



Cardiff Law School

Legal Services Commission

**Evaluation of the
'Alternative Commissioning of Experts
Pilot'**

Final Report

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1. Executive Summary

This project evaluated a pilot engaging six multi-disciplinary teams commissioned by the Legal Services Commission to provide expert witness services in proceedings under section 31 Children Act 1989.

Pilot teams did not attract large numbers of cases, with two teams undertaking no cases under the pilot. Lack of awareness of the pilot, the duration of the pilot and concerns (particularly amongst lawyers) about the implications of team-based expert witness services all inhibited take-up. Judicial leadership assisted take-up. Requiring the pilot teams to only accept cases which required multi-disciplinary input also had a negative impact on referrals.

The concept of multi-disciplinary working was highly regarded by clinicians, children's guardians, lawyers, judges and local authorities. The quality assurance provided through mutual support, the capacity of teams to identify the need for additional assessments (and also to resource those assessments), and the ability of teams to make informed recommendations about care planning specific to local resources, were all highly valued. Proper evaluation of the true costs of the expert witness services provided by multi-disciplinary teams was not possible given the number of cases, but participants generally reported the potential for improved value for money and reduced cost to the legal and care systems overall.

The take-up under the pilot raises issues regarding the viability of multi-disciplinary teams. Resourcing such teams, and ensuring that they have the necessary capacity to provide expert witness services, requires more detailed planning and discussion with clinicians and their employers to establish whether (and in what form) teams are viable and able to contribute significantly to capacity within the system. This is likely to be a matter of financial incentives as well as persuading NHS providers that such work is consonant with the values of the NHS. In particular, ensuring expert reports are of high quality and delivered expeditiously is central not only to the legal system but to the well-being (and in some cases safety) of the parties. The NHS is also required to take a more active role in the provision of health expert witnesses in line with its duty under the Children Act 2004 to safeguard and promote the welfare of children.

A review of the letters of instruction from the ACE pilot suggests that there was often delay in providing the letter of instruction to the expert and that the questions asked did not always focus on the key issues in the case. These

issues could, at least in part, be addressed by: experts providing input into the framing of questions, training of solicitors to better understand the matters that expert evidence can address and/or increased judicial co-ordination of the instruction of experts.

2. Background and Policy Context

2.1 Introduction

In June 2004, the Chief Medical Officer was asked by Ministers to advise on how best to ensure the quality and supply of medical expert witnesses in public law Children Act cases, particularly care and supervision proceedings. The request was made in response to concerns regarding the quality and validity of evidence given by medical expert witnesses in court (following a series of high profile court cases including the Angela Cannings appeal¹), and also reports received by the Family Justice Council that there was a severe shortage of clinicians prepared to give evidence in the family courts.²

The Chief Medical Officer identified reasons why it is difficult to maintain an adequate supply of health expert witnesses in public law Children Act cases, namely:

- The system is not well organised and is dependent on multiple small agreements between individual doctors and solicitors.
- There is no real succession planning so, as experienced doctors retire, there are few younger doctors stepping in to replace them.
- Most expert witness work is concentrated in a relatively small number of hands.
- Highly specialised medical input is sometimes vital to the courts (e.g. paediatric radiology), and there are few specialists nationally in such disciplines.
- Individual health professionals are deterred from being expert witnesses because:
 - they have not been asked or feel that they are not qualified;
 - there are few good comprehensive training programmes;
 - it is outside the mainstream and is often given insufficient recognition or support;
 - some find courts and legal processes intimidating and stressful;
 - many find court processes bureaucratic, slow and time consuming;

¹ R v Cannings [2004] EWCA Crim 1, [2004] 1 W.L.R. 2607.

² 'Bearing Good Witness: Proposals for reforming the delivery of medical expert evidence in family law cases' (Department of Health, October 2006) (paragraphs 1.1 & 1.5).

- some fear referral to the General Medical Council by vexatious parties in a case.³

The Chief Medical Officer considered that health professionals would be more interested in providing health expert witness services if they could do so as part of a coordinated multi-disciplinary team that:

- Allows them to provide the service as part of their day-to-day work rather than as an additional activity.
- Provides easier access to input or peer review from colleagues in other disciplines which, in turn, helps ensure that expert witness reports are balanced, quality assured and less likely to lead to vexatious complaints.
- Enables colleagues to provide support or back-up when the requirement to complete expert witness reports for the court conflicts with the healthcare workload commitments.
- Allows new health expert witnesses to be trained or mentored in a supportive environment.

Whilst the Chief Medical Officer’s report was driven primarily by concerns about the supply of health expert witnesses, it also recognised the challenge faced by the Legal Services Commission in controlling the rapidly increasing cost of legal aid. Solicitors’ disbursements in public law Children Act cases (the majority of which are for health expert witnesses) have been rising significantly, although still constitute a small proportion of the overall legal aid budget of approximately £2.2 billion.

Table 1: Spend on disbursements in Public Law Children matters since 06/07⁴

	06/07	07/08	08/09	09/10	10/11
Public Law Children	£37,007,000	£44,883,000	£46,528,000	£51,481,000	£53,305,000

Additionally, during the course of the pilot two other streams of work have been ongoing, which are likely to impact on the future provision of expert witness services in all family proceedings. These are the government consultation and

³ ‘Bearing Good Witness’, Ibid. (page 4).

⁴ Source: LSC Annual Reports

subsequent Bill in respect of the future structure of the legal aid system,⁵ and the Family Justice Review.⁶ Where appropriate we endeavour to highlight areas where our findings may contribute to this ongoing work.

2.2 The Pilot

The Alternative Commission of Experts (ACE) pilot was designed by the Legal Services Commission working in conjunction with the Department of Health. The purpose of the pilot was to test the feasibility of new arrangements proposed by the Chief Medical Officer for commissioning health expert witnesses in public law Children Act cases. In particular, the pilot was intended to ascertain whether multi-disciplinary teams would address:

- the severe shortage of health professionals prepared to give evidence in the family courts and the consequent problem that most of the health professionals currently acting as expert witnesses are so busy that they are unable to complete cases within a reasonable timescale; and
- the requirement for the NHS to take a more active role in the provision of health expert witnesses in line with its duty under the Children Act 2004 to safeguard and promote the welfare of children.

Under the pilot arrangements, legal aid service providers were able to contract expert witness services from multi-disciplinary teams rather than from individuals, in cases where input was required from more than one clinical discipline.

Six teams participated in the pilot, with the first contracts becoming operational in April 2009. A total of 31 cases were accepted under the pilot arrangements between July 2009 and September 2010. The cut-off date for acceptance of data relating to the pilot cases was end-March 2011.

2.3 The Project Objectives

The Legal Services Commission's project specification identified fourteen questions to be considered by the research:

- 1) *Is it easier for health professionals to become engaged as health expert witnesses under the piloted method?*

⁵ 'Proposals for the Reform of Legal Aid in England & Wales: Consultation Paper' (Ministry of Justice, November 2010), and 'Legal Aid, Sentencing and Punishment of Offenders Bill' (2011, Bill 205).

⁶ 'Family Justice Review: Interim Report' (Family Justice Review Panel, March 2011).

- 2) *Will the approach being piloted result in a sustainable increase in the supply of quality-assured expert witnesses?*
- 3) *Does the pilot make it easier and quicker for solicitors and clients to access health expert witnesses?*
- 4) *As a result of the approach being piloted are there fewer delays in the provision of expert reports to the benefit of the child?*
- 5) *Does the piloted approach lead to improved quality-assurance by the experts organisations involved through peer review and multi-disciplinary input?*
- 6) *Does the approach being piloted result in the best use of public funds?*
- 7) *What elements have worked and what elements have not in the pilot regarding the stated objectives of the pilot?*
- 8) *What lessons can be learnt from the pilot to inform any rolled out approach?*
- 9) *What are the inter-relationships between the services the LSC funds and other stakeholders in the area of law?*
- 10) *What is the impact of the pilot on clients?*
- 11) *What is the impact of the pilot on solicitors?*
- 12) *Is the approach piloted cost effective and does it offer the LSC value for money?*
- 13) *What are the true costs of the services being provided?*
- 14) *Is it possible to determine the complexity of a case at the point the need to instruct an expert witness is identified, and whether this can be used to develop definitions for cases that could allow the LSC to investigate purchasing specific services at defined prices?*

3. Methodology

This section outlines the main data collection and analysis strategies employed during the research.

Data on individual cases was collected via three forms developed by the Legal Services Commission (described in section 3.3). Two forms were completed when the case was opened, and the third when the case was closed. The forms collected information on the parties, their representatives, outline descriptions of case type, information on key dates and on costs. The forms were developed partly with a view to ensuring that the Commission was able to control the funding of the pilot cases and the research team advised on the content of research focused data. The forms were piloted and revised early in the pilot.

