



Ministry
of Justice

The use of experts in family law

Understanding the processes for commissioning experts
and the contribution they make to the family court

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1. Summary

Policy background

The independently chaired Family Justice Review in 2011 concluded that there was a culture of 'routine acceptance' of the need for experts in family law cases and raised concerns that this was duplicating the work of the local authority, leading to delays and potentially compromising the welfare of children (Family Justice Review, 2011a). The recommendations of the Review and subsequent revised Family Procedure Rules aimed to move towards a more proportionate use of experts in family proceedings; to be appointed only where 'necessary' to resolve a case justly. These new Rules were later enshrined in legislation with the Children and Families Act that came into force in April 2014. The government also developed standards to improve the quality of expert evidence by setting minimum criteria that an expert must meet in order to be appointed by the court.

Aims and methodology

Changes to the Family Procedure Rules and the introduction of new standards for experts presented a timely opportunity to develop the evidence base on the use of experts in family law. The Ministry of Justice therefore commissioned this research to explore the processes by which experts are appointed in light of the new Rules and to develop an understanding of the contribution they make to just and timely decisions in the family court.

This report presents the findings from a mixed-methods study that comprised two phases. Phase 1 – conducted between November 2013 and February 2014 – included four data collection exercises: an online survey and seven focus groups conducted with professionals involved in family law proceedings (including experts), eight interviews with the judiciary and a quantitative analysis of 298 cases to examine the timeliness of expert reports both before and after the Rule changes. In Phase 2 – conducted between June and December 2014 – materials from closed family law cases were used to guide discussion and evaluate aspects of the expert process during four discussion groups and in four additional judicial interviews.

Data collection did not differentiate between Independent Social Workers (ISWs) and local authority social workers. This is important because ISWs are defined as experts that operate within the Family Procedure Rules, whereas local authority social workers provide routine evidence in public law cases. The nature of the sample in this study means that the views and experiences of psychologists and psychiatrists are over-represented. Findings should be interpreted with these considerations in mind.

Processes for commissioning expert reports

At the time of the study, participants believed that the new Family Procedure Rules had led to a decline in the instruction of experts, although there was less consensus across professions that this had led to more appropriate use of experts. Whilst many experts felt that expert evidence was not commissioned frequently enough following the introduction of the new Rules and greater use of experts was required, judicial interviewees were positive overall about the developments concerning when, and how, experts are appointed.

The issues for resolution in the case and the type of evidence required had implications for the interpretation of whether an expert was considered necessary. The judiciary highlighted important factors, including their own capability, skills and experience, which they took into consideration when making this assessment. Importantly, they said they did not always make this decision independently and instead it was taken in collaboration with the parties and legal representatives of a case.

Specialist or medical experts were considered necessary on the basis that their expertise was outside that of the court. Conversely, the appointment of experts such as psychiatrists, psychologists and ISWs was less likely to be considered necessary by the judiciary as they suggested that this type of evidence could be sufficiently provided by a robust local authority social work assessment. Other professional groups agreed that these experts were less likely to be appointed after the introduction of the new Rules. Whilst the judiciary expressed positive views that this had led to a more effective use of local authority social workers, other professionals argued that social workers were being asked to provide evidence outside of their expertise. Social workers felt they would benefit from additional training and support to enable them to provide evidence to the court effectively and confidently.

Experts raised some concerns that the perceived decline in the commissioning of expert reports was resulting in a reduced pool of available experts. This concern was often expressed alongside considerable frustration in relation to the fees and hours available to complete publicly funded expert work, meaning that some experts were no longer willing to undertake this work. The judiciary identified that specialist experts, such as paediatric neurologists or radiologists, were difficult to find due to lesser availability. Monitoring the availability of experts may be beneficial moving forwards.

Progression and duration of cases

Analysis of case files to explore the timeliness of cases where experts were appointed indicated that expert reports were being filed more quickly since the introduction of the new

Family Procedure Rules. This was largely attributed to the commitment of professionals within the family court and independent experts to ensure that care cases are completed within the statutory timeframe of 26 weeks. Where there were delays in cases with experts, these were related to issues with late, incomplete or unclear letters of instruction (which outline the terms of the expert appointment), insufficient communication between parties and lack of access to relevant information.

The quality of letters of instruction and expert reports

The judiciary acknowledged that a good expert report could facilitate and support sound decision-making in family cases. Participants – largely non-judicial professionals – reflected on cases where an expert was not appointed, and raised potential concerns about the impact this may have for children and families.

The new Rules were considered to have improved letters of instruction (Lols). Participants agreed on the features that made a good quality Lol. They should be clear and focused, and include only questions that are specific to a case. These findings are largely in line with existing guidance for Lols in Practice Direction 25C. Participants cited the importance of good quality Lols in terms of maintaining the timeliness of submitting reports to the court.

Perceptions of the impact of the new Family Procedure Rules on the quality of expert reports were more mixed. Whilst experts, particularly psychologists, expressed the view that a reduced pool of experts would subsequently affect the overall quality of evidence available to the family court, they did not think the quality of their own work had been affected. The judiciary did not share these concerns and believed that the overall quality of reports had not been affected. As with Lols, participants agreed what made a good quality report. Reports should be concise, focusing on information specific to the case and within the expert's area of expertise. These findings are consistent with the guidance outlined in Practice Direction 25B, thereby highlighting the relevance of this guidance in continuing to promote good practice in the field.

The impact of the new standards to improve the quality of expert evidence was less evident. Although awareness of the standards was good and they were welcomed to ensure experts were qualified and regulated, some participants felt that they simply reflected existing practice. A process for monitoring whether, and how, experts meet the new standards may therefore be beneficial.

All professional groups were receptive to the provision of feedback for experts, although they reported that it was not regularly provided. Experts were keen to receive feedback both on the outcome of the case and in relation to the contribution of their report to judicial decision-making. Consideration should be given to developing processes for the consistent provision of feedback to experts to support them in continually improving the quality of their work.

2. Background and policy context

2.1 What do we know about experts?

The role of experts

Experts are appointed by the court to provide evidence for use in family proceedings and assist the court in making decisions on matters within their expertise. Experts operate within the framework of the Family Procedure Rules (FPR). Part 25 of the FPR stipulates that experts have an overriding duty to the court to provide objective and independent advice that conforms to the best practice of their profession.¹ Experts come from a range of professional backgrounds and can be appointed for either public or private law proceedings.²

Public law cases encompass care, supervision or adoption proceedings, which are brought by the local authority when it considers that a child 'is suffering or likely to suffer significant harm' due to concerns about the capability of parents to adequately care for them (Children Act, 1989). In these cases, experts such as adult psychiatrists or psychologists may be appointed to provide an assessment of the parents and their parenting capacity. In cases with suspected abuse, medical experts may be instructed to give a view on whether injuries to the child are likely to be accidental or deliberate. Independent Social Workers (ISWs) may be called upon to provide an assessment of the family in addition to the evidence routinely provided by local authority social workers or children's Cafcass³ guardians.

The provision of expert evidence may include standardised tests, such as DNA tests or drug and alcohol tests to establish parentage or substance misuse. This expert evidence may be commissioned in private law cases where parents are in dispute over arrangements relating to children following a breakdown.

The use of experts

There are some complex debates around the use and contribution of experts in family proceedings. These issues are not illuminated by a substantial evidence base and data on the use of experts in family law cases are not routinely published. Most of the available research was undertaken prior to the policy developments outlined later in this section. At that time, the research suggested that experts were commissioned in the majority of public

¹ Part 25 of the FRP is available at:

https://www.justice.gov.uk/courts/procedure-rules/family/parts/part_25#IDADCU5B.

² An overview of the different types of experts that may be appointed in the family court and the evidence they provide can be found at: <http://www.carterbrownexperts.co.uk/search-for-an-expert-witness/types-expert/>.

³ Cafcass is the Children and Family Court Advisory and Support Service, a non-departmental public body that exists to ensure the welfare of the child is put first in legal proceedings relating to children.

law cases. A court file analysis of a random sample of 386 care cases found that experts were appointed in 91% of cases that were brought to court in 2004 (Masson *et al.*, 2008). This was supported by a later case file review of cases closed in 2009 where expert reports were ordered in 87% of 376 public law cases overall, and 92% of cases involving a care application. Where ordered, the average number of reports requested was just under four per case (Cassidy and Davey, 2011). Reports that assessed parents, such as those undertaken by adult psychiatrists or psychologists, were instructed in the highest proportion of cases (Masson *et al.*, 2008; Cassidy and Davey, 2011).

Experts were appointed less frequently in private law cases. The case file review by Cassidy and Davey (*ibid.*) found that 37% of private law cases involved an expert report; most commonly requested were drug tests or ISW reports. In a more recent pilot study, funded by the Ministry of Justice, almost a quarter of private law cases were referred for a DNA, drug or alcohol test (Summerfield, Cox and Carey, 2015).

A number of factors have been hypothesised to explain the frequent use of experts. Beckett and McKeigue (2003) suggested that repeat assessments of parents may be a result of 'the pursuit of an unattainable level of certainty' in proceedings. Others propose that experts were appointed because of judicial concerns that parents may be less likely to accept the decision of the court if it is solely based on an assessment provided by the local authority (see Masson, 2010). This was most likely to be the case with parents who did not trust social workers or consider their views to be independent (Masson, 2010; Pearce, Masson and Bader, 2011). The interim report of the Family Justice Review (2011b) cited evidence that suggested an over-reliance on experts may be, in part, a result of a cycle whereby the courts assessed that social work evidence was of insufficient quality which, in turn, affected the confidence of social workers and led to local authorities relying on experts to inform decision-making and planning. More recent research has indicated that reforms to the public law system since 2014 (described later in this section) have resulted in the local authority social worker being seen as the primary expert in proceedings and this has empowered social workers to take ownership of their cases (Ipsos MORI, 2014).

This issue touches upon a wider theme concerning the potential duplication of evidence from experts who are independently commissioned by the court and evidence from local authority social workers (excluded from the definition of 'expert' under Practice Direction 25).

Research exploring the contribution of ISWs found that assessments added information, often in relation to new circumstances or developments within the case, rather than simply duplicating the evidence (Brophy, Owen, Sidaway and Johal, 2012). The independence of

ISWs working with complex cases or parents with entrenched difficulties with the local authority was cited as another benefit (*ibid.*).

Delay in proceedings

Research exploring the association between the use of experts and the length of proceedings is mixed. Cassidy and Davey (2011) found that both public and private law cases where experts were appointed were longer than cases without experts. Another case file review found a significant relationship between the greater use of experts and the length of a case (Masson *et al.*, 2008). Yet, importantly, it is not clear whether this is a result of the use of the expert in itself or due to the underlying complexity of cases where an expert is appointed. Other research has found no evidence that the appointment of ISWs routinely caused delay through the late delivery of reports (Brophy, Owen, Sidaway and Johal, 2012). Further, in recent research in private law, the judiciary reported that the use of DNA, drug or alcohol tests enabled them to timetable cases with more certainty and that the majority of test reports were delivered to the court on time (Summerfield, Cox and Carey, 2015).

