



Department of
Justice

An Roinn Dlí agus Cirt

Männystrie O tha Laa

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Post Consultation Report: Pilot to Allow Solicitors to Instruct
Experts in the Family Proceedings Court without Prior Authority

September 2020

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Table of Contents

Introduction.....2
Consultees2
Responses3
Summary of Consultation Responses.....3
Departmental Response.....5
Next Steps7
Summary of Responses to Individual Questions posed in the Consultation9

Introduction

- 1.1 The Department of Justice issued a Consultation which ran from 16 March 2020 to 8 May 2020 regarding a proposal to run a pilot scheme which would allow solicitors to instruct psychiatrists and psychologists in Public Law Children Order cases in the Family Proceedings Court under a General Authority and without prior authority from the Legal Services Agency NI (LSANI). Some respondents were not able to respond in time, and given the COVID-19 pandemic we agreed to accept late responses.
- 1.2 The pilot would aim to deliver immediate benefits in relevant cases by removing a possible cause of delay. It would also allow us to test how the enhanced General Authorities would operate in practice, before potentially rolling them out to other types of proceedings and other expert types. It would also allow an assessment as to whether the process of getting a prior authority is causing any delay in Children Order Proceedings.

Consultees

- 2.1 This was a general consultation published on the Department of Justice internet site and emailed to certain key stakeholders. Prior to launching the consultation officials met with key stakeholders including the Shadow Family Justice Council and representatives from the legal profession, psychologists and psychiatrists to discuss the proposals. We are grateful to those we met for their constructive input into the meetings and to respondents for their constructive responses.

Responses

3.1 Substantive responses were received from:

- The Bar of Northern Ireland;
- The Law Society
- The Northern Ireland Guardian ad Litem Agency;
- A Peer Supervision Network of 5 Senior Consultant Clinical Psychologists;
- The Division of Clinical Psychology
- The British Psychological Society , Northern Ireland Branch; and
- The Royal College of Psychiatrists Northern Ireland.

Summary of Consultation Responses

- 4.1 The proposal to provide a General Authority which would allow experts to be instructed without the need for prior authority was widely welcomed as a measure that would speed up access to justice in the interests of the children impacted by the proceedings and their families. It was noted that a recent Care Proceedings Pilot Report into delays in Children Order Proceedings linked the instruction of experts to unnecessary delay which was caused by the need to secure approval for funding from the Legal Services Agency before appointing an expert and the difficulty in securing experts.
- 4.2 There was broad overall agreement from the respondents to the proposal that psychiatrists and psychologists in public law proceedings in the Family Proceedings court could be used as a basis for the Pilot although some suggested the pilot could be more effective if it was extended to the other court tiers.
- 4.3 The experts who responded generally suggested that the proposals were reducing what it considered to be the current hourly rate payable by the Legal Services Agency (LSANI), however, it should be noted that there is not currently a set hourly rate payable by LSANI in Children Order proceedings, but rather a practice has emerged of allowing a range of hourly rates to be claimed. Members of the legal profession also commented that they knew of cases where higher rates were being claimed by experts than those proposed.

- 4.4 Experts also queried the proposed fees payable for attendance at court proceedings, travel time and for mileage. It was also suggested that cancellation fees should be payable. Examples were given of experts arriving at court only to find that their report had been accepted and they were no longer required to give evidence.
- 4.5 The psychologists generally advised that they considered the cap on hours to be too low and would hinder the effectiveness of the General Authority as the cap would require prior authority to cover the majority of cases. There was particularly constructive input from the experts in outlining the steps required, and time required for those steps, to produce a report which would help the court in making its determination and ensure that the interests of the child and the family members were protected. Respondees referred to the important role which experts play in proceedings which can have a significant impact on children, parents and families, particularly in circumstances where families often feel alienated, confused and under attack, which can lead to disengagement from professionals and the legal process. In such circumstances, they advised that it is important that the experts have sufficient time to work with the parties which are being reported on, to reassure them of their independence and neutrality in these proceedings to ensure they got the proper evidence which provides a report which helps the court make its determination.
- 4.6 Experts also mentioned in responses, and at meetings with stakeholders, that the current system whereby the bill is often split between a number of parties causes administrative difficulties, particularly where there is delay in solicitors making payment of its portion of the bill. Experts have advised that there have been occasions when they have resorted to bringing proceedings to the small claims court to receive payment. Experts would welcome a provision that a lead solicitor would be responsible for ensuring the bill is paid.
- 4.7 Respondees noted that the evaluation should have a particular focus on the needs of the child impacted by the proceedings. It was suggested that the

evaluation should consider the ease with which solicitors are able to instruct experts.