It was hoped that the forms would provide a basis for quantitative analysis, but the low number of pilot cases has militated against this. The data also served as a means of sampling potential interviewees, given that courts and representatives were identified.

The bulk of the research data has been derived from semi-structured interviews with key stakeholders within the project (described in section 3.4). We faced significant difficulties in recruiting solicitors to participate in the project. In our experience it is not unusual to encounter some difficulty in securing participation from busy professionals in pilot evaluations, especially when the pilot is not central to their own interests, but for this research the difficulties were of a significantly greater order. The research took place against a background of considerable negativity in the field of legal aid funding, as well as a number of judicial reviews - one specific to family law - all of which contributed to an atmosphere that made securing voluntary participation in the research extremely difficult.

Interviews were transcribed and subject to thematic analysis (with the research questions (see section 2.3) forming the analytical framework) using NVivo8. This ensures comprehensive and well organised analysis of qualitative data. Given the qualitative nature of the project, the number of pilot organisations and the difficulties of gaining responses, the interviews are best regarded as providing insights into how the pilot worked rather than providing a fully generalisable and definitive account of whether the pilot was a success or failure.

3.1 The Pilot Cases

The initial specification anticipated that expert evidence would be provided under the pilot in between 100 – 120 cases. To be eligible for consideration as a pilot case, proceedings needed to meet the following criteria:

- The assessment must have been commissioned during the course of proceedings under section 31 Children Act 1989 (i.e. an application for a care/supervision order).
- The assessment must have required a team of experts (i.e. at least two experts from different disciplines).
- The assessment must have been commissioned on a joint basis, with the Legal Services Commission being responsible for funding part/all of the costs of the assessment.

Only 31 cases were actually processed under the pilot. We endeavour to identify the reasons for the lower than expected take-up of the pilot in Part 4 of this report.

Additionally, two of the cases run under the pilot did not meet the eligibility criteria. One was commissioned in adoption proceedings, so did not relate to proceedings under section 31 Children Act 1989; and the other required an assessment by only one expert, so was not an assessment by a team. However, as they were run under the pilot, we have included data from these cases in the analysis.

Pilot cases were conducted in each tier of the family courts, with two cases proceeding in the Principal Registry, 22 cases in county courts and seven cases in family proceedings courts. Seventeen different local authorities issued cases which were conducted under the pilot. One local authority was involved in eight cases, another was involved in four cases, some were involved in two cases, but most were involved in only one pilot case.

3.2 The Pilot Teams

The ACE specification anticipated that up to seven organisations would participate in the pilot, and that the pilot teams would be drawn from both NHS and private sector organisations. The following six teams participated in the pilot:

- Cambridgeshire and Peterborough Child and Family Court Assessment Service;

- Carter Brown Associates;
- Combined Healthcare Expert Witness Team (North Staffordshire Combined Healthcare NHS Trust);
- Family Assessment and Safeguarding Service (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust);
- Great Ormond Street Hospital for Children NHS Trust (Child Care Consultation Team);
- North East Family Court Assessment Service (in conjunction with: Northumberland Tyne & Wear NHS Trust and The Newcastle Upon Tyne Hospitals NHS Foundation Trust).

Two of the teams dealt with 23 (74%) of the pilot cases between them. These organisations had already begun working as multi-disciplinary teams prior to the pilot, funded under conventional arrangements. All of the cases would have been referred to these teams in any event, and therefore were not generated by the pilot (although the payment arrangements were somewhat different). Eight pilot cases were referred to teams where the previous expectation would have been that reports would have been commissioned separately from each relevant expert. Two teams undertook no cases at all under the pilot arrangements.

3.3 Case Data

Data on individual cases was submitted by the pilot teams, and checked for accuracy by the Legal Services Commission. Three data capture forms were used:

- Form 1 – Initial Information (Pilot Team);
- Form 1A – Initial Information (Solicitor);
- Form 2 – Whole Life of Case (Pilot Team).

The Form 1 was completed by the pilot teams upon receipt of instructions, and was designed to capture preliminary data regarding the proceedings, with particular emphasis on identifying factors that may suggest that the proceedings were complex. The Form 1A was completed by the lead solicitor⁷ following the instruction of a pilot team, and was designed to capture information regarding the

⁷ Solicitor responsible for instructing the pilot team.

parties to the proceedings and their funding status. The Form 2 was completed by the pilot teams upon conclusion of the proceedings, and was designed to capture data relating to key aspects of the provision of expert evidence, including: the letter of instruction, the expert report, experts' discussions, giving oral evidence and the outcome of proceedings.

The case data was provided in Excel format and converted for analysis using SPSS by the research team. Initial Information (Forms 1/1A) was received in respect of each of the 31 pilot cases. The cut-off date for receipt of 'Whole Life of Case' data was 31st March 2011, by which time 20 completed Forms 2 had been submitted to the Legal Services Commission.

3.4 Qualitative Methods

Fieldwork consisted of a programme of interviews with representatives of the identified constituency groups, namely:

- Pilot Teams;
- Local Authorities (legal and social work practitioners);
- Solicitors acting for the child(ren);
- Children's Guardians;
- Solicitors acting for adult parties (usually parents, but also including grandparents and adoptive applicants);
- Judiciary.

Consideration was also given to whether it would be appropriate to interview the parents/family of the subject child(ren). However, this was discounted on the basis that the principal issues of the sustainability and supply of medical expert evidence, and the quality and cost of expert witness services are not matters about which lay users can provide significant evidence, and there is no data against which to compare users before or outside of the pilot. Furthermore, contacting such users, who are likely to be vulnerable and difficult to reach, raises significant methodological and ethical problems.

All interviews with the pilot teams were conducted face-to-face, and interviews with members of the other constituency groups were conducted either face-to-face or by telephone. All interviews were conducted using semi-structured interview schedules, which were designed by the research team and piloted with a range of the constituency groups. A separate interview schedule was designed

for use with each group. The use of interview schedules ensured consistency of approach between fieldworkers.

Originally, it was envisaged that interviews would be undertaken with a purposive sample of practitioners/key personnel from within each of the pilot teams, and with a stratified but otherwise random sample of representatives from the other constituency groups. As it became apparent that the number of pilot cases was going to be considerably lower than originally anticipated, the approach to sampling local authorities and the judiciary was varied to ensure that those interviewed had most experience of cases conducted under the pilot. Local authorities with a range of experience of the pilot were identified, and a purposive approach taken to sampling to ensure that, between them, the local authorities interviewed had referred cases to each of the pilot teams. Similarly, the court areas with most experience of pilot cases were identified, and a cross-section of the judiciary conducting hearings at those courts was sampled.

It was originally anticipated that interviews would be conducted with each of the six pilot teams, with up to six local authorities, with members of the judiciary in up to six court areas, and with up to 50 members of each of the other constituency groups. The lower than expected number of pilot cases meant that the anticipated number of interviews in the other constituency groups was revised down to 30 per group. The number of interviews actually achieved is shown in Table 2 below.

Table 2: Number of interviews conducted by constituency group

Pilot Teams	6
Local Authorities	6*
Children's Solicitors	9
Children's Guardians	12
Solicitors acting for adult parties	8
Judiciary	5

(- six interviews conducted across five local authority areas)*

It can be seen that the anticipated number of interviews was achieved only in one constituency group - pilot teams. The low number of pilot cases accounted for part of the difficulty in achieving the target number of interviews, as the pool of potential interviewees was significantly reduced. As noted previously, significant difficulties in securing interviewee participation were also encountered.

In order to maximise the data available for analysis, and to increase our ability to draw conclusions from the data, we asked interviewees to describe both their experiences of the pilot and also any experiences that they had of commissioning expert evidence via multi-disciplinary teams outside of the pilot. Where appropriate, our evaluation utilises this additional data.

With the interviewees' permission, all interviews were recorded and transcribed. All interviewees were reminded that their answers would remain anonymous in any future publication.

4. Take-up of the pilot

Once it became apparent that the number of cases referred to the pilot was going to fall well below the anticipated number of 100 – 120 cases, we were asked by the Legal Services Commission to endeavour to ascertain the reasons for the low take-up. In order to try to identify the reasons, we sought information from the Commission regarding the steps taken to publicise the pilot arrangements, and also sought the views of the pilot teams and representatives of each of the other constituency groups regarding why they believed the number of pilot cases had not reached the anticipated levels.

4.1 Publicising the availability of the pilot

The Legal Services Commission has indicated that when the pilot was launched, the Commission wrote to all contract holders undertaking public law children's cases who were based in either the same geographical areas as the pilot teams or the surrounding regions. Simultaneously, the Commission wrote to all family judges in each pilot team area. The purpose of the letters was to inform recipients of the availability of the pilot, and to encourage case referrals.

