts, in part due to the delay in obtaining medical records. Compliance with Part 25 is mixed. LOIs are sometimes not available and the issues covered too vague and wide reaching. Sometimes experts are asked to exceed their expertise and/or stray into areas that should be covered by social worker evidence. Frequently, questions are not raised by the parties in accordance with the provisions of Part 25 and parties seek further time to raise questions causing further delay. Compliance with the requirements of Part 25 could be improved by more stringent consideration of the LOIs and focus on the issues at the point of instruction, the court order clearly providing for the time for questions and responses (although this should be unnecessary), timely instruction of trial advocates to ensure that questions are asked appropriately

The ***Subcommittee of Circuit Judges*** did not believe that cases should routinely be removed from the 26 week track due to the need for expert evidence but favoured a case-by-case basis. They considered that a checklist may be helpful both as a reminder to the advocates and to the judge and may assist in terms of satisfying the legal aid agency that the court has made appropriate enquiries in terms of availability of experts, area of expertise, costs and extent of instructions. They were of the view that rule 25.10 is a rule that is frequently ignored, and it may be helpful for judges and practitioners to be reminded of the ability to put written questions and the timescales for these. They suggested that it may be helpful for guidance to be issued requiring anyone seeking the attendance of the expert to give oral evidence, to set out in writing the nature of the challenge to the expert evidence so that the court can properly and robustly assess whether the expert should attend.

BASW stated that timescales are often unrealistic resulting in increased pressure and demand on professionals and rushed assessments "*One of the difficulties lies in the parties agreeing the filing date in court hearings only then for it to take weeks, sometimes, to send out the letter of instruction and court bundle to the commissioned professional. We suggest that necessary arrangements could be made to give advance notice of work required and agreement with the*

expert witness on timescales. Members also tell us that the time allowance given is not always realistic resulting in additional unpaid hours being worked. We feel that professionals should be paid for all of the work they undertake".

EWI stated there would certainly be merit in considering whether removal from the 26 week track would be beneficial.

BPS noted an increase in instructions in cases which are in the pre- proceedings process. Once proceedings have commenced, psychologists are often instructed in the latter half of the 26 week timescale. When a single expert is instructed to assess the adults and the children, this late instruction impacts on the arrangements and logistics of the assessments, often leaving insufficient time to conclude assessments and deliver a report within the 26 week time frame. It needs to be considered whether changes to working practices may assist in meeting the 26 week time frame. As an example, for some specific psychometric assessments and clinical interviews, conducting these remotely may be suitable. Where appropriate, if remote assessment is possible psychologists may be more efficient, reducing timescales. The Court does not as yet accept remote psychometric assessment or clinical interview, though remote assessment is now considered acceptable within the prison estate.

There was a concern expressed (***Garden Court Chambers***) that, in the criminal jurisdiction there are a number of essential Article 6 safeguards in place for the instruction of experts and that, in the family court there "can be no de factor harder test for permission instructing an expert"

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?

Responses:

The ***Subcommittee of Circuit Judges*** stated that they would support a system within the health service where medical experts instructed in family proceedings are able to be given access to the electronic medical records of the child. Those records would still need to be provided to the local authority for consideration with the other advocates as to relevance. They were in favour of being asked to approve all documents that are to be sent to the expert and rather than

a direction stating that “the case papers” are to be disclosed, an index of documents to be sent to the expert should be approved by the judge. Any further and subsequent documents to be sent must also be approved by the judge.

The ***BASW*** stated that the large amount of paperwork (court bundles) which all professionals are expected to read can create additional work and whilst those with experience learn to use discretion with what they read, this it can be a barrier for less experienced professionals. They suggested that the court considers a screening process to ensure that expert witnesses are provided with essential and relevant information only.

GM FJB gave some suggestions:

i. Preparation of an experts' bundle (or possibly expert’s index) which includes only those documents that all parties agree need to be seen by the expert/s. It should include a copy of the complete index so that the expert can satisfy themselves that there are no other documents they require.
ii. Clarification and agreement at the point of instruction as to the time when the bundle should be provided.
iii. The preference of the expert as to how they chose to receive the documents should be canvassed.
iv. Records must be paginated before they are sent to any party. The party who obtains the records should be responsible for paginating the documents.

