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British Psychological Society response to The President of the Family Division Working Group

Medical Experts in the Family Courts

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The British Psychological Society is an examining body granting certificates and diplomas in specialist areas of professional applied psychology.

Publication and Queries

We are content for our response, as well as our name and address, to be made public. We are also content for you to contact us in the future in relation to this inquiry.

Please direct all queries to:-

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About this Response

The response was led on behalf of the Society by Dr Sue Whitcombe CPsychol, Division of Counselling Psychology; with contributions from Dr Jaime Craig CPsychol, Division of Clinical Psychology; Dr Ben Weiner CPsychol, Division of Clinical Psychology and Roger Hutchinson CPsychol, Forensic Clinical Psychology

**British Psychological Society response to The President of the Family Division
Working Group**

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	<p><u>Medical colleges</u></p> <p>Is it viable for each of the Royal Colleges who are significant stakeholders in terms of their members providing expert evidence to the family courts, providing an online resource checklist to support their members to understand family court processes and their duties as professional and potential expert witnesses? To what extent is this already done?</p>
1.	<p>Recent specific guidance was developed by the Family Justice Council (FJC) and the British Psychological Society (BPS) <i>Psychologists as expert witnesses in the Family Courts in England and Wales: Standards, competencies and expectations</i> (2016). This is available as an online resource and includes much of this information – in particular in relation to duties as professional and expert witnesses. This guidance document needs to be included within the ‘Existing guidance and support’ section along with the RCPCH, FJC and other guidance.</p> <p>In addition, the Society has more general guidelines that are relevant for both civil and criminal proceedings <i>Psychologists as Expert Witnesses: Guidelines and Procedure 4th edition</i> (Revised 2017).</p>
	<p>What mechanism would best ensure that the Royal Colleges were able to collaborate to share such resources and to avoid reinventing the wheel?</p>
2.	<p>It is necessary to note that the BPS is not a Royal college. It would be beneficial if the terminology in the final version of this report could reflect this, possibly to include ‘Royal colleges/professional bodies.’</p> <p>When seeking to appoint a psychologist expert, there is sometimes poor understanding of the different statutorily regulated professional psychology domains. It would be helpful if this report, and indeed documentation produced by the Legal Aid Agency, followed the recommendations of the FJC/BPS (2016). Child, adult and child and family psychologists are not regulated professional categories. The FJC/BPS guidance (2016) recommends instructing practitioner psychologists who are registered with the HCPC (which regulates seven protected titles of psychologist: Clinical, Counselling, Educational, Forensic, Health, Occupational and Sport and Exercise) as experts in family proceedings. This assists with governance and the instruction of appropriate, competent, regulated psychologists. There are occasions when specialised expert evidence from a non-practitioner psychologist may be required, for example from a researcher or academic.</p> <p>There was good overlap in the work undertaken by the FJC on the development of Psychologist and Paediatrician guidelines, with the Psychologist guidelines as a forerunner and some members / professionals contributing to both. This saved some effort and ensured a coherent approach. We believe that this would be a good model to build on, sharing learning from professional body representatives and members of the FJC. Ideally, guidelines would be as broadly applicable as possible but there is a need to have aspects tailored to specific professionals. The FJC appears the ideal central point to this work to ensure consistency of approach as a partner to professional bodies/Royal colleges.</p>