In October 2009, Lord Justice Thorpe, as Deputy Head of Family Justice, wrote to the judicial fraternity network in each pilot team area to encourage case referrals.

In April 2010, the Commission attended a launch event hosted by The Combined Healthcare Expert Witness Team and HHJ Ross Duggan (Designated Family Judge), for practitioners undertaking public law children's cases and family judges in and around the North Staffordshire area.

Throughout the operational phase of the pilot the Commission continued to promote the pilot in the following ways:

- Via practitioner and academic journals. Articles promoting the pilot and the pilot teams were published in a range of practitioner and academic journals, including *'Family Law'* (March 2010), care proceedings newsletters, Cafcass internal newsletters, and the Family Law Bar Association newsletter.
- Via the Family Justice Council. The Commission has representatives on Local Family Justice Councils, who provided updates on the progress of

the pilot in those meetings and via internal Family Justice Council communications. Updates were also provided to the Family Justice Council Experts Subcommittee.

- Via the Commission's own communications network. The pilot was promoted through the Commission's internal and external websites, and through its 'Focus' and 'LSC Update' publications.

4.2 The views of the pilot teams

Factors, which the pilot teams confirmed as contributing positively to the number of pilot cases undertaken, were:

- *Use of 'opt out' procedures.*

Two teams successfully operated opt out procedures. All cases referred to the teams were assessed against the eligibility criteria for the pilot. Where a case was noted as meeting the criteria, the team contacted the lead solicitor and requested that they agree to the case being included within the pilot. The use of an opt out requirement did not impact on the number of cases referred to the teams, as the cases would have been referred in any event. However, it did significantly increasing the number of cases processed under the pilot.

- *Support from the local judiciary.*

Three teams noted that support from the judiciary was important in encouraging referrals under the pilot, with judges raising the availability of the pilot when the parties applied for permission to commission expert evidence in proceedings.

- *Promotion by the team.*

Four teams noted that team members had links with the local Family Justice Council, and one team felt that awareness of the pilot had been raised through these links.

The only concern raised in relation to take-up rates by the four teams that undertook pilot cases, was that one team questioned whether solicitors had been made aware of the pilot.

The two teams that did not undertake any pilot cases were both commissioned to provide expert evidence in children's proceedings during the pilot period, but none of the referrals received were as a result of the pilot, and so did not proceed as pilot cases. Both of these teams asked lead solicitors to allow referrals to proceed under the pilot, but the solicitors declined. These teams cited a number of factors, which they believed accounted for the poor response to the pilot, namely:

- *Lack of awareness about the pilot amongst local solicitors.*

One team commented that:

"...[solicitors] didn't know about it, so we would say are you going to put it through the pilot and they would say: 'What pilot?'" [Pilot Team E]

- *A negative relationship between the Legal Services Commission and solicitors.*

One team commented that:

"We thought this [being accepted as a pilot team] was a good thing. I think the impression that I gradually formed was that actually in the eyes of the people who were going to refer to us there is a lot of tension in the relationship between LSC and solicitors ...they didn't seem to be a particularly popular body to be associated with. There were times when we were thinking actually this is getting to act against us in terms of getting work." [Pilot Team E]

When the same team endeavoured to encourage referrals under the pilot by asking a solicitor who already referred to the team to use the pilot, the response received was:

"No absolutely not. We don't want to be involved."

This team also attended local Family Justice Council meetings, and reported encountering hostility and being “given a hard time” when trying to explain the pilot.

- *Loss of control over the choice of expert.*

The teams perceived that there was concern, amongst lawyers and the judiciary, that instructing a team would result in there being less control over which individual expert would be responsible for the opinion in the report:

“...one of the judges had said ‘I am not having a monopoly of experts in my court’.” [Pilot Team F]

The teams also perceived that lawyers preferred to instruct the experts with whom they were familiar:

“...even if they can’t report for another six months and we offer them people that can do it in eight weeks they’d still book the one for six months down the line. They’re that adamant that, you know, we’ve used that person before we’re gonna have them ...They’re very precious about the experts for their clients.” [Pilot Team F]

- *Excessive paperwork and minimal reward for solicitors’ firms using the pilot.*

Under the pilot, the pilot teams were paid directly by the Legal Services Commission for their work. One team’s understanding was that solicitors believed that the pilot would mean more paperwork, less control over which experts they could use and less control over fees. The team explained how local solicitors had reacted to the pilot:

“They are not interested basically. One of our main legal aid lawyers locally just refused to take part. She said the paperwork was excessive and the rewards so minimal as to be not worth her time ...They said that the way that the billing was set up was just making more paperwork for them and to no advantage really, and that was because it was taking the control of the money and out of their hands to a certain extentthey have their systems set up to pay the experts, bill the LSC, bill the other solicitors and to disentangle that

and to separate out just they felt was I think more complicated ...they had to do all the paperwork but not have the control.” [Pilot Team E]

However, these solicitors were happy to instruct the team outside of the pilot, suggesting that it was the pilot arrangements rather than the prospect of instructing a multi-disciplinary team that acted as a disincentive.

- *Costs of instructing a team.*

One team felt that solicitors were concerned that instructing a team of experts had the potential to increase costs when “solicitors’ fees are being cut”, [Pilot Team F].

- *Resistance to a team approach.*

One team noted that the referrals, which it received, wanted expert witness services to be provided by individual practitioners, and that there was:

“...concern that experts’ meetings will take place without solicitors’ presence being involved. This relates to discussions between experts prior to completion of report so that if the report contains agreement or dispute, there was a concern that a dominant expert may influence others in their discussions prior to writing the report. Solicitors were very wary about any case discussion between experts, which goes against the whole team-working ethos. Will there be any sanctions if the solicitors didn’t use the pilot scheme? And it was difficult to convince them that this was purely voluntary; solicitors like the independence of an expert and again don’t like the idea of any collaboration.” [Pilot Team F]

4.3 The views of the other constituency groups

All interviewees in the other constituency groups were also asked to identify any reasons why the take-up under the pilot was lower than anticipated. The factors noted as contributing to low take-up were:

- *Lack of awareness about the pilot.*

The only reason cited by local authorities to explain the low take-up was lack of awareness, with one local authority social worker noting:

“To be honest it wasn’t something that I was aware of until you contacted me, so it’s sort of being going on below my radar. I don’t know why there would have been a low take-up ...I don’t know whether it wasn’t advertised properly, or I just wasn’t looking out for it.” [Local Authority 3]

Interviewees in the other constituency groups supported this view, with the following comments being typical of the responses received:

“I must admit I wasn’t aware of it until somebody who I was instructing in [pilot team] said oh well we’re in the pilot, and I thought oh what pilot ...I have touched on it with others but ...I’m not aware of anybody else having a case under the pilot, thinking about it, nobody else has raised it with me that they have so ...if I don’t know about it then I’m assuming a lot of other people don’t know about it either.” [Children’s Solicitor 2]

“I didn’t know about it; it’s only because the solicitor for the child in the case who I was working with, she’d heard about it and she suggested it, otherwise I wouldn’t have known about it. So I would think probably the number one reason is that a lot of people haven’t heard about it.” [Children’s Guardian 3]

“We ...approached [pilot team] to do this assessment because obviously the numerous parties that were involved, and it only transpired afterwards that we were aware that it was part of this pilot.” [Solicitor (Adult Party) 2]

Even solicitors who had experience of acting in more than one pilot case felt that their knowledge of the pilot was limited, with one solicitor, acting for parents in two pilot cases, stating that information about the purpose of the pilot had not been well-communicated. However, one solicitor did not feel that take-up had been low in the local area, and that their firm had

been “very enthusiastic” about the pilot. This solicitor has originally received information about the pilot from a partner in their firm, who was active in Resolution, and the solicitor thought that other solicitors in the local area were also generally aware of the pilot.