- 4.8 A summary of the responses from individual respondents to the questions posed in the consultation is attached at Annex A.

Departmental Response

Scope of the Pilot

- 5.1 The Pilot will be launched to cover proceedings in public law cases in the Family Proceedings Court. The Department considers there to be sufficient cases at this court tier to evaluate the Pilot. It will, however, start the process of analysing data for experts in proceedings at the higher court tiers and may consider rolling out the General Authority to the higher court tiers, depending on the evidence emerging from the data and the on-going evaluation of the Pilot.
- 5.2 The Department proposes to limit the experts in the Pilot to psychiatrists and psychologists. The Pilot will be evaluated and the General Authority may be extended to other expert types in Children Order proceedings and experts in other case types.

Hourly rates

- 5.2 There were representations from the experts that the proposed rates were too low and did not reflect payments which are currently available and that this would encourage experts to apply for prior authorities. A key aim of the reforms is to standardise the rates which are payable as a range of rates are currently being paid for the same expert type. The rates proposed, or similar rates are currently in payment to some experts in these cases, however, some experts currently request higher rates and this has been agreed by LSANI. In light of the representations and after further analysis of the data it has been agreed that the rate for psychologists should be increased to £100, the same rate as is allowed

for psychiatrists.

- 5.3 This will bring the rates allowed into line with the rates payable in criminal and many of the experts who charge a higher rate for Children Order cases accept the hourly rate of £100 payable in criminal cases. The revised rates payable are set out in Annex B.
- 5.4 This is not a hard limit and higher rates may be granted under the criteria for higher rates, where justified.

Cap on hours

- 5.5 There were representations that the cap is too low and would undermine the General Authority and necessitate applications for prior authorities. Having reviewed LAMS data, we are satisfied that there is merit to these arguments and we have increased the limit to the as set out in the table in annex B. This is not a hard limit and an increase in hours can be sought under a prior authority at the outset, or by an application after an expert has been appointed under the General Authority and a need for extra hours appears necessary.
- 5.6 We will keep this under review during the Pilot and if it appears necessary to increase the cap on hours that will be considered. There will always be complex cases, particularly those with a large number of parties on which expert opinion is required which will require prior authority. The Department wishes to have a balance between speeding up justice while ensuring financial control of higher cost cases for forecasting purposes.

Prior authorities for higher rates

- 5.7 Representations have been made in relation to the criteria for decision making about prior authorities to exceed general authority limits. The balance to be struck is between clarity on the one hand and flexibility on the other. Having considered the various representations made, we consider that the balance in these terms is about right in providing clarity about when higher rates will be

payable, but allowing sufficient scope for discretion to accommodate the range of circumstances that will arise. In light of responses that the proposed test was too narrow in focussing on seniority we have widened it to consider specialism too.

- 5.8 The criteria, and its operation in practice, will be kept under review during the pilot and can be amended if that seems appropriate.

Travel time and mileage

- 5.9 There were representations about the level of travel time and mileage allowed. The rates are those which are currently payable and will remain as proposed. As with all aspects of the Pilot, these can be reviewed if there is evidence to support that.

Cancellation fees

- 5.10 Cancellation fees are not currently payable, and it is not proposed to make a change presently. The evaluation of the pilot will afford an opportunity to build an evidence base about whether this is a significant issue.

Consolidated billing

- 5.11 We recognise that the requirement to submit multiple bills for one expert report is an unnecessary complication in the current payment system. We will therefore act to remove this requirement.

Next Steps

- 6.1 The General Authority will be revised in line with the findings in the consultation and the pilot will launch on 1 January 2021.
- 6.2 The pilot will run for 12 months and be reviewed on a quarterly period with a formal review at the end of this period. The General Authority may be amended

during the Pilot if appropriate. The review will be conducted with the input of key stakeholders, including the legal profession and representative bodies of experts.

- 6.3 Any further extension of the general authority after the period of the pilot or the extension of fixed hourly rates to other expert types will be subject to the findings of the evaluation process.

Annex A

Summary of Responses to Individual Questions posed in the Consultation

Q.1 Do you agree that public law proceedings in the Family Proceedings Court are the best proceedings for piloting the General Authority?

- 1.1 The respondees all agreed that these proceedings would be best for piloting the General Authority, however, some suggested the pilot might be more effective if we extended it to other court tiers.

Q.2 Do you agree that the expert types to be included in the pilot should be psychiatrists and psychologists?

- 2.2 The respondees in the main agreed with this. Two of the psychologist responses did highlight concerns over the importance of clearly defining the term psychologist.
- 2.3 NIGALA suggested we might include independent social workers in the pilot..

