



Association of Child Abuse Lawyers

## **LEGAL SERVICES COMMISSION (LSC)**

### **The Use of Experts (Quality, Price and Procedures in Publicly Funded Cases) Consultation Paper**

**A response by the Association of Child Abuse Lawyers**

**February 2005**

## 1. Introduction

The Association of Child Abuse Lawyers was set up in late 1997 as a result of concerns within the legal profession that people who had been abused in childhood were either unable to find lawyers to take on their cases or who were experiencing poor standards of advice and assistance from lawyers they had instructed. There were concerns about the ability of some lawyers and experts to deal effectively with these traumatic cases. The Association of Child Abuse Lawyers (ACAL) is a not for profit community organisation which provides a helpline for survivors of abuse and then refers survivors to appropriate lawyers. We also provide training and support for lawyers and experts involved in obtaining compensation for people emotionally, physically or sexually abused in childhood and for people with learning disabilities who have been abused.

The objectives of ACAL are to promote and procure access to justice for people who have suffered abuse in childhood including people with learning difficulties. We aim to obtain, promote and procure access for victims of abuse to sources of assistance including but not limited to therapy, counselling, support and information. We also aim to educate, inform and develop a greater understanding amongst lawyers, experts, the judiciary public servants and any other persons working within this field and to develop wider forms of redress within the legal system for children, adults and people with learning difficulties who are affected by abuse.

This response has been prepared by ACAL's executive committee and any enquiries in respect of this response should be addressed in the first instance to Tracey Storey, Association of Child Abuse Lawyers of Irwin Mitchell, 150 Holborn, London, EC1N 2NS, telephone number 08701 500 100, fax 0207 404 0208, e-mail [storeyt@irwinmitchell.co.uk](mailto:storeyt@irwinmitchell.co.uk).

## **2. Our Client Group**

Adult survivors of childhood sexual abuse are a particularly vulnerable client group, often socially disadvantaged and socially excluded. As children, they have often been involved in sexual activities which they do not truly comprehend and to which they have been unable to give an informed consent and they have often developed complex coping strategies to deal with the traumatic nature of the abuse they have faced. The abuse will have often inhibited their developments. By the time our client group presents to lawyers, the effect of the prolonged and repeated trauma suffered in childhood can lead to complex psychological symptoms. These childhood responses to abuse can become fixed, and as a result of their experiences a survivor of childhood abuse may have difficulty in trusting lawyers and professionals including experts as they will often have great fears of being in situations where they are rendered powerless such as during the legal process and in the courtroom.

As a consequence of the complex psychological features of childhood sexual abuse and other abuse, it is often very difficult to get a full and accurate account of a person's childhood experiences without retraumatising the survivors. Disclosure of events in childhood can take time and require specialised lawyers with appropriate skills and access to appropriate experts.

The majority of child abuse compensation claims being litigated involve limitation issues. Child abuse is often accompanied by secrecy and threats to the victim to remain silent. In the past, children who reported abuse were frequently not believed. The victim often feels ashamed and embarrassed about the circumstances of the abuse. Additionally, a person who has suffered in this way in childhood will often only have the psychological status to come forward much later in life, depending on a variety of life circumstances

and the degree of their social exclusion in any event. Time limit problems are a key feature of child abuse litigation and the law of limitation is constantly evolving.

Bearing in mind this back drop, it is absolutely crucial that adult survivors of child abuse pursuing litigation are sent to see experts with appropriate expertise and an appreciation of the issues involved in child sexual abuse. Commonly the experts used in child abuse litigation are consultant psychiatrists and independent social workers. An expert in the field of child abuse is a relatively new type of expert. Although child sexual abuse is not new, the recognition of child abuse as a social phenomenon has been resisted throughout history. Current levels of awareness are relatively recent and the professions from which experts are commonly drawn are only just beginning to recognise the sequelae of child sexual abuse and its assessment and treatment. Childhood sexual abuse does not always form part of professional training and much depends on individual professional interest and willingness to climb the necessary learning curve and to deal with the personal and professional impact of this traumatic subject.

As a consequence a solicitor cannot rely on traditional sources of expertise. Existing experts who may have knowledge in other areas do not necessarily have the appropriate knowledge or experience concerning abuse issues and the needs of the survivor. The existing pool of experts is relatively small and underdeveloped. It is in this context that ACAL responds to Legal Services Commission's paper on the use of experts.

### **3. Experts Generally**

In the foreword to the paper, the LSC sets out what it anticipates the benefit of its proposals will be, including the raising of the standards of service as a result of accreditation, clearer terms in respect of payment of experts, a saving of costs as a result of reduced administration, greater clarity in respect of recoverability of fees and control of

costs of expert's fees. ACAL agrees that all these benefits would assist, but it is by no means clear that the proposals put forward would result in those benefits. As a general point, ACAL does not believe that it is possible to look at experts' fees in all areas of law without considering each area of law separately. The use of experts in criminal, family, immigration and other civil cases involve very different considerations. For example, within the paper, it is mentioned that expert rates in civil proceedings have always been historically higher than in crime. The LSC can see no justification for this historical difference. However, in a civil claim the burden of proof is on the Claimant who has to prove his / her case rather than to meet or challenge the case of the prosecution. In the circumstances, given the burden of proof it is necessary to build a case often using expert evidence which may well increase the costs of the expert's report. By considering expert evidence in crime and civil claims in the same paper, such distinctions are effectively ignored. Additionally, one has to consider the market rate for civil experts.