BPS stated that psychologists assessing children or adults will require access to medical records and any prior psychological or psychiatric assessments. For children this would include both health and education-based assessments. In some cases, it is only subsequent to starting an assessment that the psychologist becomes aware of previous involvement of local authorities or other professionals. There is often then a delay while medical, education and social care records are requested. There would be concern if a reduced bundle or limited papers were to be provided in order to reduce the administrative burden. The decision regarding which documents are likely to be necessary, needs to be taken in discussion with the appointed expert. It is only they that can indicate the likely relevance of such information in their assessment. For many family assessments, particularly those around family dynamics and parent-child relationships, evidence about observations in contact sessions would be necessary for the most robust assessment. Similarly, police records can be voluminous but

often contain relevant information in relation to allegations of domestic abuse and conflict, for example, or reports of offending behavior which are relevant to a full assessment of risk. Local authority records, particularly in relation to multiple children in the same family, can involve much duplication. When evidence is withheld, it is more likely that the appointed expert will find it necessary to qualify their assessment and recommendations to the court. Presenting such evidence at a late stage, such as at a court hearing, is unhelpful. The process of release of records is made much easier if the court routinely encourages the client to allow access to medical records

Resolution agreed that 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. 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. 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. They stated they would 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.

Others had concerns about the burdens on practitioner in this regard: it was said that no additional, unrealistic burdens should be placed on practitioners to make decisions about papers needing to be disclosed to experts and the suggestion that counsel should be paid for such an important paper sift recognising the pressures practitioner are already under and the lack of payment for preparing a case. It was recognised that it may not be possible to achieve this at a hearing especially if representing a vulnerable client who could not be left whilst their counsel undertakes that task. (***Garden Court Chambers***)

The ***Law Society*** stated that the nature of the case should dictate whether a medical record indexing agency should be used. It was felt that prior authority will be needed for such work to be undertaken as the costs involved tend to be high and most solicitors will wish to have the protection of prior authority.

EWI felt that it was important that there be clear written instructions that identify the scope

of the instruction. This should help in deciding what documents from the bundle are likely to be necessary for the expert to undertake the work and the use of a medical records indexing agency would be extremely useful.

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?

Responses:

The **Law Society** agreed with this in principle acknowledging the need to copy correspondence to other parties, The ***Subcommittee of Circuit Judges*** agreed this would be the most effective means of ensuring that the expert is provided with all documentation and questions in an administratively simple way. ***GM FJB*** confirmed this happens in Manchester and works well with the child's solicitor usually acting as the lead solicitor.

This was welcomed by the ***BPS***. They state that there are particular issues in cases in which there are litigants in person, or the absence of legal representation. On such occasions there may be no single point of communication, and no agreement between the parties. Psychologists can be overwhelmed with the direct submission of additional questions and extensive evidence such as personal communications, audio and video recordings.

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.?

Responses:

The ***Law Society*** considered that video link hearings help with ensuring an expert can take part but there seem to be problems with ensuring the technology works and that enough time is allowed for each expert. There is always a tension between booking enough time for the expert to give evidence in the witness template and using all court time effective and that fixing a guaranteed date to give evidence is also difficult in the current climate of over- burdened courts. There will always be unforeseen circumstances that will mean that even 'guaranteed' dates are at risk of being moved or postponed. The ***EWI*** shared the view

that video links should increase but stated this needed further consideration to become truly effective. They shared the concerns highlighted in recent discussions with their users that whilst the use of a video link had been beneficial in making their Court appearance easier to schedule, they had had issues where their view of the court focused on the person that was cross examining them. This left them with no view of the judge or indeed a lack of ability to read the room.

The ***BMA*** confirmed that Judicial approaches can be inflexible in terms of agreeing expert Witness availability, thus posing a disincentive for those who have other responsibilities to undertake this work. A flexible approach to agreeing times and dates for witness availability could help to further extend involvement. The ***Designated Doctors for Yorkshire and the Humber*** were clear that they should only be called to court if specific questions have not been answered in their report or not agreed by both parties' representatives. They supported being able to appear by video link.