2.2 Family justice reform and the use of experts

The Family Justice Review

There have been a number of recent and notable policy developments relating to experts in the family court. The independently chaired Family Justice Review (FJR) in 2011 concluded that there was a culture of 'routine acceptance' of the need for experts in family law proceedings which was duplicating the work of the local authority, causing delays and potentially compromising the welfare of children (Family Justice Review, 2011a).

The final report of the FJR made ten recommendations for reform in relation to experts. The Government Response to the Review accepted these recommendations to move towards a more proportionate use of experts (Ministry of Justice and Department for Education, 2012). The Response proposed that in commissioning an expert report, 'regard must be had to the impact on the welfare of the child ... that it must be commissioned where it was necessary to resolve the case and only when information is not available, or cannot be properly be made available from parties already involved' (*ibid.*).

The Government also committed to develop standards to improve the quality of evidence provided by experts and to promote a shared understanding amongst family justice professionals about the expectations of experts.

The Family Procedure Rules and Standards

Changes in the way the court can instruct experts were reflected in new Family Procedure Rules introduced on 31 January 2013 and later enshrined in legislation with the Children and Families Act that came into force in April 2014. These Rules changed the threshold for permission to put expert evidence before the court from 'reasonably required' to 'necessary' to resolve the case justly. In making this decision, the court should consider:

- whether the evidence could be provided by another source, such as one of the parties or professionals already involved in the case;
- the issues to be addressed by the expert evidence and the questions to be put to the expert; and
- the cost and impact on the court timetable of obtaining the evidence.

The changes are encompassed within Practice Direction 25B (PD25B).⁴ This also sets out guidance for experts, including the duties of an expert, the content of the expert's report and arrangements for an expert to attend court.⁵ The practice direction is supplemented by an annex detailing the 11 national standards for experts. The aim of the standards is to improve the quality of expert evidence by setting minimum criteria that an expert must meet in order to be appointed by the court. These minimum criteria include the professional registration requirements, levels of practice and knowledge, and engagement in continuing professional development.

Against this backdrop, the Children and Families Act (2014) introduced a statutory time limit for the completion of care and supervision proceedings. Wherever possible, these cases must be completed within 26 weeks. The implementation of the statutory time limit was supported by revised judicial guidance for the case management of public law proceedings, known as the Public Law Outline (PLO). The revised PLO placed an increased emphasis on the local authority being fully prepared with all necessary documentation and evidence, including from independent experts, when a care or supervision application is submitted to the court. This had implications for the timing of the appointment and submission of expert reports in public law proceedings.

⁴ Available at: https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/practice-direction-25b-the-duties-of-an-expert,-the-experts-report-and-arrangements-for-an-expert-to-attend-court.

⁵ Guidance for expert psychologists is also provided by the British Psychological Society and is available at: http://www.bps.org.uk/system/files/Public%20files/Policy/inf129_april_2015_web.pdf.

2.3 Research aims

Changes to the Family Procedure Rules implemented on 31 January 2013 and the introduction of new standards for experts (hereafter Rules and Standards) presented a timely opportunity to develop the evidence base on the use of experts in family law, to explore the processes by which experts are appointed, and to understand the contribution they make to the court. The Ministry of Justice therefore commissioned this research with the following aims:

- To explore processes for commissioning expert reports in family law cases and how these align to the new Rules and Standards.
- To develop our understanding of how expert reports can affect the progression and duration of family law cases.
- To explore factors that relate to the quality of letters of instruction and expert reports, and the contribution of reports in helping the court reach timely and just decisions in family law cases.

This research was carried out by Coventry University in collaboration with Forensic Psychology Practice, Carter Brown Associates, Phoenix Psychology Group and Psychology Associates. These collaborating organisations are referred to as ‘consortium partners’ throughout the report.

3. Methodology

This mixed-methods study comprised two phases. Phase 1 included four data collection exercises: focus groups, an online survey, judicial interviews and an analysis of case timeliness data. Fieldwork was conducted between November 2013 and February 2014. In Phase 2, case materials were reviewed by peer review discussion groups and in judicial interviews. Fieldwork for this phase was carried out between June and December 2014. See Appendix A for a detailed description of the methodology.

3.1 Phase 1

Focus groups

Focus groups were designed to explore participants' perceptions and experiences of the new Rules and Standards for experts in family law cases. They covered themes including the process by which experts were identified, selected and appointed; the timeliness of reports; the quality of letters of instruction (LoIs)⁶ and reports, and feedback provided to experts.

Seven focus groups, each of two hours duration, were held in six locations across England between November 2013 and January 2014. Participants were recruited using opportunity sampling.⁷ Professionals involved in family law cases where experts were commissioned or were experts themselves were invited to take part in a focus group through Bond Solon's⁸ network of experts and the research team's contacts. In total, 42 participants took part in the focus groups. This included a range of professionals, including solicitors, local authority social workers, Cafcass guardians and experts such as psychologists and ISWs (see Table 3.1). Respondents who expressed an interest in the focus group but were unable to attend were invited to take part in the online survey.

⁶ When experts are appointed, a letter of instruction is provided to the expert. This outlines the principles, duties and responsibilities of the expert. The questions that the expert is asked to address for the court are agreed by all parties to the case and the court.

⁷ Opportunity sampling uses a population of potential participants who are available and fit any inclusion criteria for the research. It is often based on known contacts, availability and location.

⁸ Bond Solon is a UK-based legal training and information company. It maintains a national list of professionals who conduct expert work.

Table 3.1 Focus group participants by profession

Profession	Number
Psychologist	17
Solicitor	7
Social worker	6
Psychiatrist	4
Guardian	3
Accountant	1
Social worker/Guardian	1
Solicitor/Recorder	1
GP	1
Family therapist	1
Total	42

Online survey

The online survey explored the same themes as the focus groups. The survey encompassed a combination of fixed-choice questions, rating scales and free text questions. It was available from 22 October 2013 to 24 February 2014 and was completed by 78 participants.⁹ The sample was self-selected. Professionals were invited to take part in the survey through requests on professional websites and forums for professionals and experts involved in family law proceedings (a full list is provided in Appendix A). The professions of the respondents to the online survey are shown in Table 3.2.

Table 3.2 Online survey respondents by profession

Profession	Number
Psychologist	27
Psychiatrist	17
Social worker	16
Magistrate	6
Solicitor	3
Multi-Disciplinary Team (MDT ¹⁰)	2
Children's Guardian	1
Radiologist	1
Other	2
Unknown	3
Total	78

⁹ Respondents were not required to answer all questions in the survey and therefore base numbers vary by question. Where findings are reported, base numbers are stated unless all 78 participants answered.

¹⁰ A multidisciplinary team (MDT) comprises experts from different professional backgrounds. They may be appointed to provide multiple assessments to a case utilising a collaborative holistic approach.

Interviews

Qualitative interviews were conducted with seven judges and one barrister to explore the same aims as outlined for the focus groups and online survey. Interviews lasted for an average of an hour. To recruit a range of judges, the Judicial Office contacted eight judges on behalf of the research team to request their participation in the research. Two members of the research team conducted these interviews in January and February 2014. Six of these interviews were conducted face-to-face and two by telephone, at the judges' convenience.

Case timeliness data

To examine the timeliness of expert reports and their impact on case duration, a small-scale quantitative analysis of key timeliness measures within family law cases was conducted. A total of 298 cases were included (201 from September 2012 and 97 from September 2013). Data were collated from all the cases where the consortium partners received initial enquiries about the availability of an expert in September 2012 and September 2013.¹¹ The data were collected at the end of January 2014, which allowed time for the reports to have been filed at the point of data collection.

For each case, the dates were recorded for the initial enquiry relating to the appointment of the expert; confirmation of the expert's appointment; receipt of the Lol and submission of the report. Where reports were filed late, the reasons for this were recorded.

3.2 Phase 2

In addition to the aims outlined in section 2.3, Phase 2 was designed to explore areas of good practice and to identify ways in which the expert process could be improved. A peer review methodology was employed in this phase. Peer review methodology is widely used in clinical settings to set and monitor standards and improve service quality. Discussion groups and judicial interviews in Phase 2 were broadly based on these principles to enable participants to evaluate aspects of the expert process. This approach included utilising materials from closed family law cases where an expert had been commissioned to guide discussion in groups and interviews.

¹¹ These time points were selected because September 2012 was four months prior to the new Rules (January 2013), and September 2013 was eight months after, ensuring sufficient time for the new Rules to embed.

Discussion groups and judicial interviews explored participants’ perceptions of the following themes:

- Factors that are considered in assessing the suitability of experts.
- The quality of Lols and expert reports.
- How experts support judicial decision-making and the progression of cases.
- Feedback for experts.
- Good practice that facilitates the delivery of good quality expert reports.

Discussion groups

Twenty public law closed cases were selected from five courts in England. Courts were selected to ensure geographical spread and to include different tiers of the family court. The documents used for the basis of these discussions included expert reports, Lols, Cafcass reports, local authority social worker reports, threshold documents¹² and viability reports.¹³ These cases contained reports from a total of 32 experts, largely from psychologists and psychiatrists, as outlined in Table 3.3. The expert reports included detailed assessments as well as standardised tests such as hair strand tests¹⁴ to establish substance misuse.

Table 3.3 Expert reports used in the peer review discussion groups

Type of expert report	Number
Psychology	15
Psychiatry	6
Medical	5
Hair strand	3
Residential assessment	2
Cognitive assessment	1
Total	32

Anonymised case materials¹⁵ were sent to participants in advance of the groups. Participants were recruited through opportunity sampling. Invitations to participate were circulated via the Bond Solon network of experts and the research team’s contacts. Each group included

¹² A threshold document outlines an analysis of the child’s life to date including a chronology of key events, the child’s development, health, wellbeing and the impact of parenting on the child. It is used as the basis to conclude whether a child is either suffering, or is at risk of suffering, significant harm. The aim is to help the court determine whether the threshold (need) for care is met and there is justification for care proceedings.
¹³ A viability report considers the suitability of care options for a child; for example, a return to home, permanent residence with relatives, foster parents, special guardians or adoption.
¹⁴ Hair strand testing is a medical technique used to establish drug or alcohol misuse, or used to evidence familial relationships through DNA analysis.
¹⁵ See Appendix A for detail on the approvals process for this methodology.

individuals from a range of professions (see Table A.2 in Appendix A). Four day-long discussion groups were held in Coventry and London in June and July 2014. Two groups reviewed four cases each and two reviewed six cases. Participants were encouraged to discuss one case at a time to explore themes using a discussion guide developed to ensure consistency when reviewing each case (see Appendix B for the discussion guide).

