Pilot to Allow Solicitors to Instruct Experts in the Family Proceedings Court without Prior Authority

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**Ministerial Foreword**

I am pleased to launch this consultation 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.

The proposals have two key objectives. They are designed to standardise hourly rates, but also to speed up access to justice by allowing the instruction of experts without the need for legal aid approval for routine cases.

Public law Children Order cases arise when a Health and Social Care Trust or other public body has intervened to protect a child from harm.

Expert evidence is often of significant benefit to the Judiciary in making its decisions which are of fundamental importance to the child and the family in the case before the courts. Often the experts are able to advise of interventions which will help parents, or other family members, and address shortcomings in their parenting skills with the best outcomes for the child/children and the family.

It is important for the children and families in those proceedings that the proper interventions are made in a timely manner and speedy access to expert reports will assist this.

I encourage those with an interest to respond to the Consultation and I look forward to considering those responses.

Naomi Long, MLA

Justice Minister

**Pilot to Allow Solicitors to Instruct Experts without Prior Authority**

# Speeding up Access to Justice

* 1. The Department of Justice (DOJ) is considering introducing enhanced General Authorities which would allow solicitors to instruct experts without the prior authority of the Legal Services Agency (LSANI) providing the experts work for a standard hourly rate, within a cap on hours and within other controls relating to incidental costs.
	2. The process for instructing experts currently requires prior authority, whereby a solicitor applies for approval from LSANI to instruct an expert citing the number of hours required and the hourly rate which the expert is charging. This has led to a divergence in the hourly rates allowed for experts in civil cases and a divergence between the rates charged between civil and criminal cases.
	3. The proposals for reform would introduce standard hourly rates for different expert types, however, within a cap on hours designed to allow LSANI to retain control over costs and assist with forecasting. There would be provision for LSANI to grant experts outside of the standard hourly rates and cap on hours where this is justifiable.
	4. These provisions should allow the legal profession to instruct psychiatrists and psychologists in the majority of cases without needing prior authority from LSANI, thereby speeding up access to justice.

# 2. Pilot to Allow Solicitors to Instruct Experts Without Prior Authority in Public Law Proceedings in the Family Proceedings Court

2.1 The Department of Justice proposes to run a pilot which would allow solicitors to instruct psychiatrists and psychologists in Public Law Children Order cases in the Family Proceedings Court under enhanced General Authorities and without Prior Authority from the Legal Services Agency NI (LSANI). The Pilot would allow us to test how the enhanced General Authorities would operate in practice, before rolling them out to other types of proceedings and other expert types. It will also allow us to assess whether the process of getting a prior authority is causing any delay in Children Order Proceedings.

# 3. The Court Tier and Case Types to be Included in the Pilot

3.1 It is proposed that the pilot be confined to Public Law Children Order cases in the Family Proceedings Court. Public law cases are those concerning care, supervision, child assessment, education supervision, emergency protection orders, extensions, contact with children in care and secure accommodation and investigation into a Child’s circumstances.

3.2 It is proposed that the pilot be confined to Public Law Children Order cases where the applicants and respondents are exempt from the financial eligibility test. The position can be more complex in Private Children Law Proceedings when the financial eligibility test may mean that not all parties are legally aided which adds complexities to apportioning the cost of expert reports.

3.3 It is proposed that the Pilot be confined to the Family Proceedings Court (FPC) where the majority of Public Children Order applications are received and cases disposed of (see Annex A for Judicial Statistics). If the case is transferred from the FPC to a higher court tier prior authority will be required from that point on for instructing further experts.

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

# 4. The Expert Types to be Included in the Pilot

4.1 It is proposed that the expert types to be included in the Pilot are psychiatrists and psychologists.

4.2 These are the two most commonly used expert types which produce reports for the courts in Children Order cases, particularly in the FPCs.

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

# 5. The Hourly Rate to be Allowed

5.1 In considering the hourly rate to be allowed, the following criteria were considered:

* Value for money;
* The rates currently payable in NI in public children order cases, other civil cases and criminal cases (a long term aim of the Department is to standardise experts rates between different case types);
* The rates payable in England and Wales;
* The NHS salary available for experts in NI;
* The need to retain a sufficient pool of experts; and
* The facility for solicitors to ask for higher rates in exceptional circumstances.

5.2 It is proposed that the hourly rate for Psychiatrists is set at £100 per hour, child psychiatrists at £108 per hour, Psychologists at £90 per hour and child psychologists at £100 per hour.

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?

# 6. Higher Hourly Rates in Exceptional Circumstances

6.1 A request for higher hourly rates may be made under prior authority in exceptional circumstances.

6.2 Exceptional circumstances are where the expert’s evidence is key to the client’s case and either—

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 a specialised and unusual nature that only very few experts are available to provide the necessary evidence.

6.3 Higher rates will not be allowed merely because any party or the court has a preference for a more expensive expert.

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

# 7. The Number of Hours to be Allowed

7.1 A file review identified a great range in the number of hours deployed by experts. The range for psychiatrists was from 2 – 25 hours and for psychologists was 3 – 53 hours. The lower number of hours used often entail addendum reports. The higher number of hours can relate to the reading material involved, the type of report and the number of parties to be reported on.