	<p>How best can Royal Colleges increase awareness of existing training for healthcare professionals involved in expert witness work? Are special interest groups or subcommittees a viable way of the Royal Colleges most effectively disseminating such information?</p>
3.	<p>Guidelines, training and experienced supervision are often cited as factors which might encourage psychologists to engage in expert witness work within the family courts. Within the BPS the <i>Expert Witness Advisory Group</i> provides general guidance to psychologists acting as expert witnesses and responds to individual member queries. Additional specific guidelines have been developed by the BPS in collaboration with the FJC, specific to family courts.</p> <p>Many psychologists will receive some training in working as an expert during their qualification. In addition, the Society provides a four part training programme aimed at HCPC registered practitioner psychologists considering embarking on practice as an expert witness across various legal contexts.</p> <p>The workshops cover: Workshop 1 - Roles, Responsibilities, and Business Workshop 2 - Writing the Expert Witness Report for Court Workshop 3 - Court Room Evidence Workshop 4 - Choosing, Using, and Presenting Psychometrics in Court</p> <p>Within psychology specialities, such as Forensic, there are specific CPD opportunities which are more focussed on the role of the psychologist expert witness in the family court context.</p>
	<p><u>Commissioners and NHS Trusts/Health Boards</u></p> <p>Do commissioners and NHS trusts agree that expert witness work is of value to the individual clinicians and to their employing organisations? How best can commissioners and NHS Trusts/Health Boards support their employees who wish to carry out this work?</p>
4.	<p>The report focuses primarily on mechanisms that may support medical professionals working in the NHS. It is important to note that many psychologists acting as expert witnesses may not be employed by the NHS, either working in full time independent practice or for other agencies. Many psychologists working within Child and Adolescent Mental Health Services (CAMHS) or Adult services may struggle to persuade their trusts/commissioners of the value of this work alongside hugely demanding waiting lists. This clearly would have implications for the required timeframe required for submission of expert witness reports within the family courts. There would need to be consideration of contractual obligations regarding the funding and charging for expert witness services provided by NHS employees.</p> <p>There are reports of an increasing demand on NHS employees to provide professional witness evidence in proceedings. This may, in part, be as a result of the difficulties in appointing an independent expert psychologist. The working group might like to consider the impact on justice in proceedings resulting from the lack of independent expert psychological evidence.</p>

	What might be feasible in terms of changes to commissioning arrangements which would incorporate expert witness work within relevant contracts? Should this be done on an individual commissioning body/service planning basis or might a nationally commissioned service be a realistic goal?
5.	Previous attempts to bring medical expert witness work within the scope of NHS/Trusts (Department of Health (2006)) were met with mixed responses and failed to be implemented as hoped across the UK. There are some examples of such services such as the Attachment and Trauma team, Great Ormond Street Hospital for Children NHS Trust. There are however, clear logistical challenges to a nationally commissioned service.
	<u>Payment and legal aid</u> How best can the mechanism for obtaining funding be simplified so as to reduce the administrative burden on solicitors and experts?
6.	<p>The report understandably appears to focus on the situation in relation to public law rather than private law and ‘medical’ experts in particular. These two contexts (public/private law) set up some different challenges for psychologist experts in relation to payment. The provision of a single invoice mechanism would solve some of the challenge in situations in which all parties are legally aided or local authorities, and reduce the burden on experts. However, a similar mechanism may be more challenging for those who are self-funding and those who are litigants in person. Some psychologists may find the administrative burden off-putting relative to the administrative requirements of other forms of private work. This additional financial complexity is one of the reasons why some psychologists may refuse to accept instructions where there are litigants in person. This has clear implications for the timely instruction of psychologists where necessary expert evidence is required. This extends beyond an administrative burden. With more than one third of private law cases now having both parties with no legal representation, this raises concerns about access to justice.</p> <p>Crucially, it is unreasonable for the expert to carry the ‘risk’ in relation to fees. Concern around prompt payment is often cited as a deterrent to those considering working as experts. Psychologist experts report problems with multiple invoices, the challenges of ensuring payment by litigants in person and those who are self-funding, as well as experiences where legal aid payments are not forthcoming following the collapse of solicitor firms.</p> <p>Some psychologist experts work as associates to expert witness organisations which provide them with both supervision and administrative support including billing and liaison with instructing solicitors and parties.</p>
	Are there changes which need to be made to the number of hours permitted in respect of particular sorts of reports? How should cases be identified which fall within or outside standard allowances?
7.	There is a need to address the limitations on the number of hours suggested for expert psychological assessment given the typical instructions and requirement for a comprehensive reliable assessment. This is highlighted in the BPS/FJC guidance (2016) which offers a broad professional consensus on the ranges of hours that would generally apply to the medium to high frequency assessments requested by the Family Court (Appendix 4). It is noted that “ <i>the</i>

