

Part Three: Experts' Fees

The experts market is a complex one, with a number of bodies and practitioners, with different objectives, all commissioning and using expert services. In legal aid cases, selection of the right expert is said by many providers to be critical to the outcome that they can achieve for their clients. Quality expert evidence is also accepted to be essential to the effective running of the civil and criminal justice systems.

Experts themselves are a disparate group, with a range of motivations for providing services. Although some are offered by experts who operate on that basis exclusively and some will form part of a public service contract, more often these services are delivered as an adjunct to professional day-jobs, provided in private time and expected to be remunerated at rates that would be more normal for private patients/clients. In the last consultation that the LSC ran², the majority (56% of the respondents who answered this question) said that they did not view their services for legal aid as public services akin to those provided by the NHS.

The fact that many good quality experts have extensive existing demands on their time and can choose whether or not to provide their services has for a long time made supply the key issue for expert service provision. More recent public criticism of leading experts, arising out of cross-examinations in court, has only added to this pressure. In this environment, steps to control costs have not been prioritised over the more pressing concerns about the quality and volume of supply.

Nevertheless, with a fixed budget and concerns elsewhere about the rising cost of legal aid, cost control of experts must be addressed. As difficult as it appears to be, control in this area must begin to mirror the efforts that have been made to achieve value for money in all other areas of legal aid spend.

In 2007/08, the LSC spent £192 million on disbursements, of which payments to solicitors for work carried out by expert's accounts for about two-thirds. £21.4 million of this has been recovered from opponents.

Gross spend on disbursements went up by a further £13.4 m in 2008-9. Significant increases in disbursement spend are public law family which went up 46.6% between 2005-6 and 2008-9. These costs increases are unsustainable within a limited legal aid budget.

Currently we are paying different amounts for the same work by different experts and across categories, which means we cannot demonstrate that we obtain best value for money.

MoJ and the LSC have already taken several steps to bring experts' costs under control:

- The removal of residential assessments from the scope of funding in October 2006
- The removal of contact centre activities from the scope of funding in April 2009

²The Use of Experts – Quality, price and procedures in publicly funded cases, July 2005

- The removal of non-expert domestic abuse risk assessments from scope in April 2009.

The Civil Bid Rounds for 2010 Contracts - A Consultation Response which was published on 30 June 2009 and set out that the LSC will:

- Remove experts' cancellation fees from the scope of funding other than in exceptional circumstances;
- Remove experts' administration costs from the scope of public funding;
- Cap the remuneration rates for travel time to £40 per hour; and
- Cap the mileage rates to the current guidance for solicitor travel, currently 45p per mile.

We are working with the Judiciary and local authorities in family proceedings to ensure that practice directions are complied with and assessments carried out under the Public Law Outline are fit for purpose so that additional expert reports, which place an additional cost burden on the legal aid fund and the whole family justice system, are not required.

We are familiar with concerns raised in previous discussions about the cost, quality and supply issues with expert witnesses and we will continue our engagement with key stakeholders to ensure their views and knowledge inform the outcome of this consultation and our future strategy.

Examination of the issues around the quality and supply of experts underpinned the Chief Medical Officer's proposals published in Bearing Good Witness. The LSC is currently working with the Department of Health to pilot the approach proposed in Bearing Good Witness in certain Public Law Childcare cases and will examine among other things how supply can be increased and quality assured.

The LSC is also working with the Forensic Regulator to ensure current quality developments within the profession inform and reflect our longer-term quality strategy.

Proposal

We aim to reduce expenditure in the longer term by 20%, subject to further work on experts' fees/rates. In the short-term we propose, as a first step, to set maximum rates in crime and civil cases through amendments to the relevant Funding Orders made under the Access to Justice Act 1999, with limited provision for exceptions.

There are currently guideline rates set out by the Ministry of Justice that are intended to guide court staff dealing with claims from expert witnesses under the Costs in Criminal Cases Regulations 1986. These rates are used as a benchmark by the Crown Prosecution Service, Her Majesty's Courts Service (payments from central funds) and the LSC with exceptional circumstances taken into consideration, although in practice the LSC has gradually exceeded these rates. Historically, higher rates have been claimed in civil cases. From the LSC experience there does not appear to be any objective reason for this and sometimes the same expert working across different categories of law may charge different rates. By paying different amounts for the same work by different experts and across categories, it is unlikely that we are obtaining best value for money.

As a starting point, we would expect the LSC to pay the same rates in both criminal and civil/family cases with these rates based on the Ministry of Justice guideline rates for payments to expert witnesses from central funds, with only limited exceptions. The medical category has been expanded into more detailed groups to distinguish between experts. This level of detail and some additional experts such as DNA and drug tests have been included to reflect the expert types that make up 90% of the LSC spend. Where regulations did not cover the type of expert, we have used rates routinely allowed by the LSC for the more 'run of the mill' case.

Setting rates aims to increase transparency, ensure consistency and control the unsustainable rising costs of expert's fees.

In criminal cases and we would expect defence and prosecution rates, for similar work, to be consistent. Where similar types of experts work across the civil and crime categories we would expect that, as a starting point, the rates should be the same.

Total costs depend on a variety of factors. The complexity and type of case and level of experience required of the expert will influence the amount of time taken. This is the first stage of a longer-term strategy aimed at controlling costs in this area. There has been a general move towards paying solicitors and barristers on the basis of fixed fees. Our view is that there is no reason not to take this approach to the payment of experts in the future, but we have insufficient data at this stage to model fixed fees taking all of the relevant factors into account. Part of our strategy is therefore to get a better understanding of the market place and what it is we purchase.

The proposed rates are hourly rate bands that would be allowed on assessment. We would not expect payments very often to reach the top end of the band – the amount allowed would vary by type of expert. So for example, we would expect a report by a nurse to be at the lower end of the General Medical rate set out in Annex C. In exceptional circumstances, solicitors will be able to apply for prior authority to exceed these rates.

The LSC should allow exceptions to these rates in circumstances where there is a need to maintain access in a particular area, where there is a particular market problem or where an unusual level of expertise is required for the case. The reasonableness of the total cost will still be considered at assessment or at prior authority stage.

Neither MOJ nor the LSC have a direct relationship with experts. They cannot be accessed through a small number of representative groups and without resorting to extensive data collection from legal aid providers the LSC has only limited data on expert costs. The LSC is currently carrying out a further data verification exercise but we are seeking views in this consultation about how effective the proposals set out above are in taking the first step to control costs. We would also like your views on how we might take even more effective steps in the future, allowing for cost control, whilst maintaining the supply of sufficient quality experts. We have provided questions to guide responses, but please feel free to provide other relevant information.