7.2 It is proposed that the number of hours allowed under the General Authority are as per the table below which is based on the evidence from the file review and the experience of adjudicators in LSANI. This number of hours should allow the majority of cases to be captured by the General Authority. If more hours are required, a request for prior authority must be made to LSANI.

|  |
| --- |
| Number of hours above which prior authority must be applied for  |
| Expert Type | One individual to be assessed | Two individuals to be assessed | More than 2 individuals to be assessed |
| Psychologist (inc Child Psychologist) | 10  | 15 | 20 |
| Child Psychiatrist | 10 | 15 | 20 |
| Psychiatrist (full report) | 10 | 15 | 20 |
| Psychiatrist (Competence Report) | 5 | N/A | N/A |

7.3 The hours allowed covers all work including reading time, interviews, consultations, observations and writing of reports. The hours do not include travel time.

7.4 By applying the cap at this level the General Authority should capture the routine cases, however, it will allow LSANI to exercise financial control in more complex cases where a higher volume of hours is required. It will address the concerns of The Review of Civil and Family Justice: “experience suggests that hourly rates can cause problems because they encourage an expert to take as long as possible and/or to follow every possible avenue of enquiry”.

Q.5 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?

# 8. Court Attendance

8.1 The General Authority for Medical Fees in Civil Cases which issued in September 2001 allows for £203.50 for a half days court attendance and £297.00 for a full days court attendance, however, these fees are out of date and rarely applied. The fees are set on a case by case basis and this leads to divergence in the rates allowed in civil cases and a divergence between the rates allowed between civil and criminal cases.

8.2 It is proposed that experts are allowed up to £250 per half day and £500 per full day. This brings the payments into line with the amounts allowed in criminal cases.

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

# 9. Impact Assessments

9.1 The Department has completed screening exercises for the equality, rural needs, regulatory, human rights, and privacy impact of the proposed amendments.

9.2 The policy has been screened out in respect of each of the above impacts.

9.3 The Regulatory Impact Assessment noted that:

* There are currently psychologists and psychiatrists offering their services at this rate, or close hourly rates; and
* 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.

9.4 These decisions will be reviewed following the completion of the consultation exercise, taking account of any additional evidence received. The reports of the screening exercises are appended to the consultation document.

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

# 10. Evaluation of the Pilot

10.1 There will be an outcomes based approach to evaluating the pilot. The evaluation will include:

* Has the process speeded up access to justice;
* Has it impacted on the number of experts prepared to do medico-legal reports;
* Has the cap on hours been set too low or too high;
* Has it increased the use of experts in proceedings and if so, has this been advantageous to the courts;
* Has it impacted on the quality of the reports; and
* What has been the impact of costs to the legal aid fund and has this ensured value for money.

10.2 It is proposed that there will be ongoing evaluation, with formal evaluation and a report produced after a year of the pilot operating. It will be important to get the input of key stakeholders to evaluate the pilot including the judiciary, legal profession and psychiatrists and psychologists. The evaluation will inform any extension of the General Authority approach to other case types and expert types.

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

# 11. Responding to the Consultation

11.1 The DOJ invites views on any issues raised by this consultation document including the accompanying impact screenings. Please submit your response to this consultation to:

Expert Witness Pilot Consultation

Enabling Access to Justice Division

Department of Justice

Massey House

Stormont Estate

Belfast

BT4 3SX

Email: eajdconsultations@justice-ni.x.gsi.gov.uk

Tel: 028 9016 9526

Text phone: 028 9052 7668

11.2 Responses must be received by **2pm, 8 May 2020**.

11.3 When responding it would be very useful if you could confirm whether you are replying as an individual or submitting an official response on behalf of an organisation.

11.4 If responding on behalf of an organisation please include:

* Your name;
* Your position (if applicable);
* The name of your organisation;
* An address (including postcode);
* An email address.

11.5 We will consider the responses received and publish an outcome report on the Departmental website.

11.6 In line with good practice and sustainable development this document has been published electronically.

# 12. Privacy, Confidentiality and Access to Consultation Responses

12.1 For this consultation, we may publish all responses except for those where the respondent indicates that they are an individual acting in a private capacity (e.g. a member of the public). All responses from organisations and individuals responding in a professional capacity will be published. We will remove email addresses and telephone numbers from these responses; but apart from this, we will publish them in full.  For more information about what we do with personal data please see our consultation privacy notice[[1]](#footnote-1)[1].

12.2 Your response, and all other responses to this consultation, may also be disclosed on request in accordance with the Freedom of Information Act 2000 (FOIA); however all disclosures will be in line with the requirements of the Data Protection Act 2018 (DPA) and the General Data Protection Regulation (GDPR) (EU) 2016/679.

12.3 If you want the information that you provide to be treated as confidential it would be helpful if you could explain to us why you regard the information you have provided as confidential, so that this may be considered if the Department should receive a request for the information under the FOIA.

# 13. Next Steps

13.1 Following the consultation exercise, a Post Consultation Report will issue and the draft proposals will be finalised and taken forward as appropriate.