As the members of the judiciary who were interviewed had generally presided over pilot cases, most were aware of the pilot. However, one judge interviewed had not been aware of the pilot, and another commented:

“I don’t think Circuit Judges in general knew much about it I’m afraid.”
[Judiciary 2]

Where interviewees had knowledge of the pilot, they identified the judiciary as their main source of information, with the following comments being typical:

“I think it came through the courts. I think Judge [X] did give a big push and indicated that this pilot was running ...because the experts involved and the organisation is not something I’d come across before.” [Local Authority 5]

“Locally I don’t think it received very much publicity. We were put onto the scheme initially by a district judge who’d obviously received some information about it.” [Children’s Solicitor 6]

“Because of the problems we were having in getting experts to meet deadlines there was a suggestion that instead of us making a selection from our list, our approved list of people that we know, we were going to be encouraged to go for somebody through this process ...it wasn’t as far as I was concerned really a matter of choice. The judge is very concerned about delays that have arisen in a number of cases and of course we knew delays are arising, so he’s got access to this multi-disciplinary team, he’s going to be encouraging us to follow this procedure rather than pick our own experts off a list because it’s going to be quicker.” [Children’s Guardian 11]

- *Loss of control over the choice of expert.*

Children’s solicitors indicated that lawyers preferred to instruct experts with whom they were familiar, and were reluctant to instruct a team of experts as this would result in the lawyers having less control over which

expert would be responsible for the opinion in the report. In particular, there appeared to be reluctance to instruct new or unfamiliar experts:

“In the area where I work [name of town] the experts that are instructed in cases tend to be ones that people have used before and have experience of using, so there’s a familiarity ...we tend to use the same experts all the time and ...we will only go elsewhere if one of the experts we normally use isn’t available. Most practitioners will have their list of people who they always use and we just tend to use them because we know them, we know they will do the job and therefore there’s no need to go elsewhere.” [Children’s Solicitor 4]

This solicitor felt that there were sufficient well-known experts available in the locality, but reservations were also expressed in another area where there were serious delays in experts being able to start work:

“I think one of the problems was that we weren’t going to know who was actually doing the work and I think solicitors and certainly guardians like to know who’s going to undertake the assessment, so I think that’s probably one of the first things that was an issue.” [Children’s Solicitor 7]

“I think because traditionally people are used to identifying an expert, and a specific expert based on probably their previous experience of working with that expert, and when you’ve got a multi-disciplinary team where you’re just dealing with one person and they’re allocating the work, I think probably legal representatives feel that they don’t have the same level of control as to who does a specific piece of work within that team.” [Children’s Solicitor 8]

Children’s guardians and the judiciary also identified reluctance to try unknown experts as a barrier to instructing the pilot teams:

“I mean probably just because I think it’s very difficult to instruct people that you don’t know or have faith in, I think it’s probably as simple as that, that we all tend to go to people that have either been highly recommended or that we have some personal knowledge of.” [Children’s Guardian 8]

“I would think that those who instruct experts are probably looking for known experts with a proven track record who can bring a degree of weight to their views, who are well known to the judges and to the courts, and whose reports are known to be good. So there’s probably a tendency to instruct the known and the experienced as opposed to

venturing into new territory with the young and the inexperienced.”
[Judiciary 1]

- *Referral criteria too narrow.*

Only cases where the expert witness services required input from more than one clinical discipline were eligible for entry into the pilot. Some interviewees noted that this multi-disciplinary requirement was a hindrance to improved access to expert evidence:

“I attempted to instruct the pilot on another case subsequently and it was too straightforward for the pilot team to take on and I was quite disappointed, so I was told that it really did have to be quite complex before the pilot team would be appropriate ...I thought that once they had the resource they were being used for all the cases in our area ...like a conglomeration of experts and that you could mix and match and pull one out.” [Children’s Solicitor 5]

“I regularly commission expert evidence but rarely, well less frequently, find myself commissioning expertise from more than one discipline. Once or twice I’ve found myself wanting to use the pilot and being tempted to use my imagination to bring a second discipline to bear in order to make that possible ...There’s a great need for expertise, the pilot scheme identified that, but as I say I think it was a mistake to seek to restrict it to multi-disciplinary expertise ...these people are health service professionals, they’re not available on the private market; it was the pilot that made them available to us. But by your artificial restriction to multi-disciplinary teams you lost the opportunity I think to make the headway that you might have chosen.”
[Judiciary 5]

- *The pilot period was too short.*

It was noted by some interviewees that it takes time to establish a reputation as an expert witness, and that the pilot period was insufficient to allow the pilot teams, particularly those teams that had been created for the purposes of the pilot, to establish the necessary reputation to attract a high number of referrals:

“I’m aware that the project has been used in I think at least one other case, but I haven’t heard positive comments from other practitioners. For instance we sit around at court quite a bit and people will say

'have you tried this expert?' or in casting around for other cases nobody's said 'oh try the project there' ...It's not that I've heard negative things, but there isn't a groundswell of opinion from other practitioners who are saying 'use this scheme'. I've had one guardian who's asked me to check out whether they're still running to see if they could do a report and when I checked it out they weren't."
[Children's Solicitor 6]

This concern was also raised by the judiciary, with the judge who noted that the referral criteria were too narrow also regretting that the pilot had ended before the local pilot team had had time to build capacity to take more referrals.

- *Perceived lack of capacity within multi-disciplinary teams.*

Children's Guardians also noted a perception that multi-disciplinary teams were generally difficult to access:

"Often they're seen as very scarce and precious resources that often have quite long waiting lists or actually they can't actually respond in any timescale that's appropriate for the child in question." [Children's Guardian 4]

There was also a perception that the pilot teams had been established with a cap on the number of referrals that they could accept, which may have deterred referrers who assumed, without enquiry, that pilot teams had exhausted their capacity:

"My understanding was the ACE project were only offering a limited number of options for this and I thought they were all filled pretty quickly." [Children's Guardian 12]

- *Incorrect balance of professional disciplines within teams.*

One judge, who was involved in the pilot only because the circumstances of the case dictated that it was in the child's interests to order a report from a pilot team, although the team was situated in another part of the country, commented:

"It seems to me that there were an insufficient number of Pilot schemes certainly there are none in the [X] area that I could have

used if I'd wished to do so ...I think it was unfortunate that perhaps the kinds of multi-disciplinary teams that certainly I had envisaged participating in the long run don't on the whole seem to have put themselves forward. The work seems to have been very much limited to basically a lot of psychologists and psychiatrists." [Judiciary 2]

- *A negative relationship between the Legal Services Commission and solicitors.*

One children's solicitor noted that solicitors were "suspicious of LSC initiatives because [the LSC] was only interested in doing a thing for less money", [Children's Solicitor 1].

4.4 Analysis

Interviewees across all six constituency groups indicated that there was a *lack of awareness about the pilot*. This is surprising given that the Legal Services Commission provided information about the pilot to contract holders (children's solicitors and solicitors acting for adult parties), Cafcass (children's guardians) and the judiciary. The only constituency group, which appears to have not been directly targeted by the Commission, was local authorities, although information was provided to the Family Justice Council, and local authorities are often represented on local Family Justice Councils. The fact that so many interviewees raised the issue of lack of awareness indicates that either information about the pilot was not widely received (suggesting that the information provided failed to permeate through recipient organisations, such as Cafcass and solicitors' practices), or that recipients did not read or retain information about the pilot (suggesting that pilot was not seen as a high priority).

Although there was a perception amongst some of the pilot teams that there was hostility to the pilot as a result of a poor relationship between the Legal Services Commission and solicitors, solicitor interviewees were, in general, positive about the objectives of the pilot, with only one children's solicitor noting that solicitors were "suspicious" of Commission initiatives. However, we did experience considerable difficulty in recruiting solicitors to take part in interviews, despite repeated attempts. Whilst this may have been due to the demands of practice, it may also reflect a lack of interest in the pilot, and a lack of willingness to participate in Commission sponsored initiatives.

The second most cited factor to explain the low take-up was *loss of control over the choice of expert*, which was noted by interviewees in four constituency groups (pilot teams, children’s solicitors, children’s guardians and the judiciary). The fact that the pilot teams did not have much time to establish themselves and overcome such views may also be important. This raises obvious concerns regarding the effectiveness of the pilot arrangements in facilitating health professionals acting as expert witnesses and promoting a sustainable supply of expert witness in children’s proceedings, which is an issue that we consider further in Part 5 of this report.

The third most cited factors to explain the low take-up were that *the referral criteria were too narrow* and that *the pilot period was too short*, which were both noted by children’s solicitors and the judiciary. Therefore, maintaining a requirement that a multi-disciplinary team can only be commissioned in cases where the expert opinion requires input from at least two disciplines has implications for the effectiveness of the multi-disciplinary model in addressing issues relating to sustainability.⁸ Unless multi-disciplinary teams are allowed to undertake cases where mono-disciplinary assessments are required, the capacity for multi-disciplinary teams to contribute significantly as a delivery model is somewhat reduced.

Similarly, the fact that concerns were raised that the pilot period (at least twelve months) was too short a period for some pilot teams to establish themselves, suggests that there is likely to be a considerable lead-in time before provision of expert evidence via multi-disciplinary teams would have any significant impact, especially where the creation of new teams is required.

Of those factors noted to have had a positive effect in encouraging referrals to the pilot, the most important was *support from the judiciary*, which was noted by interviewees in four constituency groups (pilot teams, local authorities, children’s solicitors and children’s guardians). Additionally, and perhaps unsurprisingly, the pilot teams that dealt with the greatest number of pilot cases were the two teams that operated ‘opt out’ systems, treating all qualifying referrals as pilot cases unless the parties objected.