The ***Subcommittee of Circuit Judges*** felt that it was possible to give experts a fixed date for their evidence to be given and ***GB FJB***, ***BPS*** and ***Resolution*** agreed. Robust case management should be exercised stating "*if necessary interposing other witnesses or interrupting other witnesses to ensure that the expert evidence is heard on the date identified. On occasions where it is not possible to accommodate an expert's availability within the trial window judges are encouraged to set up bespoke hearings of eg ½ day to hear from the expert*". ***GB FJB*** felt that proper consultation prior to, and availability should be available to the trial judge, at the IRH.

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?

Responses:

The ***Subcommittee of Circuit Judges*** suggested that a form of words could be agreed at the IRH to be sent by the lead solicitor with the approval of the court; the judges did not think it was appropriate to explain this at the beginning of an expert's oral evidence: "*A judge would not do that with any other professional witness. There is a danger of judges simply adopting a*

formula of words and it must be borne in mind the cross-examination of experts has an adversarial component".

The ***Law Society*** considered this would be unnecessary, and this responsibility sits better with the instructing or lead solicitor. They felt that all experts who agree to report will know that the possibility of being cross-examined is a part of their instruction and where an expert prepares a report, they should already be aware that they may have to justify their conclusions in court. Additionally, the letter of instruction prepared by the lead or instructing solicitor may well set out the dates of hearings, informing the expert that they may have to attend to give evidence.

EWI felt that experts should understand that there will be matters on which their opinion will be aligned with other experts participating in the case and there will be areas where it does not, "*if the Expert understands their role and duties, they should be able to predict the key areas will be that will be up for discussion"*. ***GB FJB*** did not think it was necessary to warn an expert of the area of challenge. ***Resolution*** thought the question bettered answered by others but said yes.

BPS felt that the expert should be aware of this issue in the case following acceptance of instructions. Psychologists should anticipate that there will be challenge and questions about their written evidence, either in the form of written questions or cross examination. Explicit feedback to the expert which indicates whether cross examination relates, for example, to the lack of clarity in their report or their opinion or the reasoning leading to it can be helpful in improving the quality of future reports to the court.

15. 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?

Responses:

Practitioners were concerned that there should be no bar, implied or otherwise, to a client robustly challenging expert evidence (**Garden Court Chambers**)

The ***Law Society*** stated that given the seriousness of the issues involved, robust criticism of expert evidence must be permitted that it is important that such criticisms should be made in a

way that is tactful, professional and strictly follows the appropriate process. They considered that it would be sensible for any judge to be sensitive to the fact that public criticism may have an adverse effect on the instructed expert, but that should not mean that criticism should be avoided training should be offered as to the appropriate approach to take if criticism of an expert, or any other witness, is being contemplated. ***Resolution*** stated limiting the nature of criticism as suggested is appropriate and sensible.

BASW stated that the adversarial nature of some courts can create a hostile environment for all concerned and felt that professionals should be briefed and expect court work to be challenging. they were keen to point out that some of their members have had positive experiences in the court environment.

EWI considered that whilst there is definitely a case to remind Judges and those cross-examining experts to remain from being rude or disrespectful, it would not be appropriate to limit the criticism. If any Judge or instructing party identifies issues with an expert and if the expert is a member of the Expert Witness Institute, they can submit a complaint against the expert which will be reviewed. This could lead to an expert being removed from membership or being required to undertake further training before being added back onto the register of experts.

TAE felt that if a giver of 'key' evidence has not done so to the required standard it is important that the expert should be admonished and be seen to be admonished. The 'right of reply' is one of the fundamental requirements of natural justice. Therefore, were in support of the recommendation in principle. However, they felt that there should be strict controls on the process. For example, the proposal should only be applicable to 'serious' criticism and there should be a strict timetable for the response from the expert.

GB FJB stated that it would be artificial and inappropriate to attempt to limit judicial criticism of an expert. Where a judge prefers the evidence of one expert over another, that need not always amount to a criticism. The reasons for so doing should always be clearly set out in the judgment. It was felt that straying outside of someone's expertise is a legitimate criticism and findings of negligent practice should be publicly known. However, one member of the group commented "*In some specialities (such as psychiatry) we are typically sole experts and may need to interpret a wide range of medical notes to assist the Court. There the clear demarcation*

of specialties can be difficult to maintain (for example in understanding FII or Somatisation Disorder). So, experts might value guidance in how to make general comments about matters where it is reasonable for any doctor to comment beyond strict specialty boundaries, and the Royal Colleges could take a lead in developing guidance on how we can be helpful without breaching the duties of experts"