	<p><i>psychologist will work within the relevant code(s) of conduct as well as the PD and FPR. This may include raising concerns regarding ethical considerations, including where the guidance or instruction indicates too few hours to complete the requested assessment.”</i></p> <p>In particular, one concern in relation to the Legal Aid Agency (LAA) approach to family assessments and assessments of multiple individuals is noted in the guidance <i>“It is erroneous to assume there is any economy of scale when multiple family members are included in an assessment. This adds complexity owing to the increased requirement for synthesis of additional data sources and potential conflicts therein.”</i></p> <p>There has been an increase in the complexity of cases for which psychological expert evidence is now sought, following the revision of Family Procedure Rules in 2013. The benchmark work breakdown for psychological services does not address this increasing complexity. One particular challenge is the size of bundles provided to experts which is often unknown at the time of instruction, when cost estimates are sought. The LAA suggests a 2 minute per page reading time. With a lever arch file holding approximately 500 pages, this would equate to over 16 hours reading alone. The benchmark figures suggest 5 hours per person. Many medical records are far in excess of this in complex family court cases. The assumed ‘economies of scale’ when multiple individuals are to be assessed are therefore unrealistic. It is not unusual to receive three or more lever arch files in family cases, with some psychologists reporting receiving up to seven.</p> <p>Responses to the BPS Expert Witness Advisory Group (EWAG) 2018 member survey indicated wide concern about the stated limits on the number of hours it takes to complete a thorough assessment.</p> <p>The Society recommends updating the Legal Aid Agency <i>Guidance on the Remuneration of Expert Witnesses</i> to reflect the reality of the complexity of cases in line with the BPS/FJC guidance (2016).</p>
	<p>What is the differential in hourly rates paid to medical experts as between privately or insurance funded work and legally aided work. Is it accepted that there is a disparity which needs addressing? If so in what areas is the disparity most acute? What mechanism is needed to establish the appropriate rate for different categories of experts?</p>
<p>8.</p>	<p>In January 2018 the BPS Expert Witness Advisory Group (EWAG) undertook a members’ survey of psychologists who work, or wished to work, as expert witnesses. Whilst not specific to family court experts, a quarter of survey respondents indicated that the change in LAA rates had affected whether they took on legal aid funded work. Almost two thirds (62.9%) of respondents reported that the LAA capped rates do not accurately reflect the work that they undertake as expert witnesses.</p> <p>Given the evident need to recruit and retain psychologist expert witnesses, as highlighted in the draft report, remuneration will likely need to be addressed. The legal aid hourly rate has not changed for a number of years, with current rates of £93.60 for the assessment of adults and £100.80 for the assessment of children. This disparity is in itself somewhat incongruent, given that psychologists in family law cases are often required to assess the whole family. Prior to reform of the legal aid rates, the median hourly rate for psychologists was £130 (<i>Experts in Public Family Law Cases in England and Wales</i>, Krishnamurthy, A. and Reynolds, K; Ministry of Justice, 2013).</p> <p>In a recent survey of psychologists working as an expert in legal cases, 62% reported an average hourly rate in excess of £100 per hour; 38% reported an hourly rate in excess of £150 per hour</p>