⁸ It should be noted, however, that the ‘Care Profiling Study’ data shows that in excess of 80% of the cases in that study involved two or more experts; (J.Masson, J.Pearce and K.Bader) (Ministry of Justice Research Series 4/08, March 2008) (page 49).

5. Evaluation

In this section, we set out our evaluation of the data as it relates to the 14 research questions listed in section 2.3. However, several of the questions raise similar issues. In order to avoid repetition, we have grouped together those questions where the analysis would otherwise overlap. In addition, as questions 7 & 8 require an analysis of the success of the pilot arrangements and any lessons to be learnt, we deal with them last.

5.1 Engaging and Sustaining Expert Witnesses

This section focuses on the engagement and sustainability elements of questions:

- 1) *Is it easier for health professionals to become engaged as health expert witnesses under the piloted method?*
- 2) *Will the approach being piloted result in a sustainable increase in the supply of quality-assured expert witnesses?*

The issues relating to quality assurance are dealt with in section 5.3.

Twenty-three of the pilot cases were undertaken by the two teams that successfully employed an 'opt out' approach, with all of the referrals received during the pilot period (that met the criteria for entry into the pilot) being treated as pilot cases. There is no evidence to suggest that the pilot had any effect on encouraging or increasing referrals to these two teams, as it appears that the teams would have been commissioned to provide expert evidence in the pilot cases that they dealt with even if the pilot had not been operating.

The two teams that did not undertake any cases under the pilot were each commissioned to provide expert evidence in children's proceedings outside of the pilot during the pilot period. Therefore, there is again no evidence to suggest that the pilot had any effect on encouraging or increasing referrals to these two teams.

This means that only eight of the pilot cases were referred to multi-disciplinary teams as a result of the pilot. These cases were dealt with by two of the pilot teams, with each team undertaking four cases. These teams included clinicians who had not previously undertaken expert witness work in children's cases, and thus the pilot did provide these clinicians with their first opportunity to undertake

family court work. Between them, these two teams had agreed to undertake up to 30 pilot cases. However, both teams reported difficulties in finding the capacity to meet the courts' requirements, with one team having to decline a referral during the pilot period due to lack of capacity. That team eventually withdrew early from the pilot, two months before the end of the pilot period. Therefore, even though the pilot led to these teams undertaking expert witness work, which they would not have undertaken but for the pilot, the pilot failed to ensure that the teams had sufficient capacity to meet demand.

Interviewees were asked whether they thought that the piloted approach would lead to more clinicians being prepared to provide expert evidence. Most solicitors interviewed had no views on whether a team model had the potential to ensure sustainability of supply, and tended to think that there would be the same number of experts, but working together in teams. Beyond solicitors, interviewees did note the following potential benefits, which may ensure greater sustainability:

- *Responsibility for the decision making is shared.*

A number of interviewees noted that the team model was likely to offer a supportive working environment, and provide protection from possible individual criticism. The benefits were summarised by one of the pilot teams:

"...what we have found is that people ...are still anxious about it but you take away some of the barriers to them doing the work by saying: look we will coordinate the solicitors, we will do all the invoicing, we will support you in the structure and format of a report and if you need to go to court we can provide you with the support and advice ...those are people who are often consultants already so they have got the experience of clinical work but not the experience of court work, but by providing them with some containment and advice they will take on doing the report." [Pilot Team E]

- *Less experienced clinicians have the opportunity to learn from senior colleagues.*

One of the judges interviewed likened a team to a barristers' chambers, for the benefit of less experienced practitioners:

"I think peer support amongst a team of people who go into court and give evidence would be immensely useful. They are bound to share experiences, they're bound to give each other useful advice and tips just as in a barrister's chambers." [Judiciary 1]

It was also noted that the team structure was likely to help less experienced clinicians obtain exposure to expert witness work, which they would not otherwise get, as the team would often be instructed as a result of the reputation of senior colleagues:

"... the advantage they have is that they, because they're multi-disciplinary you don't have to have every member of the team being the person everybody's heard of that they want to have, so it gives them more flexibility about getting the work done, but with perhaps one known person sort of headlining it that we're all comfortable instructing. Because that's the problem; nobody wants to instruct somebody they've never heard of." [Solicitor (Adult Party) 6]

"I suppose what would be helpful if there were respected individuals heading up a consortium who were bringing in other people whose work they knew you would have a greater trust in that. So if a known psychologist was at the helm of a new project and she was saying 'yes this person is well-qualified in their field, they're not known to you but they will provide a good report', then you would have some confidence in that person's judgement. In that way I can see that if you get the right people at the helm and they've got the availability it could work well." [Children's Guardian 9]

"...I think it would be very good, I think also if an experienced man, woman, practitioner was approached on a particular case and completely snowed under, a recommendation from them about some new young talented practitioner in that field would count a great deal. The business of recommendations of new talent given by senior people is probably how a lot of them get going and I think it would facilitate that." [Judiciary 1]

The benefits of the team model in sharing expertise amongst clinicians were also noted by the pilot teams. Several of the teams explained that they would regularly convene meetings of team members at which either a senior member of the team or an external specialist would provide training in respect of key areas of practice associated with child protection (e.g. child sexual abuse).

- *Access to training in relation to the role of the expert witness.*

The pilot team members who had undertaken expert witness training as part of the pilot were appreciative of this. Teams also provided opportunities for less experienced clinicians (trainees and registrars) to co-work cases with more senior colleagues:

“One of the things that I have been able to do is use the specialist registrars in training to join me to do the interview and to write up the report, and then to go through that with them and ensure that it actually is appropriate opinion so at the end it is my opinion but they have done the drafting and been involved in the interview ...without that opportunity they either have to do the reporting on their own or they don't get a chance to, which is all too common.” [Pilot Team E]

A different team noted that less experienced clinicians were provided with the opportunity to shadow senior colleagues at court.

For some, training in the provision of expert witness services was seen as an essential element of clinicians' broader training:

“The high-level trainees in child psychiatry come here, usually in their final year or penultimate year, and it's now a requirement that they get training in court work, it's in our core curriculum and we're one of the few places that offer it in the big rotation that we're a part of. So they all want to do court reports, and we have one trainee who is attached to our team for the whole year, but I also offer it to the other trainees while they're at this hospital so that we get as many trainees having the experience of doing a court report as possible, and it's true that if we didn't run this team I don't think they would get that experience ...they move on from here into consultants' posts, and then some of them will actually do some court work they might otherwise not have done.” [Pilot Team A]

However, the same team also noted that a similar arrangement could be made available for psychologists, but that there was no demand from practitioners.

One pilot team noted that accessing training via the Trust was very difficult, and that it would be better if some of the income generated by expert witness work was retained by the team for training purposes.

Interviewees also noted a number of concerns regarding the team model, which would deter them from commissioning expert evidence on a team basis, namely:

- *Loss of control over the choice of expert.*

As discussed previously (see section 4.4), loss of control over the choice of expert was the second most cited factor to explain the low take-up of the pilot, being referred to by interviewees in four constituency groups (pilot teams, children's solicitors, children's guardians and the judiciary).

Reservations were expressed that the members of the team were not named, nor were their 'CVs' provided in advance of instruction. One children's solicitor was concerned that lack of information about the members of the team might result in objections from other parties' lawyers, who would require information about every member of the team before they would make a judgment about the team's expertise, and that this might militate against the instruction of teams where not all the members had established reputations as expert witnesses. In another case, the child's solicitor encountered strong opposition to the instruction of a pilot team from counsel for the mother, on the basis that counsel wished to know exactly who was going to be writing the report.

- *Lack of transparency regarding team decision making.*

Interviewees were asked about how differences of opinion amongst team members would be brought to the attention of the court, and whether some team members might be more influential than others.

Perhaps unsurprisingly, the pilot teams expressed confidence that issues were always discussed in a mutually supportive manner that enabled individuals to raise any differences in opinion, and to work towards agreement. One of the teams noted that any differences of opinion would be set out in the report.⁹

However, concerns were expressed by interviewees in other constituency groups that the team approach to decision making lacked transparency.

⁹ Expert witnesses are, in any event, under an obligation to set out any range of opinion that exists within the body of the expert report (Practice Direction 25A (Experts and Assessors in Family Proceedings) Family Procedure Rules 2010) (paragraph 3.3(f)).