BPS were of the view that it is entirely appropriate for there to be scrutiny and challenge to expert opinion. However, formal criticism of an expert should be limited to situations where they have failed to comply with their duties to the court, adhered to their professional ethical duties or given evidence outside of their expertise. Criticism of the competence of an expert can be made by any of the parties to the Judge. In line with the recommendations of the BPS/FJC (2016), the appointment of HCPC registered psychologists ensures that there is a robust complaint process in place. A complaint can be raised by any party. Where a complaint is upheld, the ensuing actions can include the de-registration of a psychologist preventing them from continuing to practice. Psychologists who are members of the BPS are required to adhere to Member Conduct Rules along with a code of ethics and conduct. A formal complaint can be made to the BPS, who will consider the evidence presented and take action if considered appropriate.

The ***GMC*** commented more generally that in the context of criticism where the doctor is referred to them, they will open a provisional enquiry. Provisional enquiries help decide whether to open an investigation in response to a complaint. These enquiries involve gathering one or two discrete and easily obtainable pieces of information to help them to quickly assess risk and to avoid unnecessary investigation.

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?

Responses:

The ***Law Society*** were clear that as a matter of procedural fairness, any of the judge's concerns should be put to or explored with the expert during their oral evidence to give them a chance

to respond. ***BPS*** agreed stating that it is appropriate that an expert has the opportunity to respond to criticism of them when it relates to them fulling their duties to the court or their professional or ethical duties. Ideally this would happen when they give evidence so that misunderstandings, explanations and mitigating factors can be considered by the judge in advance of the judgment the psychologist expert is believed to have failed in their duties then the appropriate course of action is a formal complaint against a practitioner psychologist to their regulatory body, the HCPC. If a complaint is not upheld, it is unclear whether this information from the regulatory body could subsequently be appended to a judgement, given the often-extended duration of the complaints process. Psychologists who have had experiences of complaints from the court arena being heard by the HCPC have voiced concerns about the understanding of the context for expert witnesses. This may be an area in which it would be helpful for there to be further discussion with the HCPC

The ***Subcommittee of Circuit Judges*** agreed that it is appropriate to criticise an expert only when they have plainly failed to comply with their duties to the court or their own professional ethical duties. It is always open to the parties to complain to the expert's professional body or agency through which they came. They considered that it will rarely be appropriate for a judge to become involved in a complaints process. They agreed that it is appropriate to give an expert the opportunity 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. Given that they are usually named in a judgment and that the judgment may well be published, they think it is only fair that they are given this opportunity. The judges suggest that they are sent a draft of the part of the judgment that relates to them and the criticisms of them and advised of the date on which the judgment is to be formally handed down. If they wish to make any representations in respect of the draft judgment these should be made (and shared with all parties) prior to the formal hand down. Separately and if the expert has failed to abide by their duties to the court then the judges considered that this is a matter that should be raised by the parties with the judge prior to or at the issues resolution hearing and direction should be given as to how these matters are raised with the expert and the timing for these to be raised. However, "*caution must be taken to adopt a proportionate approach to this issue and guard against costly and time-consuming satellite litigation".*

EWI stated that it would be far better to raise this with the expert at the time that they give their evidence (allowing a right to reply) and then to document this in the judgment.

The ***GM FJB*** stated that there is a duty upon doctors to refer themselves to the GMC if they are criticised in a public judgment. The extent to which judges are aware of this duty was not known to the committee. It was agreed that judges should be made aware of this as a general matter. The GMC should be invited to clarify exactly what amounts to "criticism". The definition of criticism by the GMC is not clear. Members of the committee considered that any criticism should be justifiable and proportionate and questioned whether there should be judicial guidance on how to deliver criticism. In theory, experts would like to have the right to have the opportunity to comment upon a judgment in which they are criticised but recognised that the practice may be difficult and unwieldly. It is recognised that no such opportunity of 'right to reply' exists for parents.

The ***pupil /doctor*** stated that advocates should be expected to treat the experts with courtesy and respect and the report does not address this; it was felt that judges should be told to interject if counsel is being rude or interrupting the witness.

Resolution felt that "*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?