Q.3 Do you agree that the hourly rate of £100 per hour should be payable to Psychiatrists and £90 per hour should be paid to Psychologists?

Psychologists Response

- 3.1 The British Psychological Society strongly disagreed with the proposed rates deeming them 'unfair'. It perceived the rate to represent a reduction to £100 from £120 and suggested that experts would not work for a reduced fee from that which some currently obtain when an increase might rather have been reasonably expected. It noted that the Draft General Authority disallowed a number of things such as secretarial and administrative support and fees in respect of office space or provision of a consultation room in which costs continue to rise with inflation and that this effectively reduced the net hourly fee.

It also questioned the distinction between the fee for a psychiatrist and that for a clinical psychologist and also between a psychologist and a child psychologist.

- 3.2 The Peer Supervision Network of Clinical Psychologists response suggested that there is no argument put forward to justify the proposed differential payments in the draft General Authority between psychologists and psychiatrists and that more consideration should have been given to the demands and complexity of the task in setting the hourly rate.
- 3.3 The response from the Division of Clinical Psychology indicated that the fee quoted for child psychologists (£100 p/h) may fall short of regional expectation. It suggested there should be a clearer formula for the fees proposed.

Psychiatrists Response

- 3.4 The Royal College of Psychiatrists NI highlighted that responses from their members indicated that the proposed psychiatrist rate was not considered adequate as it did not properly take into account the complexity of the work and was less than in other jurisdictions. It noted that the rate had not increased for many years and that their members believed it would be difficult to obtain expert psychiatric advice at this rate.

Legal Profession Response

- 3.5 The Bar Council found the rates to appear acceptable. It noted that these rates should not prevent a solicitor from seeking higher rates for an expert where necessary depending on the circumstances of the case. It also considered the need for 'appropriately qualified experts' to be more important than the need to 'retain a sufficient pool of experts'. The Law Society noted that in the experience of its members, experts can currently charge hourly rates which are higher than the rate proposed

NIGALA Response

3.6 NIGALA supported the consideration of fixed fees with limited scaling rather than hourly rates. It agreed that expert fees should be set at a level to attract and retain a sufficient pool of experts.

Q.4 Do you agree with the criteria below for exceptional circumstances to be considered in a request to pay a higher hourly rate?

- a) the complexity of the material is such that an expert with a high level of seniority is required: or
- b) the material is of such specialised and unusual nature that only very few experts are available to provide the necessary evidence.

Psychologists Response

- 4.1 The British Psychological Society NI strongly disagreed with the criteria suggesting that they were 'meaningless and incapable of application'. It took issue with how the complexity of the material could be defined in these types of cases and suggested that it did not cover many of the facets involved with particular family circumstances.
- 4.2 The Division of Clinical queried what is meant by a high level of experience and that the requirement for courts and its witnesses with the required expertise.

Psychiatrists Response

- 4.3 Whilst reiterating its opposition to the standard hourly rate for non-exceptional circumstances the Royal College of Psychiatrists NI agreed that the criteria for exceptional circumstances appear reasonable.

Legal Profession Response

- 4.4 The Bar Council disagreed with the reference to 'high level of seniority' instead referring to 'expertise in a particular area' as more appropriate. It has concerns that the criteria set out do not explicitly reference the importance of expert specialisms as part of the consideration of requests for a higher hourly rate. It also noted the important role that the court will take an important role in ensuring the right type of expert is appointed depending on the circumstances of a

particular case. The Law Society noted concern that the introduction of additional criteria for an application for a higher hourly rate may result in the legal representatives being unable to meet the court directions in a timely fashion.

NIGALA response

4.5 NIGALA again highlighted its proposal for a limited scaling of fees and supported consideration being given to the development of a register of suitably qualified experts.

Q.5 Do you agree that the cap of hours proposed is set at the right level to capture the majority of routine cases that require expert opinion?

Psychologists Response

- 5.1 The British Psychological Society NI strongly deemed the 10 hours to be allowed under the General Authority to be 'entirely inadequate' and that few if any cases could be undertaken with these restrictions. The 10 hours is unrealistic and it compared it to the 25 hours allowed for assessment of one individual under English guidance..
- 5.2 The Peer Supervision Network of clinical Psychologists also strongly disagreed with the 10 hour timeframe and believed that it would be impossible to complete an individual assessment in this time. It stated that when assessing children it is necessary to interview the parents of the child, teachers, social workers etc. as well as the child itself. It also stated that when assessing two parents it is not a 'duplicate process' and would require more time than that proposed. It suggested that the vast majority of their cases would be complex rather than routine.
- 5.3 The Division of Clinical Psychology indicated that the cap on hours was entirely inadequate. It noted that one psychologist allows at least 30 hours for one child involved in Children's Proceedings.