Judicial interviews

Four judges were recruited using the same approach as Phase 1 (described in Appendix A). Telephone interviews took place between September and December 2014 and were conducted at the judge's convenience. They lasted on average around 70 minutes. Anonymised materials from two cases used in the discussion groups were emailed to judges in advance. Each judge reviewed different cases, therefore a total of eight cases were reviewed. The cases were selected to ensure a range of expert reports were covered in the interviews. The interviews used the same discussion guide as the peer review groups.

3.3 Analysis

The focus groups, interviews and peer review discussion groups were transcribed manually verbatim. These responses, along with the open-ended text responses to the online survey, were analysed using thematic analysis. The fixed-choice questions of the online survey were analysed descriptively. Due to the small numbers of survey respondents from different professional groups and geographical locations, it was not possible to statistically compare the responses between professions or by location.

To analyse the timeliness data, the number of days between the initial enquiry and the report being filed, and between the receipt of the Lol and the report being filed, was calculated for each case. Independent samples t-tests were used to assess the differences in these times across the two periods. The reasons for the late submission of reports were listed and compared between the two time periods. These are outlined in more detail in Appendix C.

3.4 A note on the methodology

The findings throughout this report should be interpreted taking into account the following methodological limitations. (These are described in further detail in Appendix A). Participants in the study were recruited through an opportunity sampling approach and were self-selected. Personal contacts of the research team consortium were used and assistance for recruitment was sought from various organisations. This may have resulted in a bias within

the findings, as individuals or professional groups most willing to participate may have had different characteristics from those who did not volunteer.

Some key professional groups, including those from medical backgrounds, such as paediatricians and radiologists, were not adequately represented in the fieldwork. Whilst significant effort was made to try to increase the number of such professionals, this was unsuccessful. Psychologists and psychiatrists are over-represented in the sample. Following this, the findings refer largely to detailed expert assessments rather than standardised tests such as DNA or medical evidence. Findings should be interpreted with this in mind when considering the generalisability for practice and policy implications.

The judiciary were largely recruited via the Judicial Office, which also provided approval for the research. Whilst this allowed the researchers to collect data from all tiers of the judiciary, there is a risk of sampling bias.

The breakdown within professions from other research participants is less clear as this was balanced with the need to maintain anonymity. Following this, the profile of solicitors is unknown. The profile of psychiatrists (i.e. private or NHS employees) is also unknown; nor is it possible to identify whether psychiatrists specialised in adult, or child and family work. Additionally, the data collection and analysis did not make the distinction between ISWs and local authority social workers. This is important because ISWs are defined as experts that are commissioned and operate within the Family Procedure Rules, whereas local authority social workers routinely provide evidence in public law cases.

3.5 Presentation of findings

The findings outlined in sections 4–6 are structured around the aims of this study and are based on the broad themes arising from the qualitative analysis. They reflect themes from all data sources collected across both phases of the study, unless a particular source is specified. Similarly, all professional groups included in the qualitative data collection exercises are referred to collectively as ‘participants’ unless specified, whilst individuals who took part in the online survey are referred to as ‘respondents’. Due to the small numbers of participants, both magistrates and judges are referred to collectively as ‘the judiciary’.¹⁶

¹⁶ Some of the judges were also Designated Family Judges (DFJs) and the term ‘judiciary’ also encompasses their views.

Verbatim quotes are used throughout the report to illustrate findings, and are labelled according to the data source: focus groups (FG), online survey (OS), peer review discussion groups (DG) and judicial interviews (J), and, where possible, the professional group.

4. Processes for commissioning expert reports

Participants believed that the introduction of the new Rules had led to fewer experts being commissioned,¹⁷ although there was less consensus amongst professional groups that this had led to a more appropriate use of experts. The new Rules and fee structures were perceived to have contributed to a smaller pool of available experts, particularly in specialist areas such as paediatric neurology.

4.1 Awareness of the Rules and Standards

The new Family Procedure Rules and Practice Direction introduced in January 2013 changed the threshold to put expert evidence before the court from ‘reasonably required’ to ‘necessary’ to resolve a case justly. The majority of research participants said they were familiar with the new Rules. Almost all (97%) of the 78 online survey respondents reported that they were familiar to at least some extent,¹⁸ with just under half (45%) stating they were familiar to a ‘considerable extent’. Over half (58%) stated they ‘always’ used the new Rules, and just under a third (29%) ‘sometimes’ used them.¹⁹ Among magistrates who appoint experts, half said they ‘always’ used the Rules, whilst half ‘sometimes’ used them.

There was slightly less familiarity with the new Standards that set out to improve the quality of expert evidence. This is likely to be because they were published in November 2013, during the data collection period. However, most participants still had at least some level of awareness. The majority of online survey participants said they were ‘very’ or ‘somewhat’ (84%) familiar with the new Standards.²⁰ Not all judges were familiar with the Standards.

I have looked at [the Standards], yes, but hadn't looked at them before [the researcher] wrote to me. I was conscious it was all going on but then it hadn't yet hit my consciousness stream to actually have a look. And I suspect that's the same because ... a couple of my CJ colleagues ... have a low level of awareness as well. (J6)

¹⁷ As noted in section 3, fieldwork for Phase 1 of this study was conducted between November 2013 and February 2014, and phase 2 was conducted between June and December 2014. These findings are based on qualitative perceptions at the time of the fieldwork. Data on the commissioning of experts in family law cases are not routinely published.

¹⁸ 98% of online survey respondents said they were familiar with the new Rules to ‘some’ extent, a ‘moderate’ extent or a ‘considerable’ extent.

¹⁹ Based on 76 respondents.

²⁰ Based on 77 respondents.

4.2 Implementation of the new Rules

Number of experts appointed

Participants across the study noted that the new Rules had been widely implemented and believed that the stricter threshold to commission experts had resulted in fewer experts being appointed. This was consistent across all professional groups and geographic regions.

In the old days I would have instructed an expert if the parties wanted, almost automatically. Now I give them a lot of grief before I would find it necessary, then they really have to argue and get me round to thinking it's necessary. (J1)

A perceived reduction in the appointment of experts was supported by analysis of the timeliness data. The consortium partners of the research team reported 201 cases in September 2012 and 97 cases in September 2013 where an expert was commissioned. This represents a 48% drop in the number of cases following the introduction of the new Rules in January 2013. Furthermore, three quarters (75%) of online survey respondents said that the new Rules had had an impact on the process of commissioning experts to 'a considerable extent'²¹ and nearly two thirds (65%) said that they had observed a 'strong decrease' in the number of cases where an expert was appointed.²²

Perceptions around whether the impact of the new Rules was leading to a more appropriate or proportionate use of experts were mixed. Whilst responses from the online survey showed that over half (57%) of respondents said they either 'strongly disagreed' or 'disagreed' that the new Rules had led to more appropriate use of experts, 16% said they 'neither agreed or disagreed' and 12% said they did not know.²³ Although survey respondents and focus group participants tended to believe that prior to the Rule change, the courts were over-instructing expert evidence and agreed that changes were necessary, some participants, including psychologists and psychiatrists, compared the changes to a pendulum and felt that the use of experts had 'swung too far the other way'.

I've heard of cases now where it's got to a final hearing, everybody has been in agreement that an expert should have been appointed, so they then have to go and appoint one and everything is delayed, so rather than saving time, the failure to appoint an expert at the beginning has extended the time of the hearing and there will be more occasions where that happens ... I don't think the pendulum

²¹ Based on 77 respondents.

²² Based on 75 respondents.

²³ Based on 77 respondents.

has settled down yet and I don't know where it will be in say a year's time.

(FG1; Psychologist)

Members of the judiciary expressed more positive views on the impact of the new Rules in leading to more proportionate use of experts than other professional groups, including social workers and guardians, experts and solicitors.

Family judges generally agree that experts were used too much. (J4)

There has been, in my opinion, a significant improvement in the way experts are chosen, the timing of it, and the focus of why we're involving them. (J7)

When discussing the types of cases where experts were appointed, participants reasoned that the *Re B-S (Children)*²⁴ case may result in a 'reverse swing'. The *Re B-S* judgment expressed concern about a lack of clear and authoritative guidance in adoption cases and emphasised the need for 'global holistic evaluations'. It was felt by some participants that this implied the need for expert knowledge and could lead to an increase in the use of experts. However, as the *Re B-S* judgment was made in September 2013 during Phase 1 of the fieldwork period, awareness of the judgment and its implications in relation to the appointment of experts was relatively limited.

Since about September, we appear to be going slightly back the other way ... where practitioners and certainly judges have taken that decision [Re B-S] as being perhaps unintended guidance from the Court of Appeal that we should be giving parents more opportunity to challenge care plans ... certainly for adoption, than we thought was the case. (J7)

Interpretation of 'necessary'

The new Rules changed the threshold to appoint experts from 'reasonably required' to 'necessary' to resolve a case justly. Interviews with the judiciary explored how 'necessary' was interpreted for the purposes of commissioning experts. Judges spoke of their own abilities and experience in making this assessment. They stated that they would initially consider whether there was sufficient expertise among professionals already involved in the case, including themselves, a local authority social worker or a Cafcass guardian. If the knowledge of these professionals was lacking, an expert would be more readily

²⁴ The judgment from *Re B-S (Children)* [2013] EWCA Civ 1146 was made in September 2013.

commissioned. Some judges highlighted that the decision whether or not to deem an expert 'necessary' could have substantial implications for a case.

I've had another example very recently where a child was failing to thrive, taken away from parents, the local authority's case was that they were failing to feed the child and care for the child properly. The child didn't pick up as quickly as one might have expected in those circumstances in foster care ... I said I think there needs to be a paediatrician in case there's something else going on and the paediatric report itself said actually the child is gradually picking up ... but I didn't think, having had experience of tens of thousands of children, that that was sufficient and I asked for further and more detailed bloods and so on. And in fact the child ... was found to have a really rare deficiency and an inability to process Vitamin C and feeding the child Vitamin C within 48 hours, she was a different child completely and so the child was then obviously restored back to her parents' care because they clearly ... had been doing their best, they just didn't know. Now that child so easily would have gone, would have left the parents' care almost certainly. And so it shows you the significance of the very fine line of when you need expert evidence. (J5)

The judiciary noted that the decision to commission an expert was not always taken by them in isolation. The parties would usually agree whether an expert was required, and solicitors and barristers would play an active role in both assessing the 'necessary' criteria and the commissioning process. The value the judge placed on the solicitor or barrister's views regarding expert evidence varied across interviewees. Some trusted the lawyers who came before them, whilst others questioned their motivations as they were working solely for the party they were representing. In public law cases, the local authority can also raise the issue of additional expert evidence being required, although one judge stated that local authorities were often wary of doing so.