**Annex A**

**Tables from Judicial Statistics 2018**

Public Law Children Order Applications received and disposed of by venue in 2018

Table 1

|  |  |  |
| --- | --- | --- |
|  |  |  |
|   |   |
| **Public Law[1]** |
| **Number of applications entered** |   |
| **Number of disposals** |
| **Family Proceedings Court** | **Antrim** | - | 1 |
| **Armagh** | - | - |
| **Ballymena** | 74 | 36 |
| **Belfast** | 205 | 110 |
| **Coleraine** | 1 | 2 |
| **Craigavon** | 70 | 36 |
| **Downpatrick** | - | - |
| **Dungannon** | 11 | 8 |
| **Enniskillen** | - | - |
| **Limavady** | - | - |
| **Lisburn** | 23 | 14 |
| **Londonderry** | 60 | 40 |
| **Magherafelt** | - | - |
| **Newry** | 65 | 33 |
| **Newtownards** | 112 | 66 |
| **Omagh** | 60 | 70 |
| **Strabane** | - | - |
| **Venue total** | 681 | 416 |
| **Family Care Centre** | **Belfast** | 41 | 155 |
| **Coleraine** | - | - |
| **Craigavon** | 15 | 61 |
| **Dungannon** | 1 | 12 |
| **Londonderry** | 4 | 16 |
| **Venue total** | 61 | 244 |
| **High Court** | **Royal Courts of Justice** | 41 | 74 |
| **Venue total** | 41 | 74 |
| **Northern Ireland Total** | 783 | 734 |

**Annex B**

**Privacy Notice – Consultations (DoJ)**

Data Controller Name: Department of Justice (DoJ)

Address: Castle Buildings, Stormont, BELFAST, BT4 3SG

Data Protection Officer Name: DoJ Data Protection Officer

Telephone: (028) 90378617

Email: DataProtectionOfficer@justice-ni.x.gsi.gov.uk

Being transparent and providing accessible information to individuals about how we may use personal data is a key element of the [Data Protection Act (DPA)](http://www.legislation.gov.uk/ukpga/2018/12/contents/enacted) and the [EU General Data Protection Regulation](https://gdpr-info.eu/art-6-gdpr/) (GDPR). The Department of Justice (DoJ) is committed to building trust and confidence in our ability to process your personal information and protect your privacy.

**Purpose for processing**

We will process personal data provided in response to consultations for the purpose of informing the development of our policy, guidance, or other regulatory work in the subject area of the request for views. We will publish a summary of the consultation responses and, in some cases, the responses themselves but these will not contain any personal data. We will not publish the names or contact details of respondents, but will include the names of organisations responding.

If you have indicated that you would be interested in contributing to further Department work on the subject matter covered by the consultation, then we might process your contact details to get in touch with you.

**Lawful basis for processing**

The lawful basis we are relying on to process your personal data is Article 6(1) (e) of the GDPR, which allows us to process personal data when this is necessary for the performance of our public tasks in our capacity as a Government Department.

We will only process any special category personal data you provide, which reveals racial or ethnic origin, political opinions, religious belief, health or sexual life/orientation when it is necessary for reasons of substantial public interest under Article 9(2) (g) of the GDPR, in the exercise of the function of the department, and to monitor equality.

**How will your information be used and shared**

We process the information internally for the above stated purpose. We don't intend to share your personal data with any third party. Any specific requests from a third party for us to share your personal data with them will be dealt with in accordance the provisions of the data protection laws.

**How long will we keep your information?**

We will retain consultation response information until our work on the subject matter of the consultation is complete, and in line with the Department’s approved Retention and Disposal Schedule [DoJ Retention & Disposal Schedule](https://www.justice-ni.gov.uk/sites/default/files/publications/doj/retention-and-disposal-schedule-final-signed-copy.pdf).

**What are your rights?**

* You have the right to obtain confirmation that your data is being [processed, and access to your personal data](https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/right-of-access/)
* You are entitled to have personal data [rectified if it is inaccurate or incomplete](https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/right-to-rectification/)
* You have a right to have personal data [erased and to prevent processing](https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/right-to-erasure/), in specific circumstances
* You have the right [to ‘block’ or suppress processing](https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/right-to-restrict-processing/) of personal data, in specific circumstances
* You have the right to [data portability](https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/right-to-data-portability/), in specific circumstances
* **You have the right to** [object to the processing](https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/right-to-object/)**,** in specific circumstances
* **You have rights in relation to** [automated decision making and profiling](https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/rights-related-to-automated-decision-making-including-profiling/).

**How to complain if you are not happy with how we process your personal information**

If you wish to request access, object or raise a complaint about how we have handled your data, you can contact our Data Protection Officer using the details above.

If you are not satisfied with our response or believe we are not processing your personal data in accordance with the law, you can complain to the Information Commissioner at:

Information Commissioner’s Office

Wycliffe House

Water Lane

Wilmslow

Cheshire SK9 5AF

casework@ico.org.uk

1. [1] The DoJ Consultation Privacy Notice is attached at Annex B. [↑](#footnote-ref-1)