	<p>(Bond Solon, 2017). Current fees for therapeutic work provided by psychologists in independent practice are typically in the region of £100 - £130 per hour.</p> <p>While remuneration is but one factor in the availability of psychologists undertaking expert witness work in family proceedings, the current disparity between the LAA rates and the market rate for psychologists, is unlikely to encourage or retain psychologists to work in this area.</p>
	<p><u>Court processes</u> Should cases more routinely be removed from the 26 week track as a consequence of the need to ensure the court has the correct expert evidence before it? How best can compliance with the requirements of FPR 25 be achieved? Should a checklist accompany each application which is completed prior to orders being made? Should a standard form order which incorporates all relevant elements be a part of every order providing for expert evidence?</p>
9.	<p>The Society welcomes the recognition of the need for increased availability of psychologist expert witnesses in particular those specialising in assessments of children and their families, within the family courts. There is tension, therefore, when psychological expert opinion is needed and capacity prevents this being available within the 26 week timescales in Public Law cases.</p> <p>There are some historical reasons why this capacity has reduced mainly due to psychologist experts anticipating a reduction in this work, moving into other areas of work. There is some data to support this including Brown, Craig et al. (2015) who note that the number of psychologists continuing to work as expert witnesses, post-2013, appears to have reduced subsequent to new Civil and Family Procedure Rules coming into force in April 2014. These Rules resulted in several changes to the instruction of expert witnesses, including a change to the threshold criteria to instruct an expert witness, capped fees for all expert witnesses and revised. These changes resulted in a decline in the instruction of experts (including psychologists) and the appointment of experts such as psychiatrists and psychologists was less likely to be considered necessary by the judiciary (Brown, Craig et al., 2015). This raised concern that the perceived decline in the commissioning of expert reports was resulting in a reduced pool of available experts who left this work due to the uncertainty.</p> <p>It is noted that there has been an increase in instructions in cases which are in the pre-proceedings process. Once proceedings have commenced, psychologists are often instructed in the latter half of the 26 week timescale. When a single expert is instructed to assess the adults and the children, this late instruction impacts on the arrangements and logistics of the assessments, often leaving insufficient time to conclude assessments and deliver a report within the 26 week time frame.</p> <p>It needs to be considered whether changes to working practices may assist in meeting the 26 week time frame. As an example, for some specific psychometric assessments and clinical interviews, conducting these remotely may be suitable. Where appropriate, if remote assessment is possible psychologists may be more efficient, reducing timescales. The Court does not as yet accept remote psychometric assessment or clinical interview, though remote assessment is now considered acceptable within the prison estate.</p>

	<p>How best can the necessary documents for an expert be identified? Would the use of a medical records indexing agency be likely to lead to time and costs savings in respect of the expert such as to make the use of such a service a reasonable use of public funds?</p>
<p>10.</p>	<p>Unindexed bundles add significantly to the time burden on experts and any mechanism which ensured that the necessary documents are provided to the expert in a coherent form is welcomed, e.g. a medical records indexing agency.</p> <p>Psychologists assessing children or adults will require access to medical records and any prior psychological or psychiatric assessments. For children this would include both health and education based assessments. In some cases, it is only subsequent to starting an assessment that the psychologist becomes aware of previous involvement of local authorities or other professionals. There is often then a delay while medical, education and social care records are requested.</p> <p>There would be concern if a reduced bundle or limited papers were to be provided in order to reduce the administrative burden. The decision regarding which documents are likely to be necessary, needs to be taken in discussion with the appointed expert. It is only they that can indicate the likely relevance of such information in their assessment. For many family assessments, particularly those around family dynamics and parent-child relationships, evidence about observations in contact sessions would be necessary for the most robust assessment. Similarly, police records can be voluminous but often contain relevant information in relation to allegations of domestic abuse and conflict, for example, or reports of offending behaviour which are relevant to a full assessment of risk. Local authority records, particularly in relation to multiple children in the same family, can involve much duplication.</p> <p>When evidence is withheld, it is more likely that the appointed expert will find it necessary to qualify their assessment and recommendations to the court. Presenting such evidence at a late stage, such as at a court hearing, is unhelpful.</p> <p>The process of release of records is made much easier if the court routinely encourages the client to allow access to medical records.</p>
	<p>Is a single point of communication (probably the lead solicitor) a viable means of ensuring that the expert is provided with all documentation and questions in an administratively simple way?</p>
<p>11.</p>	<p>We believe that a single point of contact/communication certainly assists. Psychologists report that there are occasions when they have felt it necessary to liaise with several solicitors in order to secure the evidence required.</p> <p>The recommendation that questions in the letter of instruction are compiled and restricted to those necessary is welcome. Psychologist experts report that at times, possibly most evident in situations when there are litigants in person, this pruning process of questions posed by different parties does not appear to happen effectively and repeated similar questions are asked. This is also a factor in written questions subsequent to a report.</p> <p>There are particular issues in cases in which there are litigants in person, or the absence of legal representation. On such occasions there may be no single point of communication, and no agreement between the parties. Psychologists can be overwhelmed with the direct submission of</p>

