Battling the threat to expert evidence

The government has launched a raft of legislation and consultations in an attempt to radically reduce court costs, including those generated by experts. But while many believe the cut backs are too extreme, in the short term experts will have to adapt their practices to make their work pay. **Mark Solon** reports

The Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO), despite its long and turbulent passage through parliament, has implemented many of the civil justice reforms recommended by Lord Justice Jackson in his final report of December 2009.

LASPO received assent on 2 May this year and will remove legal aid support for most cases involving housing, welfare, medical negligence, employment, debt and immigration. These provisions will take effect in April 2013.

Law firms across the UK are now looking at ways to bring claims in these areas without legal aid, including on a 'no win, no fee' basis. However, equally controversially to many in the legal sector, LASPO will abolish success fees on 'no win, no fee' claims, and many claims with little monetary value, regardless of how important they are to the applicant, will no longer be brought to court.

As the impact of these changes is digested by law firms, the effect on the experts they instruct is equally uncertain. LASPO itself does not include any provision that directly impacts on experts but, inevitably, the fewer cases taken on by solicitors, the fewer instructions for experts operating in those areas.

The cut backs also follow in the wake of a reduction in legal aid fees for expert witnesses, implemented last year by the Legal Services Commission. In September rates were capped, with London rates set at a far lower level than outside the capital, owing, it was argued, to the greater supply of experts in London. The hourly rate for the majority of experts including an anaesthetist, child psychiatrist or neurologist is £90. Outside of London that rate is £135, £135 and £153 respectively.

Further measures expected to impact on experts include Justice Secretary Ken Clarke's unveiling in March this year of a new consultation, *Solving Disputes in the County Courts: Creating a Simpler, Quicker and More Proportionate System*. Three key proposals are to increase the minimum value of High Court claims from £25,000 to £100,000, to raise the maximum value for claims in the small claims process from £5,000 to £15,000, and to introduce

compulsory mediation for small claims. Paul Edwards, head of costs at Hill Dickinson, says: "A high percentage of personal injury claims fall within that bracket and suddenly all of those costs will only be small claims."

In the small claims court parties are only able to instruct one expert each and, according to Edwards, there is expectation of "downward pressure" on expenses as solicitors' fees are also capped. Again, solicitors are likely to find these cases far less attractive to take on and Edwards envisages that, if the proposal is passed, it may impact on the number of experts being instructed in cases of this value.

A further relevant Jackson reform still being considered by the government is qualified one-way costs shifting (QOCS). QOCS applies to personal injury cases and means that an unsuccessful claimant will not have to pay a defendant's costs unless the claimant is extremely wealthy or has acted fraudulently. The government plans to introduce QOCS to reduce the need for claimants to take out ATE insurance – litigation funding for legal expenses and disbursements – which under LAPSO is no longer a recoverable cost. However, Edwards queries: "If a defendant is not going to get their costs back are they going to be more reluctant to pay for expert evidence?"

Quality control

The way experts are instructed, particularly in the family courts, has undoubtedly become expensive and sometimes shambolic, with too many experts reports commissioned, too many delays, and too much wasted expense. However, experts are an essential part of the process and there is a risk that the raft of changes currently being introduced will mean the best experts will no longer be available.

In one of the many backlashes by the House of Lords against LASPO, Lord Beecham tabled an amendment to part 1 (relating to legal aid), stating: "The Lord Chancellor must review the accessibility and quality of expert advice that is available for civil legal proceedings and ensure that this is maintained or improved following the commencement of this part."

Lord Beecham stressed the importance of expert witnesses across many types of

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cases and said: "There are many cases in which expert evidence can be extremely important in the context of private family law. Examples include false allegations of child sexual abuse. In one particular case a child psychiatrist, having examined the situation, stated that a child who was allegedly abused would in fact have no memory of the time when the abuse was alleged to have occurred and thus was able to demonstrate that the child had been influenced by a foster carer.

"The question is this: to what extent can

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the government ensure that expert evidence will remain available? The problem is that it is under threat."

The Consortium of Expert Witnesses to the Family Courts, with a membership of some 500, reports that, on the most recent evidence, only 7.5 per cent of its members in London would be prepared to work at the lower rates that are now being offered.

However, Lord Beecham withdrew the amendment after hearing arguments from Lord Faulks and Lord Wallace of Tankerness that the courts themselves are better placed to control both the quality and quantity of expert evidence and are making progress in this area. In particular, Lord Faulks drew attention to the Woolf reforms, which introduced the timely exchange of reports, experts' meetings and paved the way for trials of 'hot tubbing', under which experts meet in court at the same time and exchange views in order to reach consensus.

Lord Wallace of Tankerness also assured the House that the Ministry of Justice is working with the Legal Services Commission and stakeholders to monitor the effect of the fee levels and to gather further data to inform the government's longer-term plans to put in place a scheme of fixed and graduated fees for experts.

Time to focus

With experts now expected to work in half the time they used to in some instances, consensus will need to be reached on a reduced number of questions, and experts will need to focus only on core areas and a reduced number of papers. There are other measures that can be taken to reduce costs, including the appointment of a single expert in cases.

Many law firms will undoubtedly find a way to continue advising clients by improving their processes and increasing their efficiency – albeit, they will argue, at the expense of quality – and experts should do the same.

The crackdown on costs has exposed experts in some quarters to be unreliable, slow to produce reports and unqualified for the job, either because they have not been in practice for too long and their knowledge is not current or because they are not qualified as a witness and do not know their obligations in report writing or to the court.

The current backlash may seem extreme but while the right balance is sought experts must do their best to be reliable, concise, unbiased in their reporting, and remain up to date in their knowledge of both their own practice and their duties as a witness.

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