Psychiatrists Response

- 5.4 The Royal College of Psychiatrists NI agreed that the hourly cap was reasonable for the majority of routine cases.

Legal Profession Response

5.5 The Bar Council agreed that the hours allowed under the General Authority appears to be appropriate but this should be carefully monitored throughout the duration of the pilot. The Law Society highlighted that reading time is an important aspect of instruction and needs to be sensibly factored into the cap on hours to ensure it is realistic.

NIGALA Response

5.6 NIGALA is of the opinion that hourly rates can 'cause problems in potentially deterring time-limited work'.

Q.6 Do you agree that the rates of £250 per half day and £500 per full day should be payable for court attendance?

Psychologists Response

6.1 The British Psychological Society NI suggested that the rate for a half day at court had reduced from £350 to £250.

6.2 The Division of Clinical Psychology indicated that the rates were comparable with what is currently charged but suggested there should be cancellation guidelines.

Psychiatrists Response

6.3 The Royal College of Psychiatrists NI suggested that along with the hourly rates, members did not consider the daily/half daily rates for court attendance to reflect the nature and complexity of the work.

Legal Profession Response

6.4 The Bar Library indicated agreement with the rates for most attendances but stressed that higher attendance fees need to be allowed in appropriate circumstances to ensure that the correct expert can be instructed. The Law Society did not object to the rates but noted that they need to be kept under review.

NIGALA Response

6.5 NIGALA supported the rates on the proviso that they are in line with other areas of court work and are regionally consistent. NIGALA also highlighted the possibilities for improving the use of technology in delivering expert evidence to courts.

Q.7 Do you have any comment on the Impact Screenings and the Regulatory Impact Assessment?

Psychologists Response

7.1 The British Psychological Society NI suggested the impact assessments did not take into account the need for experts to make visits involving considerable travel and travel time. The Division of Clinical Psychology likewise raised the issue of travel and would welcome an impact assessment in this regard.

Legal Profession Response

7.2 The Bar Council noted that there are experts offering their services at this rate , or close hourly rates and that the others would be expected to work at this hourly rate unless the criteria for a higher rate is met. It highlighted the impact that appropriately qualified experts forgoing expert work could have on the value being brought to the court.

NIGALA Response

7.3 Whilst supporting the idea of fixed fees NIGALA recognised that less people may be willing to take on court work due to this and that this should be kept under review.

Q.8 Is this the right approach to evaluation? Are there other impacts which should be evaluated?

Psychologists Response

8.1 The British Psychological Society again suggested that the terms of the General Authority were unrealistic and that most experts will prefer to work as they have

been by applying for Prior Approval. Therefore they believe that evaluation will be difficult as there will be few cases.

- 8.2 The Division of Clinical Psychology suggested that there needs to be a value based approach grounded in a child not experiencing any unnecessary delays.

Psychiatrists Response

- 8.3 The Royal College of Psychiatrists NI agreed that these were reasonable criteria to take into account when evaluating the pilot.

Legal Profession Response

- 8.4 The Bar Library welcomed the proposed approach and suggested another impact – whether there has been any adverse effect on the ability to instruct appropriately qualified experts for the issues that are presented in cases. The Law Society noted the importance of the ongoing evaluation and review of the pilot.

Annex B

Hourly Rates to be applied under the General Authority

Table 1

Expert Type	NI Hourly Rate
Child psychiatrist	£108
Psychiatrist	£100
Psychologist	£90

Maximum Number of Hours

Table 2 below provides a maximum number of hours, above which you must apply for prior authority.

Number of hours above which prior authority must be applied for			
Expert Type	One individual to be assessed	More than one individual to be assessed	More than 2 individuals to be assessed
Psychologist (inc Child Psychologist)	8 hours for assessment 8 hours for report 3 hours for observing contact (per parent)	10 hours per individual	10 hours per individual
Child Psychiatrist	10	15	20
Psychiatrist (full report)	10	15	20
Psychiatrist (Competence Report)	5		

These numbers are a guideline and we would not expect experts to require this number of hours in every case. When engaging an expert the solicitor should have regard to the public purse and the hours requested by the expert.

The maximum hours allowed includes including the assessment of individuals, preparation of a report and addendum reports. It does not include travel time or court attendance, for which prior authority normally will not be necessary and should be justified on final assessment instead.

If an experts' meeting is required, up to five hours will be allowed under the General Authority and prior authority will be required to exceed this.

Reading time is not included in the maximum hours allowed as the hours required for reading can vary significantly from case to case.