#### **4. Experts in Child Abuse Litigation**

As stated above, ACAL members regularly use psychiatrists and independent social work experts in their claims. There is a scarcity of both types of experts who are experienced in the field of child abuse litigation. Because many of our client group are bringing claims dating back to the 1960's, 1970's and 1980's, it is simply not good enough to instruct a social work expert who is familiar with practices and procedures after the implementation of the Children Act. The social work expert has to look at a case in historical context and as such, has to have a detailed knowledge of historic practice. Accordingly, it is not possible to simply use current day guardians who are reporting in family proceedings but to find accredited social work experts who are familiar with the historic practice of social work, where a social work department may have failed our clients in the past.

ACAL members recognise the private paying client test and in cases of child abuse, our client group consider it very important to establish how they were let down and why and what the consequences for them have been. Often a social work expert will be setting out the serious failings which led to sexual abuse within an organisation. Our client group would have suffered sexual abuse which could have been prevented by proper practice and procedure being in place. A psychiatrist will be detailing how that abuse has affected them into adulthood. Accordingly, the issues at stake in expert evidence in child abuse cases are crucial and of utmost importance to our clients.

For these reasons, ACAL does not consider that the cost of an independent social work report in civil proceedings should be paid at the same rate as a guardian in family proceedings. An independent social worker in civil proceedings has to apply the Bolam test to social work practice at the time in question. He or she is looking at historical context and without supportive evidence that standards of care were not met, the case cannot go forward at all.

ACAL members are used to approving and using certain experts and judging their competency in what is a very specialist field of litigation. To that extent, the experts we use are a scarce but accredited group of witnesses. An example of this is the cost of psychiatric reports in child abuse litigation. In complex cases psychiatric reports for survivors of child abuse are in the region of £1,200 to £1,400, rather more than a standard psychiatric report in a personal injury case.

## **5. LSC Spend on Experts**

There is mention in the paper of a £130 million spent on expert's fees in crime, family, immigration and other civil cases. We do not know what percentage of this spend is recovered. In a successful child abuse claim, expert's fees are usually recoverable from

the Defendant and are invariably deemed reasonable upon assessment. This is in contrast to crime, family, immigration and other civil cases where there is no inter partes cost recovery. It is misleading to give a gross figure when we should be looking at the spend on experts' fees which is unrecovered. Cheaper expert evidence may well be false economy, leading to more cases being lost.

## **6. Accreditation**

We agree with the LSC that accreditation should not be compulsory. It has been suggested that experts be registered with the Council for the Registration of Forensic Practitioners (CRFP). It is by no means certain that accreditation of any form will raise the standard of expert reports but accreditation will certainly add an additional layer of bureaucracy. At the moment psychiatrists and independent social work experts are not involved with the CRFP and at best accreditation will be a paper exercise which will not add to the process of assessing the quality of experts. Any assessment of the quality of experts must be made by those who have a full understanding and experience of expert evidence in the context of child abuse work. This is not a process that should be delegated to any other body whether it is the CRFP or not. Accreditation by such bodies can only be at best limited guidance as to whether or not an expert might be of an appropriate quality and expertise.

## **7. Control and Recovery of Fees**

It does not seem to be appreciated that in a civil case if the claim is won, the Defendant will be paying the legal costs. If there is a dispute on costs, the court will check the reasonableness or otherwise of the costs and indeed the costs of experts. If Claimant lawyers are obliged to instruct experts on different terms when publicly funded, there is a distinct danger that experts will not work for publicly funded Claimants. Experts may

refuse to undertake Claimant publicly funded work and/or only work for Defendants. For many years claimants' solicitors have been subject to controls by the LSC regarding experts and indeed in child abuse litigation where there is a group action, experts will be agreed in advance with the LSC. Contracting solicitors maintain experts' registers which are regularly updated and indeed in civil cases involving high costs, individual case plans are agreed with case managers at the LSC. There is already no need for prior authorities in this type of work and there is considerable costs management with case managers at the LSC.

## **8. Proportionality**

The consultation paper does not differentiate between crime, civil and family law and there seems to be little appreciation that in civil cases there is a great deal of control and management of experts' fees in any event. Costs generally are subject to proportionality considerations in civil cases and the Civil Procedure Rules encourages the use of single joint experts in civil cases. Already in child abuse litigation, ACAL members regularly use single joint experts particularly in psychiatry to avoid the need for our client group to be assessed by 2 separate psychiatrists. Using a single joint expert obviates the need for separate experts and for our clients to give their account of traumatic childhood experiences on several occasions. If a significant number of experts did not wish to work for publicly funded Claimants as a result of changes in method of payment, the choice of experts would be restricted and this would prevent the use of many joint experts with obvious costs consequences for the LSC.