Online survey respondents reported that the interpretation of 'necessary' varied between courts and locations. This was further substantiated by participants in the focus groups. However, it was not possible to identify a consistent pattern in the way in which 'necessary' had been interpreted from the data collected.

Types of cases in which experts are appointed

Participants across Phase 1 collectively agreed that, in line with the guidance in the Public Law Outline (PLO), there had been an increase in assessments conducted prior to court proceedings which reduced the need for experts to be commissioned during a case. It was reported that under the new Rules experts were now more likely to be appointed for particularly complex cases, such as those that required medical evidence, or when a capacity, cognitive or forensic assessment on the parents was required by a psychologist. Participants stated that psychiatrists would be appointed in many cases where there were issues regarding mental health. There was ambiguity from some participants surrounding which expert should be commissioned for different types of cases and some expert roles were seen to be blurred.

Judges placed considerable emphasis on the importance of medical experts, such as radiologists, because they have specialist knowledge that is beyond that of the court. This was particularly emphasised in relation to non-accidental injuries, where judges did not feel that they had sufficient knowledge to manage a fact-finding hearing without additional expertise.

I have little qualms in a complicated medical case in saying that a proper range of investigations are necessary, because they are, you know, they are. The cases are not straightforward and medicine is developing all the time and I'm not a doctor. (J2)

This was in contrast to the appointment of experts to provide evidence on less specific areas of inquiry, largely on issues relating to the welfare of the child (described by one judge as 'welfare experts'). This referred to experts including psychologists and ISWs. Participants believed that these types of experts were less frequently appointed since the introduction of the new Rules as the judiciary required more justification before agreeing them 'necessary'.

What's more woolly, I suppose, is an expert to work out what's best for a child and whether a child should be placed in foster care – what I call a welfare expert. You know, that's much more nebulous, and in those sorts of cases I think far fewer experts are going to be used. (J4)

The perceived decrease in the use of 'welfare experts' was believed to be linked to the more effective use of local authority social workers (described later in this section). Whilst this change was welcomed by the judiciary, it was generally viewed negatively by other

professional groups, who believed that this type of expert evidence was still necessary and could make a valuable contribution to a case.

All participants said they had noted an overall decrease in the number of psychologists appointed. Judges agreed, however, that psychological expertise was still required in cases to assess an individual's capacity to instruct their solicitors or make legal decisions, and for other cognitive assessments.

The other area where I am always inclined to grant a report is if I have qualms about a parent's capacity, litigation capacity ... I will always have an assessment of their cognitive functioning. (J2)

To some extent judges also thought psychologists were required to undertake an assessment of the risk that a parent might harm a child.²⁵

The use of psychiatrists as experts was also believed to have declined. Participants felt that when mental health issues were already evident from the case files, such as a formal medical diagnosis or a previous report, additional psychiatric assessments were no longer being requested.

Assessments that take a substantial amount of time to complete, such as residential assessments, were perceived as less likely to be authorised. This was particularly so if they were likely to extend the case beyond the 26-week time limit for the completion of public law cases as set in the PLO.

Social workers

Independent Social Workers (ISWs) may be appointed as experts to undertake parenting capacity or kinship assessments in addition to the evidence that is routinely provided in public law cases by local authority social workers. Participants across Phase 1 believed that the appointment of ISWs had declined, and since the introduction of the new Rules, they were appointed only in unique circumstances. Examples of such circumstances may be where there was a specific issue of trust between the local authority and the family, or if the local authority social worker did not have the capacity to complete assessments. On the whole, it was felt that local authority social workers were relied upon in the majority of cases

²⁵ Risk assessments were discussed infrequently during the fieldwork so it was difficult to explore the impact of the new Rules in relation to this type of assessment.

to be the primary source for this type of evidence. It was noted by social workers and judges that this had led to a marked change in social work practice, including the provision of additional training for social workers and through the creation of dedicated social work assessment teams.

There's been a move towards fewer Independent Social Workers because ... if social workers are reclaiming their territory they need to be doing the job and the assessments themselves. (J3)

Participants identified advantages in local authority social workers providing the core evidence about families, such as their ongoing relationship with the family and familiarity with the case. Despite this, concerns were expressed by many participants, including local authority social workers themselves, that not all social workers have received appropriate training, or were able to display the same level of skill or confidence as independently appointed experts. Some felt this issue was exacerbated by heavy workloads of social workers and stretched resources of local authorities. Examples were highlighted where more than ten local authority social workers had been involved in an individual case due to a high staff turnover. Some judges agreed that local authority social workers may not have the time to complete assessments with their other workload demands and argued there was still a need for ISWs for this reason.

Participants noted that the conflicting and complex roles and relationships that local authority social workers have with families may also present challenges in providing evidence to the court. Further, whilst a social worker's professional obligations require them to make their own independent views known in any assessments undertaken for the court, not all judges were confident in social workers' abilities to ignore the 'corporate view' of their local authorities, which may bias expert evidence.

They're there to support the family, yet they're assessing to take away a child. So how do you marry up those two positions? (FG6; Guardian and ISW)

Concerns were raised that the greater reliance on local authority social work assessments since the new Rules may not be wholly appropriate in some cases. For example, some participants believed that certain issues for resolution in the case may require specific psychological expertise. In particular, many expressed strong views that an assessment of

attachment²⁶ required a psychologist and questioned the extent to which social workers were trained and able to assess this. Some participants said that local authority social workers ‘don’t know what they don’t know’ and were sometimes being asked to assess issues outside of their areas of expertise.

The judges did not share these concerns – raised largely by psychologists – that local authority social workers did not have the skills or expertise to conduct assessments. Judges were willing to accept a decline in the appointment of psychologists on the basis that some of the expert evidence commissioned to psychologists prior to the new Rules was not ‘necessary’ and could be undertaken by a robust social work assessment instead.

4.3 Implementation of the new Standards

The introduction of the Standards was generally welcomed by participants across Phase 1 to ensure that appointed experts are suitably qualified and regulated. Participants believed that the Standards would help ensure that inappropriate individuals would not be appointed as experts.

I’m glad to have Standards and the new guidelines are very helpful ... [they are] good to ensure that experts are suitably qualified and regulated ... weed out the good and bad ones. (OS3)

The issue of how the Standards would be monitored was questioned throughout the research. A minority of online survey and focus group participants and one judge felt that the Standards would not have a substantial impact on practice because they were minimum standards that largely reflected existing practice, rather than setting new or enhanced standards.

I’m not sure where the change is because I think my experience is that it hasn’t changed that much ... what I’m seeing on paper isn’t too different to what I’ve been used to in the past. (FG4; Psychologist)

²⁶ Attachment is a psychological theory that describes the type and quality of the relationship between a parent and his or her child.

4.4 Identification and appointment of experts

Across both phases of the study, participants widely reported that the identification of appropriate experts most often comes from ‘word of mouth’, reputation or previous work, but also through expert agencies and internet searches. Peer review discussion group participants agreed that in many cases, experts were instructed based on personal recommendations.

I've been aware as long as I've been doing it that it's the word of mouth, who do you know, who would you recommend? And that's about trust, it's about the devil you know. (DG2; Independent family assessment consultant)

Participants reported variation in practice in the appointment of experts. In some instances, quotes from potential experts were sought. It was suggested that this approach was not always adopted because they believed one impact of the Rule change was that there was now a limited pool of suitable experts. This could mean limited experts available to complete work within the timeframe required for the case. In some instances a particular expert would be sought, most likely on the basis of specific expertise or reputation. Participants themselves were not clear on why such variations in practice existed and whether they applied equally to experts of different professional groups.

All judges noted that experience was crucial in helping them to identify an appropriate expert, and this was usually assessed on the basis of experts' CVs. Views regarding how thoroughly CVs were scrutinised varied. Some perceived that only cursory glances were used to ensure that experience seemed relevant. Others described a need for more thorough analysis to ensure that the right expert was appointed for the case.

Once you've decided it's necessary and you're given, for example, three CVs, you then look for particular expertise in the particular area; and that is quite a skill, because obviously CVs are generally written to promote the person and to get the job, and you need to know how to read between the lines to really work out whether that particular expert really does have experience, for example, of broken bones in under ten year olds, or broken arms in under ten year olds. So then you check how long they've been doing it, how many reports they write, what their teaching posts have been, how many papers they've written on that particular issue – so there are ways objectively to check the person's experience and knowledge. (J4)

Whilst all judges felt that experience was key, some viewed their role as merely to 'endorse the agreement' between the parties involved in the case on which expert to appoint. The importance of cooperation between the parties and the experts was raised. Due to the need to maintain a strong working relationship, judges voiced hesitation in appointing an expert that was openly objected to by either party. One judge provided an example of good practice whereby the parties exchange the name and CV of a particular expert and draft a Lol before the hearing takes place. This minimises the role of the judiciary and focuses on cooperation between the parties.

When quotes from a number of experts were obtained, participants in Phase 1 reported that solicitors were inclined towards selecting the expert that offered services at the lowest cost and within the quickest timeframe, rather than based on previous experience and expertise. Timescales were particularly important as solicitors would not instruct experts unable to meet the statutory 26-week timeframe for public law cases.

Peer review discussion group participants felt that the new timeframes outlined in the PLO had reduced scrutiny of the choice of experts being instructed. This was due to the limited time available within which to choose experts, and because CVs may only be received a few days before the hearing. It was noted that this limits the opportunity to conduct any thorough background research into the appropriateness of an expert.

Smaller pool of experts

Participants widely believed that the pool of available experts was reducing. Experts who responded to the online survey tended to report in the open-ended questions that they were either considering stopping expert work, or had done so already. Nearly half of respondents (45%) reported that there were difficulties finding a suitable expert who can report in a timely manner.²⁷ This was confirmed by the qualitative data across both phases of the research.

A major reason identified for the perceived reduction in the pool of experts was because experts were no longer willing to complete this work under the new fee structure (see later in this section for a more detailed discussion). Participants suggested experts might be reluctant to undertake expert work because it involved substantial risks to their reputation, and under the new fee structure they considered there was less financial incentive for doing so.

²⁷ Based on 74 respondents.

They write a report and they stand in court and that could be their career over, like that. If they get it wrong or make a finding or a claim or a conclusion that's wrong. (FG1; Solicitor)

A perceived reduction in the pool of experts was considered to have made it particularly difficult to find a specialist expert who could complete the work within the required timescale. Most judges agreed that the pool of experts was becoming smaller; particularly medical experts who specialise in particular areas, such as paediatric neurologists. This also applied to experts with specialist experience or skills to work with clients from ethnic minorities and those who had sensory impairments. Other experts that were identified as difficult to locate were those with expertise in specialist areas such as child and adolescent psychiatry, fictitious injury and specialised pathology.