	additional questions and extensive evidence such as personal communications, audio and video recordings.
	Is it feasible to fix a guaranteed date for the experts to give evidence within a trial template? What would be needed to ensure this was possible?
12.	An agreed date at which the expert may be required to give evidence would be beneficial. Increasing delays in the appointing of an expert, and securing the disclosure of required evidence, currently leads to slippage in the timeliness of the case. Pre-arranged hearing dates are often vacated as a consequence.
	<u>Treatment of experts</u> Is it appropriate for a judge to explain to an expert the issue in relation to their evidence which has required their participation in the hearing and the purpose of cross examination?
13.	The expert should be aware of this issue in the case following acceptance of instructions. Psychologist experts should anticipate that there will be challenge and questions about their written evidence, either in the form of written questions or cross examination. Explicit feedback to the expert which indicates whether cross examination relates, for example, to the lack of clarity in their report or their opinion or the reasoning leading to it can be helpful in improving the quality of future reports to the court.
	Is it appropriate to seek to limit the nature of criticism of an expert save where they have plainly failed to comply with their duties to the court or their own professional ethical duties? Is some form of intermediate level of informal complaint mechanism appropriate in this context?
14.	It is entirely appropriate for there to be scrutiny and challenge to expert opinion. However, formal criticism of an expert should be limited to situations where they have failed to comply with their duties to the court, adhered to their professional ethical duties or given evidence outside of their expertise. Criticism of the competence of an expert can be made by any of the parties to the Judge. In line with the recommendations of the BPS/FJC (2016), the appointment of HCPC registered psychologists ensures that there is a robust complaint process in place. A complaint can be raised by any party. Where a complaint is upheld, the ensuing actions can include the de-registration of a psychologist preventing them from continuing to practice. Psychologists who are members of the BPS are required to adhere to Member Conduct Rules along with a code of ethics and conduct. A formal complaint can be made to the BPS, who will consider the evidence presented and take action if considered appropriate.

	<p>Is it appropriate to give an expert a right to comment on a judgment which proposes to criticise them in respect of a failure to abide by their duties to the court or their professional duties? If so how can this be achieved in a realistic timeframe? If there are issues as to a failure to abide by their duties should this be raised with the expert when they give their evidence rather than at the judgment stage</p>
15.	<p>It is appropriate that an expert has the opportunity to respond to criticism of them when it relates to them fulfilling their duties to the court or their professional or ethical duties. Ideally this would happen when they give evidence so that misunderstandings, explanations and mitigating factors can be considered by the judge in advance of the judgement.</p> <p>If the psychologist expert is believed to have failed in their duties then the appropriate course of action is a formal complaint against a practitioner psychologist to their regulatory body, the HCPC. If a complaint is not upheld, it is unclear whether this information from the regulatory body could subsequently be appended to a judgement, given the often extended duration of the complaints process.</p> <p>Psychologists who have had experiences of complaints from the court arena being heard by the HCPC have voiced concerns about the understanding of the context for expert witnesses. This may be an area in which it would be helpful for there to be further discussion with the HCPC.</p>
	<p>Should any expert receive a copy of the final judgment? Is a précis of some form more appropriate? If so who would draft this?</p>
16.	<p>It is recommended that psychologist experts are provided with a copy of the final judgement in order that this informs their practice and development.</p> <p>Reading a full judgement is a valuable exercise in understanding how the analysis of their evidence contributed to the findings and final outcome. Most experts will likely find that reading a judgement is invaluable in informing improvements in the quality of written reports in future cases,</p> <p>Currently, it is rare to receive any feedback on the outcomes, decisions or judgements despite the value to the expert and current FPR guidance. Psychologists report that judgements and feedback are not provided as a matter of course, and are often not provided when requested.</p>
	<p><u>Training</u></p> <p>Should interdisciplinary training, mentoring and feedback form part of the recommendations? What ethical problems may arise and need to be addressed both in relation to mentoring and feedback</p>
17.	<p>It is good practice wherever possible for psychologist experts in the family court to seek feedback on reports from lead solicitors, decision makers, and/or other professionals involved (BPS/FJC guidance 2016).</p> <p>However, the recent BPS survey (2018) found 54.2% of respondents indicated they never/seldom receive any feedback, only 16.9% reporting receiving feedback often/usually. Similarly, 66.6%</p>