One solicitor acting for an adult party noted that lack of transparency was particularly problematic where it resulted in a change of opinion:

“...one doesn’t always know how decisions are reached. Because inevitably, I mean human nature, two experts of different specialist backgrounds meet in the kitchen over a coffee and have a chat, those aren’t recorded, you know they should be recorded but they’re not, obviously, one understands why. That is the disconnect, that is the disadvantage and we saw that in this case quite clearly.” [Solicitor (Adult Party) 4]

- *Priority given to the needs of senior clinicians rather than the needs of the parties.*

Some guardians were wary of less experienced clinicians being given too much responsibility:

“What we are doing is a very, very heavy-end piece of social work ...I’m a guardian, I’m obviously bound to say that from the point of view of children, but from the point of view of everybody’s rights to family life, I think it’s pretty essential that the people who are giving information that lead to those decisions being made are of the highest calibre. I don’t think it is acceptable to say we have to train people up because you know the registrars now will be the consultants of next year; they will all develop their seniority.” [Children’s Guardian 8]

A children’s solicitor was also concerned that a registrar rather than the lead consultant had attended court to give oral evidence, and that this had been done for the convenience of the consultant. However, all those interviewed who had been involved in the case (including the children’s guardian) thought highly of the registrar’s evidence.

It is perhaps indicative of the “silo mentality” of professionals in the family justice system noted by the Family Justice Review Panel,¹⁰ that some interviewees could see no benefit in giving a clinician the opportunity to gain experience and training.

Interviewees were also asked to identify the strengths and weaknesses of the pilot generally. Two strengths were identified, which could promote greater

¹⁰ ‘Family Justice Review: Interim Report’, Op.Cit. (paragraphs 2.51 – 2.64).

sustainability. First, the *creation of additional capacity*. The teams that were established under the pilot were welcomed as a new, more accessible, source of expert witnesses. Second, the *payment regime*. A number of solicitors identified fees as a factor impacting upon the supply of experts, with most noting that a reduction in fees was likely to reduce the number of clinicians prepared to act as an expert witness. However, one solicitor noted that a contractual arrangement between the funder (e.g. Legal Services Commission) and the expert team, as operated in the pilot, might result in more availability, because the current arrangements and bureaucracy acted as disincentives.

Two weaknesses of the pilot were identified as impacting on sustainability. The first was that the *referral criteria were too narrow*, with cases, which required input from only one clinical discipline, being ineligible as pilot cases. This concern was particularly highlighted by the judiciary:

“If there was a need for more than one discipline I raised it [the pilot] and did my best to impose it, sometimes against the representations of the parties. If, on the other hand, it was a case that required only one discipline, I sighed at the narrow nature of the ambit of the pilot and regrettably felt I had to go to the private sector as usual.” [Judiciary 5]

The second weakness identified was that *teams did not have correct balance of expertise*. In particular, the pilot teams were based around child and adolescent psychiatrists, child psychologists and therapists. Many of the cases, therefore, also required separate instruction of an adult psychologist or psychiatrist. Only one team had a dedicated paediatrician, whose work was integral regarding significant harm caused by neglect. Whilst another team had access to additional specialists, they were not part of the team. One judge and one guardian identified the huge difficulty in finding paediatricians and radiologists to report on cases of disputed injuries as a key area that needs to be addressed.

In summary, the data suggests the following conclusions in respect of research questions 1 & 2:

- i) The pilot did little to make it easier for health professionals to become engaged as expert witnesses, with only eight cases being undertaken as a direct result of the pilot.
- ii) Given its limited impact, it appears unlikely that the piloted approach, in its current form, would ensure a sustainable increase in the supply of expert witnesses.
- iii) A number of facets of the team model were identified as being likely to encourage less experienced clinicians to undertake expert witness work (particularly, shared responsibility for decision making, the opportunity to learn from senior colleagues and to access training in respect of the role of the expert witness).
- iv) A number of obstacles were identified to greater use of expert teams (particularly, restrictive referral criteria, the parties' desire to instruct their individual expert of choice, and lack of transparency in respect of team decision making).

5.2 Speed of Access and Reporting

This section focuses on access to expert witness services and the timeliness with which expert reports were produced, in response to questions:

- 3) *Does the pilot make it easier and quicker for solicitors and clients to access health expert witnesses?*
- 4) *As a result of the approach being piloted are there fewer delays in the provision of expert reports to the benefit of the child?*

It is accepted by all professionals involved in proceedings relating to children that the quicker a satisfactory expert report can be produced, the better, because of the duty to minimise delay in the interests of the welfare of the child.¹¹

Consequently, interviewees saw the time taken to identify an appropriate expert,

¹¹ Section 1(2) Children Act 1989.

to produce the report and whether the report was filed in accordance with the Timetable for the Child¹² as all being important.

Interviewees were asked about the referral arrangements operated by the pilot teams. Interviewees noted that a quick referral process, usually beginning with an exploratory telephone call, was preferable. It was also noted that it was important to have a central contact point, usually a team administrator, to deal with referral queries. Lack of an administrator was noted as contributing to delay, with one solicitor complaining that because there was no team administrator, contact had to be made with each separate expert's secretary.

One pilot team operated a regular weekly intake meeting at which team members decided whether to accept new cases. Solicitors and children's guardians were clear about this process, and most found it straightforward and relatively quick. However, one guardian and two solicitors (adult party) felt that the use of the intake meeting caused delay unless the referral was made just before a scheduled meeting. Another solicitor (adult party) felt that the purpose of the intake meeting was to "cherry pick the cases" that appeared interesting.

There was no consensus regarding whether the pilot had increased speed of access and reporting. Some interviewees noted that reports were produced more quickly, some had no view and some stated that reports took longer to be provided under the pilot.

One children's guardian identified two key problems with availability of experts: one was the huge difficulty in finding paediatricians and radiologists to report on cases of disputed injuries, the other was the delay in psychiatrists and psychologists being able to start work. During the period we were interviewing it appeared that psychologists and psychiatrists known to instructing solicitors were advising that it would be about three months before they could begin work on a new case. For example, a solicitor (adult party) interviewed in mid-January estimated that if s/he instructed an expert that day, the first appointment with the expert would be in April or May with a report in June. If proceedings were contested, it was unlikely that a hearing would then take place before September, and "in the life of a child that is quite a long time", [Solicitor (Adult Party 6)]. Solicitors interviewed also indicated that existing multi-disciplinary teams were also very busy, and often could not start work on new cases for several weeks.

¹² The timetable set by the court taking into account the significant steps in the life of the child who is the subject of the proceedings (Public Law Outline - April 2010, paragraph 3.2).

Unsurprisingly, it was in the areas where new teams had been established for the purposes of the pilot that most impact in terms of speed of access was noted, with the teams being able to commence work immediately. One children's solicitor interviewed noted that the primary reason for referring cases to the pilot team was to obtain the report more quickly, not because the cases were particularly complex. A judge, also working in an area served by a new team, noted:

"Under the project, as we soon learned, the workers wanted to start pretty well straight away." [Judiciary 5]

One guardian had found that using a team could speed matters up, because if one expert was ill others could complete the report, which could not have happened using single experts. Another guardian was certain that having all the experts in one place saved time. A third took the view that the expert opinion would be delivered more quickly and yet be more considered, with the team having discussed and resolved any areas of disagreement:

"The advantage being that if you bring in separate experts you've got to bring them together and have discussions, they may then go back on some of their views, so you don't get those sort of problems arising halfway through a case, which can cause fairly significant delays. You know they're actually talking to each other, considering the implications for the children as they go along. So in that respect – which is a key respect really – the approach I consider to be a far better one ...There is the potential for them to reduce the delay that derives from differences of views from experts, that does cause significant delay when it occurs and you're not going to get that with a team approach." [Children's Guardian 5]

A solicitor (adult party) made a similar comment:

"I think if you can identify early on at a professionals meeting the elements of the assessment that need to be done if you've got a team waiting there it could be done more quickly rather than a child psychiatrist starting off and then saying oh actually I think you now need to get this person in and that's more sequential whereas if you're doing it in a parallel way hopefully it can be done more quickly... if the team that identifies a particular need, say they think a social work assessment is necessary here, we can't look at that, we're not qualified to look at that but we have somebody within our team that can, that's a lot easier than having to go away, find another expert somewhere else and then that obviously leads to further delay." [Solicitor (Adult Party) 5]

Conversely, five interviewees (one pilot team, two children’s guardians, one children’s solicitor and one judge) all thought that multi-disciplinary teams could take longer to report. It was noted that there was a general shortage of multi-disciplinary teams, and, where a team had an established reputation, it was likely to be oversubscribed. Concern was also raised that teams which also offered therapeutic intervention often “made a meal of it”, going into fine detail, whereas individual experts could be pressured into responding more quickly. It was also noted that not all teams were able to offer the requisite expertise to conduct all the assessments required (e.g. often having no adult psychiatric/psychological specialism), which meant that experts external to the team still had to be commissioned.