Several online survey and focus group participants expressed concern about the implications of a decrease in the number of experts. These largely related to the quality of future expert work, the training of new experts and being able to recruit new experts.

Fees and hours for expert reports

Many participants expressed considerable frustration in relation to the reduction in fees²⁸ for publicly funded expert work and the usually allowed maximum number of hours outlined in guidance by the Legal Aid Agency (LAA) for completing reports. Although participants in the focus groups acknowledged that the fees claimed by some experts had occasionally been excessive before the reduction, it was widely felt by participants that the cuts had been too severe.

I will not accept instruction at the new... rates: it is simply not worth it.
(OS11; Psychiatrist)

Some participants felt that expert work had become barely sustainable at the current rates. The issue of reclaiming fees from cases that had been completed months or years previously was seen to be particularly problematic. Judges had mixed opinions over whether expert fees were fair.

²⁸ The fees for publicly funded expert work were capped in 2011 with a 10% fee cut and a further fee reduction of 20% was introduced in December 2013. The fees are set out in the Civil Legal Aid (Remuneration) Regulations 2013 as amended.

I think that fees are probably too low if we want to get the top experts to report in the most difficult cases. I just think we need to accept and recognise that in some of these very difficult cases we need to pay for expertise, because otherwise there will be miscarriages of justice. And we are taking risks in our decision-making if we don't have the right sort of expertise. (J4)

Many participants noted that there was little flexibility in the number of hours allowed to complete expert work. Some experts noted that reading bundles²⁹ as part of the preparatory work to provide evidence is time-consuming, and that 'thinking time' should be taken into account.

But what I find takes the time is not the actual writing, it's the checking through the bundle, you know – several hundred pages of documents, trying to check up on things ... it does take time. (DG1; ISW)

Participants identified a range of practices that had developed in response to the new fee and hour structure. Whilst some experts reported that they had simply stopped doing expert work or had considered this, many experts stated that they worked more hours than they were being paid for. Some said that they just worked the hours they were being paid for and then stopped, but others argued that their professional, ethical and moral standards meant they felt 'clinically obligated' to do an assessment comprehensively even if they were not being paid for it. Numerous participants mentioned that experts were not being paid travel expenses, or were not being fully reimbursed. A member of the judiciary noted that in some instances where a particular expert was sought and was not willing to work for the standard fee – usually in medical expert cases – experts were being paid the standard rates but that these were 'topped-up' by a local authority. Although participants were not clear who authorised additional rates, or how common this practice was, this was seen as a further pressure on local authorities in some areas.

Solicitors in the focus groups generally thought that gaining prior authority³⁰ to exceed the maximum rates of pay and hours to complete expert work was a difficult process.

²⁹ A court bundle contains copies of the documents relevant to the case that the court or expert needs to read and will be referred to during the case.

³⁰ The maximum hours usually expected for publicly funded expert work have been outlined in guidance by the Legal Aid Agency (LAA); prior authority from the LAA must be sought to exceed these rates.

Experts felt that solicitors were unwilling to apply for prior authority as the process was time-consuming with increased paperwork, and applications were often refused.

Importantly, participants agreed that the new fee and hour structure had not made a difference to the quality of expert work, although one psychologist suggested that reports were becoming more formulaic due to time constraints. When discussed, this was always in relation to 'other' experts, and participants did not believe that their own work had become formulaic or had reduced in quality.

5. Progression and duration of cases

Participants reflected that expert evidence greatly assisted judicial decision-making where it was considered ‘necessary’ for the case. Analysis of timeliness data indicated that expert reports were being filed more quickly since the introduction of the new Rules and participants agreed that the use of experts did not adversely impact the duration of cases. This was largely due to a collective commitment from all professional groups to meet the timeframes outlined in the Public Law Outline (PLO).

5.1 The contribution of experts to judicial decision-making

There was widespread agreement across both phases of the study that good quality expert reports help judges make good decisions. Indeed, since an expert was deemed ‘necessary’ to a case, the input of the expert was seen as crucial in the judge’s decision-making process.

I would have to decide at an early stage that it’s going to be necessary for me to have the piece of work in order to assist me. So looking at it backwards as it were, yes I thought it was necessary and generally it is. (J11)

Judges said that the impact of each report would vary from case to case, depending on the number of experts appointed and whether the issue on which an expert had been asked to report was contentious; for example if more than one expert offered different opinions. Judges valued the information that was provided by experts and took this into account in their decision-making. Although one solicitor suggested that an expert ‘typically will go the direction the evidence is going’ and is unlikely to change the direction of a case, they acknowledged that this was a ‘cynical’ view.

An issue that was raised more frequently by non-judicial participants was the potential impact on decision-making without experts. That is, as discussed in section 4.1, many participants felt that experts were no longer being appointed frequently enough since the introduction of the new Rules. Participants raised concerns, particularly in the focus groups and online survey in Phase 1, of the potential impact of this change on families and children. Reasons identified for this were largely related to the complexity of the underlying issues that have led to family court proceedings. Participants felt that families and children may require a range of interventions and resources that were not being considered in the absence of expert evidence, particularly from psychologists, psychiatrists and ISWs. Many experts in this study feared that this could lead to ‘short-term fixes’ that did not address the underlying issues for a family, which may have longer-term impacts for both children and the court. Although the

impact of a lack of expert evidence was beyond the scope of this study, this may be usefully explored in further research (see section 7).

5.2 Impact on case duration

Participants reflected that the use of experts during family proceedings did not impact on the duration of cases. Many contested the conclusions drawn in the Family Justice Review that the appointment of experts adversely impacted on case timeliness. Despite this, there was widespread agreement across all professions, including the judiciary, that experts were providing reports much more quickly since the introduction of the new Rules. Two main reasons were identified for this. Firstly, participants were in agreement that courts were committed to meeting the timeframe requirements as outlined in the PLO that were introduced alongside the Rule change. Experts were expected to align with these requirements and those who could not would not be appointed.

The tolerance has gone towards the reports being late, because there was one case where one case was filed late, the judge never went for his approval again. Simple as that. (FG1; Solicitor)

Secondly, the reduction in the use of experts since the new Rules meant that some experts had fewer appointments from the family court. This made the shorter timeframes easier to achieve.

The irony is that we've fewer referrals ... I used to be in the position where I've said that I can't do that in that timescale I have all these cases backed up, but now I'm able to say yeah, I can do it because they are so few referrals coming in and it is not good practice really. (FG1; Psychologist)

Participants reported that whilst the shorter timeframe for completing reports in public law cases was achievable, it placed experts under increasing time pressure. Some experts reported that they had adapted their practices so that they could provide reports more quickly.

In terms of timeframe, we completely recalibrated our system to the point where we are now regularly meeting the, you know, eight to ten weeks is standard now. (FG4; Psychologist)

Quantitative analysis of case timeliness data supported perceptions that expert reports were being filed more quickly since the new Rules. Analysis showed a statistically significant decrease³¹ in the number of days taken in September 2013 compared with September 2012 from enquiry to the filing of the report (average of 76 days reduced to average of 56 days); and in the number of days between receipt of the Lol and filing the report (average of 47 days reduced to 35 days).

Delay

Participants reported that they rarely experienced delays with experts submitting reports. The judiciary reported that this was likely to be because most experts were aware of the importance of keeping to the timescales and were generally adhering to them.

When there were delays with an expert report being filed late, all professional groups, including the judiciary, reflected that the cause of the delay was often not related to the experts. Some causes of delay were related to the Lol. These could include the expert receiving the Lol late, or receiving overly complex instructions that required the expert to seek clarification from the court. If the Lol did not include key information, such as the contact details of the parties, this could inhibit their ability to complete their report on time. See section 6.1 for a more detailed discussion of what makes a good quality Lol.

Other causes of delay were a result of poor or insufficient communication. This could be between the expert and the solicitors to the case, or it could arise due to a lack of engagement from the parties, or through difficulties accessing relevant information such as DNA test results or medical records. Participants reflected that there had been some changes in practice since the new Rules in order to avoid such delays. For example, a judge in Phase 2 noted that there was now improved communication between the expert and the judge throughout a case to discuss and mitigate important issues that may lead to delay. This included ensuring access to medical records or helping the expert to contact a party for an expert assessment.

It was suggested that the perceived reduction in the pool of experts may lead to delays if an appropriate expert was not available, and this was a particular problem with specialist or medical experts. These situations led to concern about the potential for a less appropriate expert to be appointed for the case.

³¹ Level of significance $p < .05$.

If I had a baby shaking case and the top three neurologists in the country were unavailable then I wouldn't take number four if I was really unhappy with them. I'd extend the timescale for the case. (J11)

Participants noted that not identifying the need for an expert early in the process could potentially cause delay. In view of this, and in line with guidance in the PLO, many reported that they mitigated this by seeking early advice or making decisions during pre-proceedings, or very early in proceedings, about whether an expert is likely to be required.

So I think [it is important] having early input, early legal advice about getting the right expert, obviously at pre-proceedings stage... (DG1; ISW)

Whilst these perceptions were broadly supported by analysis of the timeliness data, there were some instances of delays related to experts themselves, including illness, bad weather and issues with quality assurance of expert work. These are outlined further in Appendix C.

6. The quality of letters of instruction and expert reports

Professional groups widely agreed on the features that make a good quality letter of instruction (Lol) and expert report, both across Phase 1 and when actual materials were reviewed in Phase 2. The new Rules were reported to have improved the quality of Lols, although perceptions on the impact on quality of reports were mixed.

6.1 What makes a good quality letter of instruction?

When experts are appointed, a Lol is written that outlines the questions that the expert is asked to address for the court and the terms and conditions of these questions. The instructions are written and agreed by the solicitors of all parties involved in the proceedings and the court. What an expert can expect from the Lol is outlined in section 4.1 of Practice Direction 25C (PD25C).³² Participants reported that good quality Lols are succinct, focused and will include only the minimum number of questions required to appropriately instruct the expert and enable them to complete their report.

Participants suggested that the most important details, such as the date the report is required by, representation status of the parties, dates of hearings or key meetings and the questions being asked of the expert should be outlined at the beginning of the Lol. It was recommended that the background to the case should be in the form of a short summary, and the 'core' Lol should be no more than three pages, unless the background was particularly complex. As outlined in section 5.2, participants stressed that providing the contact details of the parties was particularly important in helping experts avoid unnecessary delays. Participants reported that it would be helpful for information such as the details of the parties involved in the case, the documents that will be made available to the expert and the schedule of fees to be attached as an annex, although guidance in PD25C includes this as part of its core requirements.