Responses:

The ***Subcommittee of Circuit Judges*** agreed that it would be helpful for experts to receive a copy of the final judgment and to see the way in which their evidence was used. This is already considered to be good practice. Consideration can be given to whether that judgment should be

redacted. If a judgment contains a discrete section relating to the expert evidence, then a direction can be given for that part only to be disclosed to the expert. Some experts, however, are legitimately interested in seeing how the whole case resolved so this should be considered on a case by case basis. They did not consider that a précis is appropriate or achievable in light of the additional workload this creates.

The ***Law Society*** stated that was no reason why the full judgment should not be sent and that there was no need for a direction as the rules already provide for this. It was felt that sending a condensed version of the judgement to an expert, would require a direction and would create a more complex process which would require a change to the LAA guidance. If not, the costs would fall on HMCTS or the Local Authority who will not welcome yet more drains on their resources.

Resolution stated 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.

EWI stated that a common issue for experts is the fact that they very rarely get any feedback on the outcome of cases and they think it should become standard practice that experts be provided with a copy of the final judgment. ***BPS*** agreed.

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?

Responses:

The **Law Society** agreed that training would be beneficial but considered that there were some areas of training that would need to be completed face-to-face rather than online, such as cross-examination. It would be costly and time consuming. They wondered about "some sort of central body who would organise and fund it". Additionally, it would be helpful to have more guidance on the meaning of inter-disciplinary: does this relate to the different colleges or to different disciplines (e.g. medical and non-medical)? It was felt by the Law Society that case information could be kept confidential by anonymised or redacted case studies. There was a

worry about experts discussing cases with mentors because of the danger of cross contamination of their views and the **Law Society** drew attention to *Pinkus v Direct Line Group* [2018] EWHC 1671 (QB). The Judge noted that peer supervision must be disclosed as 'the view of that expert should be provided without any outside influence or, more particularly, any undisclosed outside influence', rejecting an argument that supervision was effectively a permissible discussion between experts, noting that it was properly categorised as "*a discussion between an expert and a third party*". If mentoring was to happen then there would need to be clear guidance. ***Resolution*** felt that opportunities for experts to shadow hearings should also be explored. Resolution has some peer supporter and mentoring materials. These are lawyer to lawyer, but they would be happy to share them if that might be helpful to inform further consideration of mentoring.

BPS confirmed that very little feedback is ever received. They noted that there is a great benefit in interdisciplinary training, mentoring and feedback. The BPS recently held an Expert Witness conference (2019), bringing together lawyers, judges and psychologists which received favourable feedback. While some psychologists seek out formal mentoring and supervision by experienced experts, peer supervision with others undertaking similar work is common. Psychologists are mindful of ethical considerations as a key foundation of all practice, as well as their duty to the court. Such supervision is an integral element of a psychologist's practice.

The ***Subcommittee of Circuit Judges*** supported interdisciplinary training and mentoring and feedback for experts but that mentors should come from their own discipline rather than from a legal background. Interdisciplinary training can be arranged informally in the courts involving advocates who represent parents, local authorities and children in family proceedings and members of the judiciary "It is something that is often offered to social workers. It is the court's aim to achieve the very best evidence possible and if experts are more able to give useful and relevant evidence in a confident manner this will assist the court process". They felt that feedback to experts is not provided by the judiciary but see no difficulty with this being provided by the advocates. "*Given that instructions to experts are usually joint instructions, we would suggest that experts could provide a feedback form to all of the instructing solicitors in the same way that many other professionals do following the delivery of a service".*

The ***GMC*** commented that a vehicle for Inter-disciplinary training, mentoring and feedback should be developed to deliver:

- Training programmes for legal and medical professionals on issues relating to expert witnesses
- To develop and implement mentoring schemes for medical experts whether they are within the medical profession or ideally with an element of inter-disciplinary mentoring
- A vehicle for feedback from the legal profession, in particular the Judiciary to experts ranging from simple notification of the outcome of a case through to constructive criticism to aid professional development as well as informal 'complaints' as an intermediate level response to any identified failings in the provision of expert evidence which do not warrant referral to the GMC
- There should be a proper budget for such training

They considered it extremely helpful for medical experts to receive feedback on their performance and, where appropriate, constructive criticism to aid professional development. But where there are serious or persistent failures by a medical expert to follow their guidance they would expect the matter to be referred to us to consider.