	<p>never/seldom receive notification of outcome of the hearing, with only 12.6% reporting receiving notification on outcome often/usually.</p> <p>There is a great benefit in interdisciplinary training, mentoring and feedback. Examples in which legal professionals and psychologist experts have collaborated to provide training have been well received – not least as this can help communicate the value of psychological evidence to those considering undertaking expert witness work and also assist in dispelling myths. The BPS recently held an Expert Witness conference (2019), bringing together lawyers, judges and psychologists which received favourable feedback.</p> <p>While some psychologists seek out formal mentoring and supervision by experienced experts, peer supervision with others undertaking similar work is common. Psychologists are mindful of ethical considerations as a key foundation of all practice, as well as their duty to the court. Such supervision is an integral element of a psychologist’s practice.</p>
	<p>What source of funds would support formal interdisciplinary training? Could the Royal colleges and the judicial College collaborate to training programmes? Should training incorporate formal training through the Royal colleges and the judicial College alongside less formal training provided by volunteers through regional committees? What should be the content of ongoing training?</p>
<p>18.</p>	<p>Typically, psychologists fund their own formal training post-qualification, specific to expert witness work, such as that provided by the BPS and outlined above. It is important that this training includes specific requirements for those experts working in the family courts as distinct from other medico legal contexts.</p> <p>Interdisciplinary training opportunities are an invaluable addition. Currently these are more ad hoc, such as regional Resolution training events.</p> <p>We would be happy to discuss the development and provision of training in this area.</p>
	<p>How best can mini pupillages/mini marshals for medical professionals to spend time with judges/barristers/solicitors be utilised? Should these mini pupillages also include experiences within the criminal justice system? What administration would be necessary to implement such a scheme on a national/regional level? Who is best placed to deliver this? Can the family Justice Council in collaboration with family division liaison judges deliver this?</p>
<p>19.</p>	<p>Mini pupillages are an excellent opportunity for experts to gain insights that will improve their work in the family courts. There may be scope for these to be supported by the BPS through those members who are experienced experts. Some of our members suggest informal, local collaboration between the FJC and the Family Division liaison judges whilst others propose compulsory, more formal tuition.</p> <p>Some members have noted that there may be an opportunity for experienced psychologists to also assist in the understanding of Family Division judges regarding the nature of psychological expertise, the information that can be provided, and the importance of psychological formulation in the deliberations of the court.</p>

	What training currently exists within specialist organisations such as the ALC, resolution and the family law bar Association in relation to training lawyers in relation to handling expert witnesses? To what extent is there existing interdisciplinary training run by these organisations? Are there any models which could be used for national regional training?
20.	The Society recommends that training is provided in relation to instructing psychologist expert witnesses which includes education in relation to the skills and competencies of psychologists as set out in the BPS/FJC (2016) guidance. Specifically, it is important to ensure that instructed practitioner psychologists are registered with the HCPC and have current or recent experience relevant to the instructions. This will ensure that the expert has the necessary qualifications and has attained the statutorily required competences to practice in their domain.
	How could an expert witness handbook or information pack for experts and legal professionals be commissioned?
21.	<p>While there is clearly a value in an agreed handbook in relation to expert witnesses in general terms, there are issues which are specific to different specialities and professions who act as experts which means that it may be difficult to integrate all of the necessary guidance into one handbook.</p> <p>We would be delighted to be involved in the development of a handbook, if one is commissioned, to ensure its relevance for psychologists.</p>
	<p><u>Supporting and Sustaining Change</u></p> <p>Is a sub-committee of the Family Justice Council the most appropriate and effective vehicle for carrying forward in the short medium and long-term the recommendations of the working group? How should the interplay between the family Justice Council and the family justice board be addressed? What administrative resources would be required and would be available to support the work of the subcommittee which in particular might play a role in managing the mini pupillage scheme (as it currently does)? What should be the functions of the subcommittee?</p>
22.	The Society welcomes the subcommittee of the FJC and believes that it would likely be the most appropriate and effective vehicle to carry forward recommendations. It would be beneficial to include a psychologist representative in any such sub-committee and we would be happy to use our processes to find the best person to take part in this.
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End.