Participants reported that before the new Rules, Lols were overly long, with too many, often repetitive questions and the Rules had led to fewer questions and less repetition. PD25C states that questions should be kept to a 'manageable' number, but this is not quantified. Although there was reported variation in cases and their complexities, between six and eight questions was most often cited by participants as appropriate to instruct an expert. Too

³² Available at: https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/practice-direction-25c-children-proceedings-the-use-of-single-joint-experts-and-the-process-leading-to-an-expert-being-instructed-or-expert-evidence-being-put-before-the-court#IDA54MGC.

few questions, or questions that were particularly vague, such as 'Please undertake an assessment', were viewed as equally unhelpful as too many questions. Participants highlighted the importance of questions being case-specific rather than general questions relating to the expert's knowledge. The addition of a generic 'Please offer any other comments that are within your expertise' was highlighted as useful for experts as they may occasionally uncover evidence throughout their assessments that could impact on the case but have not been directly requested. Annex A of PD25C does not raise this as a potential question.³³

Participants noted that poor Lols led to addendum reports being sought for clarification. If an expert was not asked to address an important issue in a Lol, the expert would be asked at a later stage to provide this information. Some highlighted that since Lols were important for providing focus to experts' reports, poor questions invariably led to poor quality reports.

There were, however, generally mixed perceptions of the link between Lols and reports. Some participants said that good experts could write good reports, regardless of the quality of the Lols, for example by structuring the report to take account of repetitive questions. It was argued that this emphasises the need to allow experts some flexibility in how they formulate their own reports. One psychologist spoke of reordering and regrouping the questions in a Lol they received in order to better suit their needs, whilst other participants were cautious about changing the Lol, even if there were obvious errors. Nevertheless, good Lols provided clear instructions to experts and limited the likelihood of delays.

The potential for bias in Lols was raised within peer review discussion groups. This was particularly so in situations when lawyers have agreed the questions between the parties, and where there are an excessive number of questions.

I think the problem with the 15 questions thing is a product of the process, which is lawyers trying to bring anything, and often the problems are people perceive the questions to be angled or end at a certain outcome, or people want the report to come out with certain issues that may assist their party, their client... Or if somebody puts in a question that is, in a sense, angled ... or you would say 'I insist on my question going in' and then the other person says 'Well I'll put in this other question' to kind of redress the balance. (DG1; Solicitor)

³³ Annex A of PD25C contains suggested Lol questions for child mental health professionals or paediatricians, and adult psychiatrists and applied psychologists based on a Children Act case.

Participants agreed that Lols should be objective and not 'lead' the expert towards any particular conclusions. In poorly drafted Lols, experts believed that they could identify who drafted the questions and the implications that these questions were leaning towards. This was viewed as unsatisfactory and experts criticised the approach of some lawyers who drafted Lols in this way. This could also conflict with an expert's duty, as outlined in PD25B, 'to provide an opinion that is independent of the party or parties instructing the expert'.

6.2 What makes a good quality report?

Structure and content of reports

Practice Direction 25B outlines the required contents of an expert report. Certain requirements such as the 'statement of truth'³⁴ were not raised by participants during the research, but others were considered in depth. All professional groups across both phases of the study agreed that reports should be short. Fewer than 20 pages was recommended by solicitors and judges as an appropriate length. Participants, including members of the judiciary, said that reports are now shorter than they were before the implementation of the new Rules.

Participants also focused on the need for clarity within reports. It was considered that reports should include only information that is specific to the case and avoid unnecessary repetition. Further, experts should not repeat information from any of the documents with which they are provided to help prepare their report, as judges have access to this information, nor should they duplicate information from reports they have written for previous cases. Additionally, technical language, a large number of quotes, or lengthy discussion of interviews and assessments with clients were perceived as unnecessary. The ideal report, as summarised by one participant in the peer review discussion groups, was 'technical but understandable'.

Participants reported that it was important that experts are not biased and do not stray outside of their areas of expertise. Both of these points are reflected in the current guidance in PD25B. Judges and solicitors noted that experts should not make judgements of fact or stray into the duties of the court by pre-empting or providing advice regarding the outcome of the proceedings. Further, the importance of experts ensuring that their practice is

³⁴ Expert reports must be verified by a statement of truth which should take the following form: 'I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.' When the report relates to children proceedings an additional statement must be included where the expert explicitly states that they have met the required Standards.

current, and that they do not use out-of-date psychometric tests or theory in their reports was highlighted.

Summaries at the beginning of reports were welcomed by judges, as was a contents page, because this allowed them to easily identify the core information. Other professions, such as solicitors, favoured reports that developed the argument throughout and led to a clear conclusions section. All professional groups explained that reports should demonstrate sound analysis and fully justify how conclusions had been reached. In particular, it was important for the report to outline how assessment of the clients or case materials had led to the conclusions.

A good report should be a story and should answer the questions, this [is] the information, this is how it's collected, these are the outcomes, and these are my conclusions... (FG5; Psychologist)

Outlining reports in this way enabled judges to understand the analysis and conclusions that had been drawn, which allowed them to use the information more confidently in their decision-making. This was particularly useful for contentious issues, for example where different experts had reached different conclusions. The 'balance sheet approach'³⁵ as advocated by PD25B was not raised during the fieldwork. However, specific recommendations in expert reports, such as the type of therapy recommended for a client, rather than a general recommendation that intervention is required, was highlighted as good practice.

The use of 'hot-tubbing' experts

One process identified by participants as having the potential to improve the quality of expert reports was the use of 'hot-tubbing'. Usually, this involves using the knowledge of multiple experts in court simultaneously, encouraging open discussions of the evidence, and is particularly useful for complex or controversial cases. Participants believed that 'hot-tubbing' can be used for reports as well as oral evidence. This was believed to reduce costs compared to appointing multiple experts separately, whilst providing more robust assessments to aid judicial decision-making.

³⁵ The balance sheet approach encourages experts to clearly list any factors that support or undermine their assessment decisions. This may include contradictory or substantiating evidence as well as the use of current theories that advocate their approach.

The impact of the new Rules

Almost half of online survey respondents (48%) said they either ‘strongly disagreed’ or ‘disagreed’ that the new Rules enabled them to provide good quality expert reports. Although only 8 per cent of respondents said they agreed with this, a sizeable proportion said they neither agreed or disagreed (35%), or did not know (9%).³⁶ Many experts expressed concern that as the new Rules had, in their view, led to the loss of good experts, the overall quality of expert evidence available to the court had declined. This view was particularly prominent among psychologists.

If you lose all the experts and they are filled by people who don't have the same level of expertise and knowledge, then you get diminished reports.

(FG9; Psychologist)

However, none of the judges reported that they had noticed a difference in the quality of reports since the changes. Furthermore, many other experts noted that although they had a more limited timescale within which to complete their assessments and compile reports, they felt that this had not impacted on the quality of their own reports.

6.3 Feedback

Most participants said that experts should receive feedback on the evidence they provide, but most reported that this rarely happened in practice. Overall, 87 per cent of online survey respondents said they either ‘disagreed’ or ‘strongly disagreed’ that feedback was routinely received on the evidence they provide and on the outcome of the case.³⁷ When feedback was provided, it was informal and took a range of forms; for example, judges speaking to experts outside court at a chance meeting. Experts told us that they inferred positive feedback if they were instructed again on later cases.

We need feedback, how is one going to deal with one's understanding as an expert witness if you don't get any feedback? (DG3; Other practitioner)

There was less agreement on the type and format of feedback that would be helpful. Some experts said that feedback on the outcome of the case would be beneficial. Others felt that feedback should explain whether their report was valuable or otherwise, highlighting positive

³⁶ Based on 66 respondents.

³⁷ Based on 75 respondents.

aspects of the report and any improvements that could be made. In their view this would help in terms of quality assurance if they were instructed again.

I understand there's problems, but you can still send a note like for example, some of the reports we saw, if you'd received them you might have said ... 'there's not enough analysis here'. So you can say your report may have been strengthened if you'd done A, B and C and I think most people who write reports would appreciate that kind of feedback. (DG3; Psychologist)

It was also rare for experts to receive feedback on why they had not been instructed. Participants reported that it would be helpful to know, for example, whether this was because another expert offered a lower quote or commitment to complete in a shorter timeframe.

Experts and solicitors agreed that the instructing solicitor would be an appropriate party to provide feedback in terms of the outcome of the case. However, solicitors in the focus groups acknowledged that they did not always do this due to time pressure. They also felt that it was outside of their expertise to comment on the contents of the report. Although many experts thought that feedback on the content and quality of their reports would be helpful, participants struggled to identify a viable process to achieve this. Because of the limited time available to solicitors and judiciary to provide feedback, peer review of reports by other experts was suggested as a viable alternative.

There was variation amongst participants in their understanding as to whether experts were permitted to see the judgment of the case. In any event, it was rare for experts to receive this even though it was desired by all professional groups. Peer review discussion group participants noted that judgments were only transcribed in appeal cases. Some judges said that they often asked for experts to be sent a copy of judgments and this formed part of an informal feedback process.

In my cases, I have always been absolutely clear that it is our duty as a judge to make sure the expert in the case gets a copy of your judgment and in your judgment you give proper feedback. (J2)

7. Conclusions and implications

This report outlines the findings from a mixed-methods research study on the use of experts in family law. The nature of the sample means that the views and experiences of psychologists and psychiatrists are over-represented. The research was commissioned to address some of the evidence gaps in relation to the commissioning of experts, as well as the requirements for a good quality letter of instruction and expert report. The study has provided several practice and policy implications that are summarised below. It has also highlighted a number of important areas that would be usefully explored with further research.

At the time of the fieldwork, conducted between November 2013 and December 2014, participants believed that the introduction of the new Rules had led to a decline in the commissioning of experts. They raised some concerns that this had resulted in a reduced pool of available experts. This concern was often expressed alongside frustration in relation to the fees and hours available to complete publicly funded expert work, which was suggested to have resulted in fewer experts being willing to report under the new structure. Ongoing monitoring of the availability of experts, particularly in specialist areas of medical practice, could be considered to estimate the extent of this concern. These findings also highlight some potential risks of making any further reductions in the fees and hours available for publicly funded work.

Analysis of the timeliness data indicated that expert reports were being filed more quickly since the introduction of the new Rules, and there was a general consensus among participants that there was a strong commitment to meet the timeframes outlined in the Public Law Outline. Although delay was rare, participants identified areas of good practice that could prevent delay in the expert process. For instance, it was seen as important that letters of instruction (Lols) include the contact details of the parties to a case so experts are not unnecessarily delayed in completing their reports. Further good practice considerations for the expert evidence process are illustrated in Figure 7.1.

The study highlighted that continued efforts to ensure that Lols are clear, focused, and include only the minimum number of case-specific questions required to appropriately instruct the expert are particularly important in facilitating an efficient expert process. Lols drafted in this way should ensure that addendum reports are not required and thereby help avoid delay.