EWI were very clear that training already exists. They wrote that they run a number of training programmes to support aspiring and experienced experts. **https://www.ewi.org.uk/training-and-events/ .** As well as bespoke courses and refresher training based around these offers and host an Annual Conference. They considered that Recommendations 1-3 in the report will lead to a significant duplication of effort and would instead like to see the Royal Colleges work with and through EWI. EWI also runs a mentoring programme for Provisional members (and are providing a guidance note to take account of Pinkus), They state that they also provide an 'adviceline' for members. Members can email in queries and this is circulated to our Governors who will provide them with advice.

TAE stated they have been delivering inter-disciplinary training for experts and prospective experts for some thirty years and believe that the full backing of the Royal Medical Colleges is necessary. They supported the use of mentors with the proviso that there should be an effective monitoring system of the monitors as many of the problems with Experts come from those who might be classified as experienced.

The ***Designated Doctors for Yorkshire & the Humber*** felt that online resources and training were really important. They considered that specific expert witness peer groups in the UK would be helpful – "*there needs to be a way for new experts to learn from each experience, whether it is just writing a report or actually appearing in court. Ours is a supportive group and could function to some extent to support expert witness work".*

GB FJB stated peer review occurs daily in clinical medical practice and is considered good practice. Peer 'review' or mentoring may provide a degree of reassurance and quality assurance but may lead to ethical issues; what would the duty of the expert instructed be and that of the peer if there was a difference of opinion? What would the mechanism to refer any disagreement back to the court? What would be the impact? The committee agreed that such a system may be beset with difficulties. Consideration was given to the alternative of peer 'debriefing' with the aim of avoiding professional isolation and identifying experts whose opinions are at odds with mainstream speciality opinion. If used from the outset of an individual's expert practice would assist practice development and assist sustainability. A professional practice network should be established to enable professionals to draw upon the experience of cases, with the emphasis on learning rather than evaluation.

The **pupil/doctor** who responded stated that a mandatory training course should be implemented, and this precede any instructed expert work. They pointed out that the GMC's 'Good Medical Practice' separates the duties of a doctor into four domains:

a. Knowledge skills and performance;
b. Safety and quality;
c. Communication, partnership and teamwork; and
d. Maintaining trust

And considered that "*if the GMC was on board with medical practitioners acting as experts there is every possibility that the mandatory training course could be recognised as CPD*". They stated that feedback is an important factor in training.

18. What source of funds would support formal interdisciplinary training? Could the Royal Colleges and the Judicial College collaborate to training programmes? Should training incorporate formal training through the Royal colleges and the judicial College alongside less formal training provided by volunteers through regional committees? What should be the content of ongoing training?

Responses

The ***Law Society*** wished it to be noted that the work required to establish an effective, quality training programme that can be given by solicitors and barristers should not be underestimated, and that to be comprehensive, it would need to cover the operation of the family justice system, report-writing and giving evidence in court. It is unrealistic to expect this to be developed and delivered without significant financial investment. They drew attention to current commercial training programmes such as the Cardiff University Bond Solon Course, which has been running for in excess of 10 years. Additionally, the Expert Witness Institute has launched a new accreditation scheme in conjunction with the Judicial Institute at UCL.

The ***Subcommittee of Circuit Judges*** stated that the Judicial College is already under significant pressure to meet the training requirements of the judiciary and that training should be provided through the experts' professional body, perhaps a standard information pack could be provided setting out in summary form the provisions of Rule 25 FPR. Informal training can be provided through local advocates and the court. This could be done in liaison with the regional medico-legal societies. This would be training about court procedure and the giving of evidence generally.

EWI advised that they kept training as affordable as possible but given that they pay Barristers and Solicitors to deliver training, there is still a cost of delivering this. Currently the cost is borne by the individual.

