
Pilot to Allow Solicitors to Instruct Experts in the Family Proceedings Court

Consultation Response

Introduction

1. The Bar Council is the regulatory and representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.
2. The Bar welcomes the opportunity to comment on the Department of Justice consultation paper on a proposal for a pilot allowing experts to be appointed without prior authority for legal aid in public law Children Order cases in the Family Proceedings Court. This submission also reflects the views of the Family Bar Association which serves to ensure an independent and quality source of specialist legal advocacy in the family courts.
3. By way of background, the latest information we have received from the Legal Services Agency indicates that certification of counsel in the Family Proceedings Court remains very low following guidance introduced in 2014 with counsel no longer being certified in many of these cases. It remains our view that whether or not this was the intention of the policy, this remains an illusory and significantly retrograde step for clients. Undertakings were previously given to the Bar that this matter would be closely reviewed and addressed as it is obvious that barristers' services are still being deemed necessary in these cases even if certification has only been granted to solicitors.
4. The Bar notes table 1 at Annex A listing Public Law Children Order Applications received and disposed of by venue in 2018 yet we have no means of ascertaining the totality of the issues in these cases and whether they are being appropriately dealt with. It is worth noting that feedback from practitioners indicates that families in the Family Proceedings Court are failing to secure representation in the most serious of cases, including domestic violence, sexual abuse and non-accidental injury to children which can result in cases being referred upwards to the Family Care Centre or appealed. Our response to this consultation covers each of the questions set out in the consultation paper below.

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Q1. Do you agree that public law proceedings in the Family Proceedings Court are the best proceedings for piloting the General Authority?

5. Yes - the Bar agrees that the pilot should be confined to Public Law Children Order cases in the Family Proceedings Court. It is also important that the use of experts in the Family Proceedings Court is kept under close review for the duration of the one year pilot to ensure that a sufficient number of cases are captured under the General Authority to allow any evaluation to be meaningful.

Q2. Do you agree that the expert types to be included in the pilot should be psychiatrists and psychologists?

6. Yes – the Bar agrees that the expert types to be included in the pilot should be psychiatrists and psychologists.

Q3. 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?

7. The Bar notes that paragraph 5.2 expands on this to propose that the hourly rate for psychiatrists should be set at £100 per hour, child psychiatrists at £108 per hour, psychologists at £90 per hour and child psychologists at £100 per hour. We consider that these hourly rates appear generally acceptable for this particular pilot. However, we would highlight that these rates should not prevent a solicitor from seeking higher rates where this is necessary depending on the circumstances of the case.
8. We also note the six criteria outlined at paragraph 5.1 used to consider the hourly rate to be allowed, including the “need to retain a sufficient pool of experts”. We would contend that this should read “appropriately qualified experts” as a particular case might require a specialist expert, such as an educational psychologist, a clinical psychologist or a psychiatrist working in the field of addiction issues. The General Authority must allow for the appropriate expert to be instructed depending on the needs of the case as there is a risk that there could be unintended consequences if the permitted hourly rates exclude these specialist experts from the remit of this pilot. For example, a second expert report might become necessary because a first one is not of a sufficient standard to cover the particular issues in a case which will ultimately only result in increased cost. Therefore it will be important to keep the pilot under ongoing review

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throughout its duration with a careful assessment of the approved hourly rates payable under the General Authority as part of this.

Q4. Do you agree with the criteria above for exceptional circumstances to be considered in a request to pay a higher hourly rate?

9. The Bar notes that paragraph 6.2 refers to exceptional circumstances being considered in cases where “the complexity of the material is such that an expert with a high level of seniority is required”. We take the view that this should instead refer to expertise in a particular area as seniority is not always the most relevant factor when the issue in a case involves the presentation of a parent. For example, a case involving a parent with an addiction would benefit more from an expert specialising in addiction psychiatry being instructed rather than a general adult psychiatrist, regardless of the seniority of the expert. The Bar is concerned that the criteria at paragraph 6.2 do not explicitly reference the importance of expert specialisms as part of the consideration of requests for a higher hourly rate. Meanwhile the use of the term “the complexity of the material” is not particularly relevant to cases which require an expert focused assessment of issues involving a parent. This could result in the court requiring a second expert report because a first report does not adequately cover the specific issues in the case.

10. Furthermore, we note that paragraph 6.3 states that “higher rates will not be allowed merely because any party or the court has a preference for a more expensive expert”. The Bar takes the view that the court has an important role to play in ensuring that the right type of expert is appointed depending on the circumstances of a particular case. It is worth noting that the court has to grant leave to release the papers to an expert before being instructed in the case and will carefully consider the identity of an expert, the timescale for any reports and the letter of instruction.

Q5. Do you agree that the cap on hours proposed is set at the right level to capture the majority of routine cases which require expert opinion?

11. The Bar takes the view that the number of hours allowed under the General Authority appears to be appropriate but this should be carefully monitored throughout the duration of the pilot to ensure that it is adequately capturing the majority of routine cases.

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Q6. Do you agree that the rates of £250 per half day and £500 per full day should be payable for court attendance?

12. The Bar's main concern is to ensure that the pilot enables access to specialist experts as necessary which will ensure that the most suitable type of assessment is conducted to meet the needs of families and resolve the issues in the case. We consider that this rate will be appropriate for most attendances but would caution that higher attendance fees need to be allowed for in appropriate circumstances to ensure that the correct expert can be instructed.

Q7. Do you have any comment on the Impact Screenings and the Regulatory Impact Assessment?

13. The Bar notes the point at paragraph 9.3 from the Regulatory Impact Assessment that "there are currently psychologists and psychiatrists offering their services at this rate, or close hourly rates" and that "there are others who will be expected to do the work at this hourly rate or forego expert work, unless the criteria to apply for a higher hourly rate under a prior authority are met". We would reiterate the need for the pilot to take into consideration the important contribution that an appropriately qualified specialist expert can make to a case. The Department should not underestimate the value which these experts can bring to the court and thereby to families and children through their assessments.

Q8. Is this the right approach to evaluation? Are there other impacts which should be evaluated?

14. The Bar welcomes the proposed approach to the evaluation of the pilot given that there will be ongoing evaluation as well as a formal evaluation report produced after a year of the pilot operating. We also consider that another impact should be added to the points for evaluation, which is whether there has been any adverse effect on the ability to instruct appropriately qualified specialist experts for the issues that are presented in cases.