Finally, interviewees were asked whether there was any delay in producing the report, and, if so, whether the delay was justified and whether it impacted upon the Timetable for the Child. Interviewees were specifically asked whether they attributed a timely report to case management under the Public Law Outline (PLO), so that the impact of the pilot and the PLO could be separated. Generally, interviewees across all constituency groups noted that reports were received on time, and that, whilst case management by the courts could assist, the key factor in ensuring that the report was filed on time was the pilot team.

In one case, the multi-disciplinary team was described as particularly helpful in reducing potential delay, as the initial assessment noted the need for an additional assessment, which had not been originally anticipated, but which could be carried out by other members of the pilot team:

“...because it was a multi-disciplinary team and they had that expertise on site it was quicker to get those assessments as opposed to say she’d been seen by a singular expert who then decided a speech and language expert was needed, I think it would have taken longer to agree that expert, for all parties to agree.” [Local Authority 1]

One local authority said that the pilot team operating in its area was “always” late, and that this sometimes led to adjournments. It was felt that the team’s schedule was too full, and that the team also took on too much extra work with families, beyond what was required for the assessment. However, it should be noted however that all the other interviewees in this location said there had been no delays.

The pilot teams were asked to provide data regarding any delays in filing their reports on the ‘Whole Life of Case’ report form (Form 2). Contrary to the

interviews, late filing was noted in ten of the twenty cases completed during the pilot period. In the majority of cases, the reasons for late filing appeared to be beyond the pilot teams' control, and were noted as:

- Person(s) to be assessed failed to attend appointments (2 cases).
- Delay in receiving relevant supporting documents (2 cases).
- Additional assessment identified as being necessary during the course of referred assessment work (2 cases)
- Timescale set by the court impossible to comply with due to: 'sickness absence' (1 case), 'annual leave' (1 case) or 'other unstated reason' (1 case).

For one case the reason for the late filing was not recorded.¹³

In summary, the data suggests the following conclusions in respect of research questions 3 & 4:

- i) The only cases where the pilot appears to have made it easier for solicitors and clients to access health expert witnesses were those cases that were referred to the pilot teams created in order to participate in the pilot, as these teams had capacity to accept cases immediately. However, the experience under the pilot was that new teams also struggled to provide capacity.
- ii) Systems, which appear to contribute to ease of referral, include having a designated, accessible referrals process, and a designated contact person who is available and able to deal with queries as they arise.
- iii) Timeliness in producing reports appeared to depend on the capacity of the team rather than being the product of external processes such as the pilot or judicial case management.

¹³ The Form 2 notes that the report was only two days late and that an extension had been agreed by the lead solicitor.

5.3 Quality of Reporting

This section focuses on whether the pilot arrangements resulted in improved quality assurance procedures being applied to expert witness services, in response to question:

- 5) *Does the piloted approach lead to improved quality-assurance by the experts organisations involved through peer review and multi-disciplinary input?*

In order to evaluate issues relating to quality, the pilot teams were asked to explain the quality assurance procedures that they employed, and interviewees in the other constituency groups were asked for their views on the quality of the expert evidence commissioned under the pilot.

The majority of solicitors and children's guardians were satisfied with the quality of the reports received, and also thought that the 'holistic' approach employed by multi-disciplinary teams had potential to enhance the quality of reports. Particular advantages of multi-disciplinary team reports were identified as:

- cross-fertilisation (with experts from different disciplines sharing their expertise and providing a coordinated opinion in respect of all the relevant issues);
- flexibility (as if additional assessments were identified as being necessary they could be undertaken by other members of the team);
- easier for families (as they only needed to engage with clinicians from one organisation); and
- less duplication (as experts work collectively as part of the team rather than in isolation).

The following comments are typical of the views of interviewees:

"the advantage is obviously it gives you a very complete I would say, in this particular case, a very complete view of the issues ...so it certainly helped us gain a better insight into our concerns and it helped us with our care planning, and, in this particular case being very complex, it has helped the court shed much needed light in terms of the emotional harm that these children had suffered." [Local Authority 2 (social worker)]

"...they can see how things are going and think well actually we need to bring a psychiatrist in here. Whereas on previous cases I haven't had the experience that experts generally do that; they normally conclude their

assessment and say this is what we found, this is where we think we should go from here, rather than saying part way through we think this is necessary or that's necessary. So that's been really very helpful." [Solicitor (Adult Party) 8]

"...in certain very complicated and complex situations it can reduce the number of people that are asked to see, that see a family or see children; that's what I'm particularly concerned about, it's actually reducing the number of professionals that interview the children in particular." [Children's Guardian 2]

"...it is different because you get the view from the different disciplines rather than having ...an adult psychiatrist just considering a parent from their perspective working separately from people who are working with the children, you don't get the more holistic approach to the family. So yes you do get a more thorough report." [Children's Guardian 4]

However, solicitors and guardians who liked the multi-disciplinary team approach also believed that the high quality of the individuals in the pilot teams was a major factor in instructing the team:

"...theoretically the advantages are significant and ...include the fact that specialists can add specialist pieces to an overall whole, for example if you look at the [pilot team] model you've got people ...who are very expert at story-stem assessment, it's not to say there are people who can't do them, but they have particular expertise so they can add that as a small, but very significant, part of a bigger overall assessment." [Children's Guardian 8]

In a small number of other cases, solicitors reported that the team approach had not delivered the co-ordinated, holistic report that they had anticipated. A children's solicitor was disappointed that the report did not seem to benefit from a team approach, but was "pretty much" the same as having three individual reports:

"My experience in this case was that the individual experts tended to do the reports obviously within their own area of expertise ...I didn't detect a great deal of overall coordination and consideration of issues as they developed. I suspect that each individual expert simply developed their individual reports in accordance with the letters of instruction that they were given from us. I had the impression that a scheme of this nature was more to be driven by someone with clinical expertise and overall management ...And then I think the final report, albeit a combined report, had three very different aspects to it, which were essentially the three disciplines' reports." [Children's Solicitor 6]

This reflected the interview with the judge in this case, who had not been aware that the report had been produced by a team.

Another children's solicitor received a report, one part of which was "fine", but the other part did not answer the questions in the letter of instruction and was written by a psychiatrist, when a psychologist had been instructed. The local authority solicitor interviewed about this case was also unhappy that the report had not provided what was requested.

Another children's solicitor using this team was pleased with the quality of the report, its timeliness and the way the psychologist had kept in touch with her, but noted:

"In this particular case, I understood from the person who ran the work that in fact we wanted two experts ...But somewhere that second report got lost in the ether, and nothing was set up for that and I don't know why. It doesn't have any bearing now; the case has taken a completely different turn so the lack of that evidence matters not, but had it been crucial obviously I would've had to chase that up to try and find just what had happened." [Children's Solicitor 9]

One local authority social worker said that the report had not added anything to the existing evidence in the case, and that the authority would not wish to commission that team again. In another local authority, the legal adviser and social workers felt that the pilot team's report was not sufficiently analytical, and was more suited to supporting families than reporting to the court. This team was described by a solicitor (adult party) as being perceived as being "fair to parents".

One solicitor interviewed stated that he did not think his parent-client had been correctly assessed by the pilot team, resulting in him having to obtain permission from the court to instruct another expert. The second expert contradicted the negative view that the team had taken of his client, and it was the second expert's evidence that was accepted by the court.

Amongst the judiciary, there were few comments about the quality of the reports produced by the pilot teams, partly due to the lack of sufficient cases to form a view, but some positive observations were made regarding the usefulness of the team approach. One judge, who had dealt with a number of multi-disciplinary teams, both inside and outside the pilot, commented:

“I think the quality of reports is fairly standard, I think it helps where you have cooperation between professionals, and my experience of the multi-disciplinary teams who have undertaken expert work, in quite a number of cases actually the more I think of it, is that there has been useful liaison between them. It can mean less travelling about for the clients, they can actually see one perhaps more experts, assessors at the same place on the same day if that isn’t too tiring, and also that at the end you will have a degree of cohesion between the conclusions because experts will, in a sense, have their own meeting and seek to reach a combined view I think, which is useful. Whereas when you have a number of different experts, as I’ve had in the case today, and I was left facing two experts going one way and two going the other, as it happens they’ve all come together now and quite independently have reached the same view. But I do wonder whether I would have been faced with that if there had been a multi-disciplinary team, they might have reached that conclusion earlier.” [Judiciary 1]

Although most solicitors and children’s guardians interviewed were satisfied with the quality of the reports provided by the pilot teams, only two practitioners, when asked whether the team approach would improve the quality of reports, observed that multi-disciplinary teams had better quality assurance systems than individual experts. One solicitor (adult party) noted that in one case another psychologist, outside of the pilot team, had previously been instructed, and the report provided was so poor that there were queries about paying the psychologist’s fee. The solicitor commented that if that psychologist had been working in a team, someone else would have stopped the report being issued. A second solicitor said:

“If there was just one team dealing with it and one bundle to be kept up to date and we knew that those experts were having peer reviews and supervision and discussing your case, and you know you had one central point of administration you’d save a huge amount of costs, there’d be a lot less delay and I think you’d just get a better service for the children.” [Children’s Solicitor 5]

All six of the pilot teams stated that they had intended to employ quality assurance systems. The systems identified as having been employed were:

- use of a template report;
- group discussions;
- supervision by managers;
- supervision by peers; and
- other.