The ***GM FJB*** suggested that support from NHS Trusts might be achieved in tandem with "buying consultant time" to do expert work within the working week. The judiciary and lawyers may have an invaluable role as to what would assist in terms or content and presentation. It was noted by the psychologist member of the GM FJB *"Psychologists do not have the equivalent of Royal Colleges. The British Psychological Society is a much smaller entity with a more diffuse role and much less clout. It could be galvanised to support training for expert witnesses, but it has nothing like the potency or clout of the Royal Colleges. Many psychologists are not even members of it."*

BPS stated psychologists fund their own formal training post-qualification, specific to expert witness work, such as that provided by the BPS and outlined above. It is important that this training includes specific requirements for those experts working in the family courts as distinct from other medico legal contexts. Interdisciplinary training opportunities are an invaluable addition. Currently these are more ad hoc, such as regional Resolution training events. They have stated they would be happy to discuss the development and provision of training in this area.

19. How best can mini pupillages/mini marshals for medical professionals to spend time with judges/barristers/solicitors be utilised? Should these mini pupillages also include experiences within the criminal justice system? What administration would be necessary to implement such a scheme on a national/regional level? Who is best placed to deliver this? Can the Family Justice Council in collaboration with Family Division liaison judges deliver this?

Responses:

There was considerable merit in allowing potential experts to attend court as a form of shadowing to get some idea of what is involved. The ***Law Society*** considered this could be best administered by the individual courts and/or chambers, which may be very time consuming to co-ordinate and would require resource. They considered that a direction from the President would be helpful in ensuring that the number of opportunities are maximised.

BPS felt there may be scope for these to be supported by the BPS through those members who are experienced experts. Some of our members suggest informal, local collaboration between the FJC and the Family Division liaison judges whilst others propose compulsory, more formal tuition. Some members have noted that there may be an opportunity for experienced psychologists to also assist in the understanding of Family Division judges regarding the nature of psychological expertise, the information that can be provided, and the importance of psychological formulation in the deliberations of the court.

The ***subcommittee of Circuit Judges*** stated that mini pupillages can be set up through the Royal medical colleges and the regional medico-legal societies. Consideration could also be given to approaches to local hospitals, particularly teaching hospitals to offer such schemes. They suggested that expressions of interest from the judiciary, the bar and solicitors are invited so that a directory may be compiled of those willing to offer these opportunities is maintained.

Mentors who are already existing expert witnesses could also be included in such a directory. They felt that this is something that could be administered through the Family Justice Council in collaboration with the Family Division liaison judges.

The ***GB FJB*** stated that GM judges offer senior paediatric and psychiatry trainees and junior consultants to sit in and to experience different family court hearings, often 3 – 5 days experience. Feedback from trainees is that is uniformly and vociferously positive. Experts, or those considering becoming experts, could be given similar opportunities.

The ***pupil/doctor*** stated that It is unlikely that the mini-pupillages will ever be part of required training and a better way of raising awareness about the medical experts and enticing trainees who are soon to become consultants would be medical talks during educational lunchtimes. An informative talk given by a barrister or solicitor about the importance of experts, what would be expected of an expert, and how to become an expert during a lunchtime educational session is much more likely to entice doctors who have some interest. They also stated that lawyers and judges be educated on the medical training application system **("MTAS").** Lawyers may benefit from the medical equivalent of a mini-pupillage. This would entail lawyers attending multi-disciplinary meetings.

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?

Responses:

There is an advocacy element to the **Law Society's** Children Law Accreditation, requiring mandatory training to be undertaken by applicants. Barristers' chambers do offer advocacy training to Local Authority Lawyers, for example, but this is often done pro bono. They recommended a review being conducted to ensure that any training schemes cover effective cross-examination of experts and suggested 'The Advocate's Gateway'9 as an option for a project like this, as they have extended their work beyond criminal justice.

EWI confirmed that whilst the majority of their training participants are Experts, they consider themselves well placed to work with other key stakeholders to provide lawyers with training in relation to handling Expert Witnesses.

The ***GM FJB*** stated that lawyers would benefit from reciprocal training delivered by experts, as to the handling of expert evidence. NHS England and the FJC should establish a link. It is important to acknowledge that all local initiatives rely heavily on the good will of professionals giving of their time and expertise. It is a big ask of busy professionals (of whatever discipline) to contribute and it may not be attractive or sustainable as a long-term model of training to continue to rely on the good will of others.

BPS recommends that training is provided in relation to instructing psychologist expert witnesses which includes education in relation to the skills and competencies of psychologists as set out in the BPS/FJC (2016) guidance. Specifically, it is important to ensure that instructed practitioner psychologists are registered with the HCPC and have current or recent experience relevant to the instructions. This will ensure that the expert has the necessary qualifications and has attained the statutorily required competences to practice in their domain.