In civil cases under the Civil Procedure Rules, the court has considerable case management powers which include the power to limit expert costs. Expert evidence is subject to detailed direction from case management judges and controls through Part 35 of the CPR. The court has a vital role in case management and this extends to experts.



## **9. Scarcity of Experts**

In the experience of ACAL, there is a distinct scarcity of independent social work experts as well as psychiatrists who are familiar with the issues and difficulties in this specialist field of law. ACAL is concerned that changes to guideline rates and a reduction in fees will lead to a greater scarcity of experts in this field. We are instructing busy clinical practitioners who often have opportunities to do other private work other than forensic work and their other opportunities e.g. private psychiatric work may be more attractive to them than expert witness work. Expert witness work is often not their only adjunct to their professional careers. Any proposals which are implemented must not drive out experts where there is already a scarcity nationally.

## **10. Equality of Arms**

As stated above, in civil cases the burden of proof is upon the Claimant to prove his / her case. There is mention in the paper of equality of arms in criminal proceedings but equally, equality of arms should exist in civil cases. We cannot have a situation where the Defendant has a greater choice of experts than the Claimant. If a further layer of bureaucracy is added by way of accreditation, this could lead to a greater shortage of experts with many experts refusing to undertake publicly funded work and only working for Defendants. We could face the situation where experts instructed by Claimants are subjected to limited hourly rates and limited fees where experts instructed by Defendants are not. The expert's advice should not be determined by the success or failure of a case, the extent to which his / her fee is recoverable, the identity of the party instructing him / her and how their fee is funded.

## **11. Access to Justice**

ACAL is concerned that the proposals contained within the paper reverting to fixed hourly rates for experts could return us to a situation where it is difficult if not impossible to find an expert willing to advise on behalf of a Claimant. The impact upon an abused person's access to justice could be immense. If claimants bringing these types of claims are unable to obtain good expert evidence to prove their cases, they will not be able to go forward with their claims at all.

## **12. Miscarriages of Justice**

Reference is made in the LSC paper to miscarriages of justice. It is suggested that by raising the quality of expert evidence in general, this will reduce the risks of miscarriages of justice. However, there have not been significant miscarriages of justice in civil cases involving child abuse. It is wrong to suggest that there have been. Indeed, the Working Group on Sudden Unexpected Death in Infancy chaired by Baroness Kennedy QC did not suggest accreditation by the CRFP. The working group suggested that the speciality organisation should accredit experts and that expert witnesses receive training and that trial judges establish the expert's credentials. We would not disagree with these findings. However, the more serious miscarriages of justice have happened in criminal and family cases rather than in the civil courts where control of experts is clearly defined in Part 35 of the CPR. It is wrong to suggest that there have been miscarriages of justice in civil cases as a result of failings in expert evidence. Where practitioners have been concerned about experts departing from their expressed views at expert discussions or at trial, this can usually be dealt with by lawyers and managed under Part 35.

### **13. Bureaucracy**

ACAL is concerned that accreditation will lead to an additional layer of bureaucracy which will drive out some experts from carrying out this work at all. This will leave Claimant lawyers with a reduced choice in what is already a scarce field of experts with Defendant lawyers having a greater choice of experts. With a reduction in number of experts in these fields, this could increase delay in an area of work which is already delay sensitive due to limitation problems.

### **14. Conclusion**

It should be noted that the Civil Justice Council has only just established the Experts' Committee which is going to report on experts in civil proceedings. ACAL would suggest that the LSC would be best advised to await this report before implementing any proposals.

ACAL supports the raising of standards in expert evidence, clearer terms in respect of payment, reduced administration and greater clarity regarding the recoverability of fees. It is not correct to say that the procedure and rules in civil cases relating to the instruction of experts is overly complex and poorly understood. Both experts and solicitors working in this field well understand the complexities. Accreditation will not solve the problems of quality nor will the LSC's proposals result in a greater equality of arms or increased access to justice for survivors of child sexual abuse.

We would remind the LSC that we are dealing with a vulnerable client group often socially excluded and without a voice, who have been let down by professionals in the past. Our professional obligations to our client group require us to obtain the best objective expert evidence possible.

ACAL hopes that the real motive behind the consultation paper is not cost driven. However, we are aware that:

“the rising expenditure on criminal legal aid is putting pressure on the Community Legal Service and civil expenditure”

[Jonathan Lindley, LSC service design executive, quoted in the Law Society's Gazette 3 February 2005].

Whilst we understand and appreciate the costs issues involved, access to appropriate experts and to legal aid is an important consideration for survivors of childhood sexual abuse to ensure equality of arms and access to justice. Our client group are often taking on public authorities and have no means themselves, largely due to the traumatic events in their childhood. To restrict their choice of experts in civil cases would be unjust in the extreme. Accordingly, any reform to the current system of instructing experts in child abuse litigation should take into consideration equality of arms arguments to ensure that disadvantaged people are not denied redress. If the proposals go through in their present form, they will inevitably invoke a challenge under the Human Rights Act.

**DATED this 25<sup>th</sup> day of February 2005**