Participants said that expert reports should be concise – at a maximum of 20 pages – and sensibly structured. Reports should include only case-specific information within the expert's area of expertise. They should also include a summary and contents page. Many of these findings broadly reflect existing guidance for experts in PD25B. The study therefore supports the usefulness and relevance of the PD25B guidance for experts in delivering high quality reports to the court, and highlights that these requirements should be maintained to promote good practice within the field.

The qualitative data indicated the importance of experts receiving feedback on their reports, although participants said it was not regularly provided. It may therefore be helpful to develop processes for the consistent provision of feedback to experts in family law cases. Consideration should be given to how this may work in practice, although it may be appropriate to develop processes for the supervision, training and peer review of experts. The routine recording and sharing of final judgments to experts was also raised as a potential solution, and experts agreed this would be useful for their development in order to continually improve the quality of their work.

Local authority social workers, as well as other professional groups, suggested that not all social workers have the same level of necessary skills or confidence as independently appointed experts to present evidence effectively to the court. Additional training may assist local authority social workers with this aspect of their role. Alongside this, when assessing the workload and resources of the local authority it is important to recognise that providing evidence to the court is an integral part of the social worker's role. The judiciary noted that enabling robust social work assessments supported their decision-making.

Awareness of the Standards was good, and they were welcomed to ensure that experts are regulated and qualified. Some questioned the impact of the Standards and felt that they simply reflected existing practice. There were also mixed perceptions of whether the new Rules and Standards, as well as other implications of family justice reforms, had affected the quality of expert reports. A process for monitoring whether, and how, experts meet the new Standards may therefore be beneficial.

Figure 7.1 Good practice within the expert process



Moving forwards

Whilst the Family Justice Review in 2011 identified a 'routine acceptance' of the need for experts and other literature suggested the family court had become over-reliant on experts prior to the Rule changes, other research has highlighted the valuable contribution experts make to family cases over and above evidence routinely provided by the local authority. In this study, the judiciary were positive about the Rule change and confident both in their ability to determine when experts are necessary for a case, and in the sufficiency of a good quality social work assessment to provide the evidence required.

It was beyond the scope of this study to engage in a wider debate about the impact of a lack of expert evidence on cases, and the capability or appropriateness of social workers to be the primary expert. These are, however, important issues that could be considered for further research. Whilst this study has explored how experts can contribute to judicial decision-making, some questions remain on the extent to which experts may influence or change the direction of a case. The study suggests a need to understand the impact on cases where experts are not appointed, including the short-, medium- and long-term impact on the children and families involved. Whilst this study has contributed to the evidence gap on the commissioning process, concerns raised by experts in the study lead to questions around why experts may define and interpret 'necessary' differently to the judiciary and, indeed, the extent to which 'necessary' is interpreted differently by judges across the country and why.

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Appendix A

Detailed methodology

This study comprised two phases. Four data collection methods were employed in Phase 1: an online survey, focus groups, judicial interviews and a quantitative analysis of case timeliness data. In Phase 2 cases were reviewed by peer discussion groups and through judicial interviews. These research strands were designed to reflect a range of professionals involved in family law cases where experts are appointed, and to provide in-depth discussions (focus groups, peer review discussions and interviews), geographical spread (online survey) and quantitative analysis of the timeliness of expert reports (timeliness data).

The study design was reviewed and approved by the project's Steering Group, MoJ Analytical Services Ethics Advisory Group and Coventry University's Research Ethics Committee. Permission to interview family court judges was provided by the Judicial Office and permission to use documents from closed cases was provided by Her Majesty's Courts and Tribunal Service (HMCTS). The study was conducted in accordance with the British Psychological Society's Research Ethics Guidance, Health and Care Professions Council Standards and Coventry University Research and Governance policies. All participants were provided with full information about the study and their rights to withdraw from the research. Participation was voluntary and data stored anonymously and in line with data protection legislation.

A.1 Focus groups

Seven focus groups were undertaken to facilitate a detailed discussion with a range of professional groups in six locations across England. Focus groups of two hours duration were held from November 2013 to January 2014. The aims of the focus groups were to explore participants' perceptions and experiences of:

- the new Rules and Standards;
- the way in which experts were identified, selected and appointed;
- the timeliness of commissioning reports;
- the quality of reports and Lols;
- fees paid to experts; and
- feedback provided to experts.

Focus group participants were recruited using opportunity sampling. Professionals who were involved in family law cases where experts were commissioned or had been commissioned as an expert themselves were identified via the research team's contacts and Bond Solon's network of experts. Professionals were invited to take part in the focus groups via email.

Efforts were made to include participants from a range of professions in each group, although this was not always possible due to a lack of availability amongst some professional backgrounds. Professional groups such as clinicians (particularly psychologists and psychiatrists) were over-represented. This is, in part, a reflection of the consortium partners of the study, which influenced the recruitment approach and, subsequently, the sample. Medical experts, child advocates and children's guardians were under-represented in the sample. This may be partly because organisations such as the Law Society for Accredited Children and Family Panels and the Association of Lawyers for Children were not used as avenues for recruitment.

The professional backgrounds of the focus group participants are shown in Table 3.1 within the main report. The process by which data were collected means it has not been possible to provide a further breakdown of these professional groups. We cannot therefore differentiate between local authority social workers and Independent Social Workers. This is significant because local authority social workers are not categorised as 'experts' under the Family Procedure Rules and face different challenges whilst carrying out their role for the court. Nor can we identify whether the psychiatrists specialised in adult work, or worked with children and families. Psychiatrists may be a combination of both NHS employees and those privately practising, as these details were not requested. It is possible that a further breakdown may have revealed interesting distinctions between these groups. An inability to explore this question should be considered when interpreting the findings.

When respondents were not able to attend the focus groups, they were instead sent the details of the online survey.

A.2 Online survey

The online survey explored the same aims as those outlined for the focus groups in A.1. The survey included a combination of fixed-choice questions, rating scales and open-ended questions. The survey enabled a greater geographical spread than would have been possible with focus groups alone, and provided an opportunity to include professionals not available to take part in the focus groups.

The online survey was available from 22 October 2013 to 24 February 2014 and was completed by 78 participants. Requests for professionals who contributed to family law cases where expert reports were commissioned and/or had been commissioned as an expert in cases themselves were placed on professional websites and forums. These included the Professional Association for Children's Guardians, Family Court Advisors and Independent Social Workers (NAGALRO), British Psychological Society Practitioner forums, the Experts Consortium, the College of Social Work, National Association for Social Workers (NASW), the Magistrates' Association, and Nottinghamshire Magistrates' website. In addition, emails were sent via the research team's contacts (which included expert consortium partners). The sample was therefore self-selected. The professions of the respondents to the online survey are shown in Table 3.1.

As with the focus groups in Phase 1, psychologists and psychiatrists were over-represented in the online survey respondents. Solicitors were under-represented. The online survey was the only opportunity for the magistracy to participate in the research and therefore their perceptions and experiences have limited representation in the survey as well as the study overall. This was despite targeted attempts to increase their participation, including through the Magistrates' Association. The limited representation of magistrates is an important consideration in interpreting the findings of this study, given their role in the appointment of experts in family cases. The profile of magistrates, for example whether any were Chairs of Family Panels, was not collected.

A.3 Phase 1 interviews

Interviews were considered the most appropriate approach to explore the perceptions and experiences of the judiciary, as they allow for in-depth data to be collected. The aims of the interviews were to explore the same areas as those outlined for the online survey and focus groups.

Interviews in Phase 1 were conducted with seven judges and one barrister and lasted for an average of 56 minutes. In order to ensure that a range of judges was recruited, the Judicial Office contacted eight judges on behalf of the research team to request their participation in the study. The research team then made arrangements for the interviews to be conducted at the judges' convenience. Whilst this enabled judges from all tiers of the judiciary to be

approached, the Judicial Office acted as a gatekeeper to interviewees, and this risked bias in the sample. At least one judge from each of the following judicial tiers was interviewed:

- District Judge;
- Designated Family Judge;
- Circuit Judge;
- Deputy High Court Judge; and
- High Court Family Judge.

Two members of the research team conducted these interviews during January and February 2014. Six of these interviews were conducted face-to-face and two by telephone.

A.4 Case timeliness data

To examine the timeliness of expert reports, a quantitative analysis of key timeliness measures within family law cases was conducted. Data were collated from the consortium partners for all the cases where they received initial enquiries about the availability of an expert in September 2012 and September 2013. These time points were selected because September 2012 was prior to the introduction of the new Rules and September 2013 eight months after, ensuring sufficient time for the new Rules to embed. The data were collected at the end of January 2014, which allowed time for the reports to have been filed.

For each case the dates were collated for:

- the initial enquiry relating to the appointment of the expert;
- confirmation of the expert's appointment;
- receipt of the letter of instruction; and
- submission of the report.

In addition, where reports were filed late, the reasons for this were recorded (see Appendix C). No other details about the cases were collected. A total of 298 cases were included (201 in September 2012 and 97 cases in September 2013).

A.5 Peer review discussion groups

Phase 2 was designed to explore areas of good practice and to identify ways in which the expert process could be improved. An innovative approach of peer review methodology was adopted. This methodology is based on medical audit, which is widely used in clinical

settings to improve the quality of service and maintain standards. Fieldwork in Phase 2 used the principles of clinical audit to review the use of expert evidence. Although this approach has similarities with workshops or focus groups, peer review is more purposeful and uses actual examples to focus the discussion. Documents from closed case files, such as Lols or expert reports, were used to guide discussion in peer review discussion groups and in judicial interviews. Following permission from HMCTS, documents including expert reports, Lols, Cafcass reports, social worker reports, viability reports and threshold documents from 20 family law cases were collected from five courts in England. Courts were selected to include a range of geographical locations and court types. The cases contained reports from 32 experts from a range of professional backgrounds, as outlined in Table A.1. Case materials were anonymised and sent to discussion group members in advance of the groups. Participants were asked to explore factors that related to the quality, supply and use of experts in the family court, including perceptions of the role, the value of expert reports to the judiciary and what makes a good quality expert report.

These issues were discussed in four day-long discussion groups held in Coventry and London in June and July 2014. Two groups reviewed four cases each and two reviewed six cases. Participants were asked to discuss one case at a time using a question schedule developed specifically for this purpose (see Appendix B) to ensure consistency in the consideration of each case. Each case was discussed for 30 to 60 minutes, with discussions later in the day generally taking less time than those early in the day, due to the similarity of issues for each case and fewer new points emerging from discussion. Each peer review group included individuals from a range of professions (see Table A.2).