Resolution's advocacy for Family Lawyers Course, running every other month, includes examination and cross examination of expert witnesses (the trainer is a practicing barrister). They 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.

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

Responses:

The ***Law Society*** were not convinced that a that a single handbook or information pack was the most effective solution as the issues for experts and lawyers appear to be different. Whether a publisher could be persuaded to commission an update could be explored, which may be an attractive proposal if the text was going to be 'core reading' for clinicians undertaking expert

witness work. The ***Subcommittee of Circuit Judges*** agreed that an expert witness Handbook/ Information pack would be useful and suggested this could be prepared through the Family Justice Council and would be to a large extent based on FPR 25 and the accompanying practice direction

Resolution were not sure a handbook was needed although there is one that Wall J wrote some years back. If one was prepared "*it would be better done as an e-document, so it can be easily updated".*

EWI stated that they currently have a range of guidance materials available (including report templates) which are available to their members. There are also a range of books available that support professionals in their medico-legal practice.

The ***GM FJB*** thought this a good idea, ***BPS*** cautioned that while there is clearly a value in an agreed handbook in relation to expert witnesses in general terms, there are issues which are specific to different specialties and professions who act as experts which means that it may be difficult to integrate all of the necessary guidance into one handbook.

The ***pupil/doctor*** stated that medical professionals who have significant experience giving evidence and legal professionals should work on thiscollaboratively. The information pack should address the prospect of the provided expert report being relied on by CPS, as this was a concern flagged up by those who took part in the medical survey.

<u>Supporting and Sustaining Change</u>

22. Is a sub-committee of the Family Justice Council the most appropriate and effective vehicle for carrying forward in the short medium and long-term the recommendations of the working group? How should the interplay between the Family Justice Council and the Family Justice Board be addressed? What administrative resources would be required and would be available to support the work of the subcommittee which in particular might play a role in managing the mini pupillage scheme (as it currently does)? What should be the functions of the subcommittee?

Responses:

The **Law Society** felt that any group must include individuals with experience of designing and delivering training for experts, members of the legal profession (including solicitors, barrister and judges), and any other relevant people with experience working in the relevant 'market' and any such subcommittee would also need clear terms of reference and governance, particularly in regard to their authority, transparency and reporting lines.

The **Subcommittee of Circuit Judges** felt that a subcommittee of the Family Justice Council appeared to be the most appropriate and effective vehicle for carrying forward the recommendations in the initial stages. Appropriate administrative support would need to be given by way of a dedicated full-time administrator for a fixed and specific time period to set up the initiatives and then some administrative support available to maintain for example the directory of judges and advocates prepared to assist with the system. Judges involved in training "*should be offered protected time to enable them to participate in mentoring and/or training*". They suggested that a regional committee as a subgroup of the local Family Justice Board would potentially be an appropriate and effective vehicle in the medium and long term to manage the training, mentoring and feedback opportunities, chaired by the designated Family Judge for the area with membership from other judges, the local bar, local solicitors and local health professionals. They suggest that the local family justice board should report back to the Family Justice Council subcommittee on an annual basis and in a prescribed format.

EWI also stated that this would be very useful in ensuring that all they key stakeholders work together. ***BPS*** believes that it would likely be the most appropriate and effective vehicle to carry forward recommendations. It would be beneficial to include a psychologist representative in any such sub-committee.

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, men touring 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?

Responses:

The ***Law Society*** reiterated its concern about a conflict of interest for any mentoring and queried the role regional committees would have where experts are working on a national basis.

EWI shared its experience that setting up regional committees to deliver a standard training programme will lead to unnecessary committees, levels of bureaucracy, and differences in the training available. Instead, "it would make sense to build upon current regional networks and commission the required training offer".

Resolution held 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 with a risk that some may be very effective and others may not. This may need a national lead.

The ***GM FJB*** stated that delivery was best at regional level but sharing of good practice and ideas nationally is needed. The local subcommittee provides an effective and appropriate way to deliver training and teaching opportunities. The committee can report back on a local and national level. A mechanism is required for sharing regional expertise.

Sharon Segal