Table A.1 Expert reports included as the basis for peer review discussion groups

Type of expert report	Number
Psychology	15
Psychiatry	6
Medical	5
Hair strand	3
Residential assessment	2
Cognitive assessment	1
Total	32

Table A.2 Professions of peer review discussion group participants

Profession	Number
Psychologist	3
Psychiatrist	3
Solicitor	2
ISW	1
Social worker	1
Independent consultant	1
Other practitioner	1
Total	12

As with the focus groups, participants were recruited by opportunity sampling. Requests were circulated by the research team's contacts and Bond Solon's network of experts. Efforts were made to include a range of professions in each group but, in line with other forms of data collection, psychologists and psychiatrists were over-represented whilst other groups' views, such as those of medical professionals, were not adequately reflected.

A.6 Phase 2 judicial interviews

As with Phase 1, interviews were considered the most appropriate method to explore judicial experiences in respect of the aims of Phase 2. Four judges were recruited using a combination of opportunity sampling and Judicial Office contacts. The judges approached without Judicial Office assistance were all Circuit Judges. It is unknown what tiers of the judiciary the Judicial Office contacted on the researchers' behalf for this phase of the project.

Telephone interviews of an average 74 minutes took place from September to December 2014 at the judges' convenience. Copies of the materials from two of the cases used in the peer review discussion groups were emailed to judges prior to the interview. Each judge reviewed different cases, resulting in eight cases being reviewed. The cases were selected to ensure that reports from different experts (such as medics, psychologists and psychiatrists) were included across the interviews. The same question schedule was used as for the peer discussion groups; however, judges discussed both cases in their responses to each answer, rather than reviewing one case at a time, due to time restrictions.

A.7 Analysis

The focus groups, interviews and peer review discussion groups were transcribed manually verbatim. These responses, along with the open-ended text responses to the online survey, were analysed using thematic analysis. The phases for conducting thematic analysis as

outlined by Braun and Clarke (2006) were followed.³⁸ For Phase 1, focus group data were analysed first, followed by the interviews and then the online survey responses. An inductive approach was taken based on the core aims of the research and used to structure the findings section of this report. For example, all qualitative data collected about the process of commissioning expert reports were identified, reviewed and re-reviewed. The data were coded and patterns were identified through the analyses of the three types of qualitative data. These codes were reviewed and grouped to create themes and sub-themes.

The framework and themes identified in Phase 1 were used as the basis of the analysis of the Phase 2 data. Generally, the findings of Phase 2 supported and triangulated with the findings of Phase 1. However, where necessary in the findings relating to duration, progress and quality, revisions to the themes and sub-themes were made to reflect the findings of both phases of the study. Few areas of good practice and specific areas for improvement were identified in Phase 1. With more discussion on these issues in Phase 2, the entire dataset was reviewed again to collate information and develop themes on this research question.

The fixed-choice questions of the online survey were analysed descriptively. Due to the small numbers of participants from different professional groups, it was not possible to reliably statistically compare the responses to these questions between professions. For the same reason, it was not possible to conduct statistically reliable analyses of responses by geographical location.

To analyse the timeliness data, the number of days between the initial enquiry and the report being filed, and between the receipt of the letter of instruction and the report being filed were calculated for each case. Independent samples t-tests were used to assess the differences in these times across the two time periods. The reasons for the late submission of reports were listed and compared between the two time periods (see Appendix C).

³⁸ The phases outlined by Braun and Clark (2006) were: familiarisation of data; generating initial codes; searching for themes; reviewing themes; defining and naming themes; and writing the report.

Appendix B

Peer review discussion group question schedule

Background and introduction: *My name is [name and role removed].*

We are meeting to discuss your views and opinions on the contribution of expert witness reports in family law cases. Specifically, this part of the research will examine and review actual 'cold' cases in which expert witnesses have been appointed in family law cases. The aim of this phase of the research is to peer review a sample of family law cases where experts have been commissioned to explore factors that relate to the quality, supply and use of experts in the Family Court, including perceptions of the role, the value of expert reports to the judiciary, what makes a good report for the court and their contribution to just and timely decisions being made. Overall this phase aims to identify good practices and practical suggestions on the nature and content of an effective and efficient expert witness process.

Although commissioned by the Ministry of Justice we are carrying out this work independently.

Scope of exercise:

Over a period of four non-consecutive days, we plan to review 24 cases, reviewing 6 cases a day. Reviews will be based on the following sources of information:

- Finding of fact, Threshold document, Cafcass report, Section 7 social work report, letter(s) of instruction, expert report(s), Scott schedule (if present) and final judgment.

These cases have been anonymised. In discussing these cases, please do not identify specific cases/individuals. These discussions will be transcribed and analysed using thematic analysis.

Ethics, Confidentiality: *As written in the information and consent sheet, anything you say in this group discussion will be kept confidential and anonymous; we will not reveal your identity when analysing or reporting the findings. You do not have to answer any questions you're not comfortable with and please feel free to ask me to clarify if you're unclear about any of the questions asked. There may be lots of different opinions shared in this discussion; please can we ensure we respect each other's views and do not talk over one another.*

Consent to record/ take notes: *A colleague is sitting with me and will be taking brief notes of your responses so I can focus on the discussion OR I will be recording this discussion. We will use this information to produce a report based on interviews, focus groups and survey responses from judges, experts and practitioners across family justice. Although your responses may be presented in this report, they will be anonymised and you will not be identifiable. Is that all ok?*

Do you have any questions before we start?

Letters of instruction

We would like to begin by examining the letter of instructions and how these relate to the expert witness reports.

1. What are considered the key elements of a good letter of instruction?
2. What features of letters of instruction are considered poor quality?
3. Does the letter of instruction clearly set out the timeframe for the case, list of relevant court dates, and the date by which the expert witness report should be completed and submitted by?
4. Does the letter of instruction clearly set out the fee structure for the commission of an expert witness report?
5. If the questions in the letters of instruction are unclear or unhelpful, does the expert take steps to clarify what is needed?
6. How does the quality of letters of instruction affect the quality of reports?
7. Should the number of questions in instructions be limited?
 - a) Does having too many, or too few questions, affect the quality of the report?
 - b) What are considered the most useful questions in a letter of instruction?

Quality of reports

This section focuses on the quality of expert witness reports.

8. What are your views on the quality of the expert reports currently commissioned?

9. What factors are considered most important in assessing the quality and suitability of experts (e.g. experience, qualifications, etc)?
 - a) Are levels of experience and qualifications clearly listed?
10. How relevant is whether the expert witness is currently working in clinical practice?
11. What features of reports detract from their quality and value to the court?
12. How readable are the reports?
 - a) Are the conclusions easily understood and accessible?
13. To what extent does the report address the key issues of the case?
 - a) Does the report specifically address the questions as listed in the letter of instruction?
14. In reaching the conclusions do the reports clearly make reference to other documented evidence in the bundle?
 - a) Does the expert witness draw on other evidence in reaching the conclusions?
15. What are the key elements that make a good quality expert report?
16. What features of reports detract from their quality and value to the court?
17. Are there any best practices which help facilitate the delivery of good quality expert reports?

Timely commissioning and delivery of quality reports

We now want to focus on the timeliness of reports and the impact on the progression of cases.

18. From the information available is it possible to determine whether the expert witness reports were completed and submitted within the given timeframe as detailed in the letter of instruction?
 - a) If there was a delay in the completion of the report, is this delay explained?

19. How do professionals feel that the quality of expert reports can impact on the progression of cases?

The role of expert reports in Judicial Decision Making and best practice

This section is based on the final Judgment:

20. How do professionals perceive that expert reports support the judiciary in their decision?

21. Does the final judgment make reference to expert witness evidence (either oral or written evidence)?

a) How is this referenced in the Judgment?

b) Does the Judgment make reference to the usefulness (or otherwise) of oral evidence?

c) Does the Judgment offer feedback in terms of the usefulness (or otherwise) of the expert witness report in reaching a final decision?

22. To what extent does the final judgment detail the contribution of expert witness evidence?

23. Do experts receive feedback routinely on the outcome of the case and the evidence they have provided?

24. What mechanism might be put in place to improve feedback of expert witness evidence?

Closing Question

Finally, thinking about everything we have discussed and based on your opinion: what one key thing do you think is most important in improving the use of expert evidence (oral or written) in family law cases?

Appendix C

Reasons for delays of expert reports

These data are the reasons recorded for the delay in experts' reports being filed late. The data are verbatim extracts from the cases.

2012 Delays

Client delays (n=10)

- Client failed to attend first few appointments
- Lack of engagement from client
- Associate struggled arranging appointments with client
- Client failed to attend some appointments
- Continuous cancelled appts with child – 5 days
- Client non-attendance – 2 weeks
- High workload, client non-attendance – 10 days
- Missed appointments
- Cancelled due to non-attendance of client
- Appt delay by client (illness), agreed new date report due

Late confirmation/Lol/Information (n=8)

- Cancelled referral until Lol and updating documents arrived in Jan
- Report a few days late due to solicitor not sending all documents on time
- Solicitors delayed clarification of some facts the associate needed to file report
- Repeated updated timescales given to solicitors
- Various changes in instructions inc adding more clients to be assessed
- Wasn't in court until November to be confirmed, the Lol was late.
- Late arrival of huge number of additional documents – 10 days
- Addendum delay of one week due to volume of questions

Financial issues (n=4)

- First confirmed then cancelled due to cost difficulties
- Public funding suspended.
- Private client – had to pay before work started, slight delay for this
- Legal Services Commission (LSC) funding delays and additional documents – 5 days

Court Delay (n=3)

- Court to confirm work should go ahead wasn't until 24 April
- Court was postponed to November – couldn't confirm until after this
- Court to confirm case to go ahead wasn't until December

Expert late (n=3)

- Report late in from expert
- Report with Quality Assurance for 5 days – report 3 days late
- 1 day late from expert

Expert unavailable/unforeseen circumstances (n=3)

- Bad snow couldn't travel – 1 week delay
- Expert ill – in hospital – 10 days
- Unexpected incapacity of psychologist

Expert asked to Delay (n=1)

- Delay – solicitors asked associate not to file until seeing observation of contact

Unclear re continuation (n=1)

- Parties unsure whether they wanted addendum work or not; caused delays

Medical records (n=1)

- Late medical records

Awaiting results of analysis (n=1)

- Delayed waiting for hair strand test results

Other (n=1)

- No report as medical records did not change expert's opinion

2013 Delays

Late confirmation/Lol/information (n=10)

- Awaiting instructions from Guardian
- Late confirmation
- Late confirmation

- Late Lol
- Late confirmation
- Late Lol and docs
- Late Lol and docs
- Late confirmation
- Late confirmation
- Ongoing

Client Delays (n=4)

- Cancelled – client refused assessment
- Appt delay by client (DNA) & cancelled contact observation (client illness)
- Appt delay by client (repeated illness)
- Appt delay by client (DNA)

Expert illness/unforeseen circumstance (n=2)

- Expert asked for extension due to family illness
- Expert ill and client appt problems – 10 days delay

Financial (n=1)

- Cost queries – late confirmation