Group discussions usually took place in meetings of the team, being either the team responsible for producing the particular report or the whole multi-disciplinary team. Supervision was usually provided either by external clinicians or by the clinical lead of the team. No detail was provided regarding the 'other' quality assurance methods employed.

One team was only partly able to implement its planned quality assurance systems. It had intended to introduce formal meetings between clinicians, but found it impossible to find times when all team members were available to meet. This team's quality assurance was undertaken via ad hoc meetings between team members, and also via the NHS supervision system. One team was unable to implement its planned quality assurance systems at all. It had also intended to introduce formal meetings between clinicians, and also found it impossible to find times when all team members were available to meet. This team did meet at the start of the pilot in order to agree a standard structure for assessments.

The members of pilot teams greatly valued peer support, both for the value it added to the quality of their reports and personally:

"Having the opportunity, feeling that there was really kind of safe, rigorous procedure and there was kind of multiple perspectives that challenges, that just feels so much more of a shared enterprise that you feel more confident in your opinion because it's either been challenged or its been agreed with, because of the other viewpoints. And individually the support just as colleagues, because this is very bleak work a lot of the time, is incredibly valuable and hopefully will keep sustaining us as a team, there's always a risk in this kind of work that people will move on quickly because it's so heavy."
[Pilot Team B]

The clinical lead in one team summarised the different facets of the quality assurance processes within the team:

"...quality assurance relies very heavily on peer discussion and support and review ...there's that, there's individual professional supervision and line management ...and then I as the leader of the team take responsibility for making sure the group functions as it should in providing ...the right level of discussion and challenging support and so on, that it functions well and that's my job ...And I think also people in this team are very happy to ask for support and help, there's no problem whatsoever, so all of us will at some time or other will ask someone to read a report or read a court report or discuss an issue, so there are frequent consultations." [Pilot Team A]

These views were echoed by another team member, who also undertook work privately, and found that the only feedback she could get there was from solicitors, mainly implicitly, by being instructed in more cases. The members of this team thought that it was helpful that more judgments were being published that included discussion of the contribution of the expert witnesses to the proceedings. It is interesting to note that the members of this team felt sufficiently protected to accept their names being cited in judgments. In contrast, one judge attributed the reluctance of experts to undertake court work to the likelihood of their being named:

“I’m particularly aggrieved that the court of appeal and the government think it is appropriate to put doctor’s names in the newspapers, because all the reporting is tendentious and obnoxious and if I was a doctor I’d just say, well the game’s not worth the candle, I’m not doing it.” [Judiciary 2]

Quality assurance procedures which require input/review from other clinicians may raise issues in relation to the procedural rules of court governing expert witness evidence in family proceedings.¹⁴ In particular, systems of peer review/supervision risk breaching the rules in relation to disclosure of information and confidentiality. For the purposes of the law of contempt of court, information relating to family proceedings held in private may only be communicated to an expert whose instruction has been authorised by the court.¹⁵ The term expert includes reference to an expert team.¹⁶ Therefore, where the court has authorised the instruction of a team, it would appear that quality assurance processes conducted within the team would not offend the confidentiality provisions. However, where supervision is provided by clinicians external to the team (i.e. by clinicians who are not working as part of the expert team), then it would appear likely that the prohibitions relating to disclosure would be breached.

Additionally, experts working in teams have queried how the procedural requirements relating to report writing should be applied to a team report. In particular, whether the report should be signed by each clinician contributing to the report, and, if so, whether the wording of the required declarations can be varied to reflect the fact that the report is written by a team rather than an individual expert (e.g. can the statement of truth read “We” rather than “I”).

¹⁴ Part 12, Part 25 and Practice Direction 25A (Experts and Assessors in Family Proceedings), Family Procedure Rules 2010.

¹⁵ Rule 12.74(1), Family Procedure Rules 2010, which provides that “No party may instruct an expert for any purpose relating to proceedings, including to give evidence in those proceedings, without the permission of the court”.

¹⁶ Practice Direction 25A, *Ibid.* (paragraph 1.1).

If there is to be more widespread provision of expert witness services by multi-disciplinary teams, then clarification by the Family Procedure Rules Committee regarding how the relevant procedural rules should be applied to team based provision is likely to avoid potential disputes regarding ancillary, procedural issues.

In order to ascertain whether parties needed to seek clarification of the contents of the expert reports produced under the pilot, the teams were asked to indicate (using the Form 2) whether they received any supplemental questions following the filing of their reports. Queries were received in nine cases. The nature of the queries raised was:

- request to undertake therapeutic work with a party (3 cases);
- request to undertake additional assessments and provide an addendum report (3 cases);
- request to provide a supplemental opinion (2 cases);
- request to attend a professionals meeting (1 case).

Only two of the queries related to the expert opinion. One of these asked for the team's view regarding whether the child should be separately represented. The other asked the team to indicate whether the threshold criteria (under section 31 Children Act 1989) were met, and whether a care order should be made. The lack of queries raised regarding the opinions offered by the teams in the pilot cases tends to suggest that the parties were not concerned about the approaches taken by the pilot teams to assessment, or by the quality of the report provided. Indeed, provided it is accurately reported, the second query would appear to relate to issues which are for the court, not the expert, to determine and, therefore, was not an appropriate query to raise with the team in any event. We are, however, mindful that the information regarding any queries raised in respect of the reports was self-reported by the pilot teams, so is likely to reflect the teams' perception of events. In particular, we note that one children's solicitor reported that a report received was unsatisfactory as it failed to specifically answer each question in the letter of instruction, and had to be returned to the team for clarification.

Overall, interviewees were generally positive about the quality of the reports produced by the pilot teams, and the concerns raised related to a minority of cases. However, whilst it is possible to identify a number of aspects of the team approach that contribute to effective quality assurance, none were specific to the pilot. Only a small number of interviewees were able to comment on the quality

assurance procedures employed by single experts and, therefore, our ability to draw comparisons between single experts and multi-disciplinary teams is very limited.

In summary, the data suggests the following conclusions in respect of research question 5:

- i) Whilst the majority of the pilot reports were of good quality, there is no evidence to suggest that this is a result of the pilot as opposed to being a benefit of multi-disciplinary working generally.
- ii) There is some evidence which suggests that multi-disciplinary teams may have more extensive quality assurance systems than single experts.

5.4 Funding and Cost Effectiveness

This section focuses on the cost of expert witness services. In particular, we consider whether the services provided represent 'value for money', and also whether the Legal Services Commission is being required to fund assessments that should be provided by other stakeholders, in response to questions:

- 6) *Does the approach being piloted result in the best use of public funds?*
- 9) *What are the inter-relationships between the services the LSC funds and other stakeholders in the area of law?*
- 12) *Is the approach piloted cost effective and does it offer the LSC value for money?*
- 13) *What are the true costs of the services being provided?*

The overwhelming majority of parties in section 31 Children Act 1989 proceedings will be publicly funded, as parents and the child(ren) are automatically entitled to funding via the Commission regardless of means, and local authorities are, of course, also funded by public money. In addition, other adult parties (e.g. grandparents) are also eligible to receive public funding to participate in proceedings if they qualify financially. Other than changing the way in which the payments for expert witness services were made (payments were made directly to the pilot teams by the Commission, rather than via instructing solicitors), the pilot did not alter the usual funding arrangements. However, we

have collected some interesting views on the boundaries between Commission, health service and local authority funding to meet the needs of children and families (e.g. relating to the blurring of the distinction between assessment and therapy), although we are conscious that our ability to extrapolate is limited by the small number of interviewees.

Where expert witness services are funded publicly, questions arise regarding the inter-relationship between the Commission, local authorities and NHS Trusts, and, in particular, which agencies should be responsible for meeting the costs of expert witness services. There appear to be two key debates, namely:

- whether the expert witness services commissioned during court proceedings should, in fact, have been commissioned by local authorities in accordance with the 'Pre-proceedings Checklist' under the Public Law Outline (PLO)¹⁷; and
- the relationship between assessment and therapy.

In relation to the first issue, only one interviewee (solicitor (adult party)) suggested that the local authority could have undertaken more work with the family, which might possibly have avoided some of the complexity and delay in the proceedings. All other interviewees felt that it was appropriate for the expert assessments to have been commissioned during the proceedings. As one judge put it:

"I think it would be a very strained and rigid interpretation of the PLO that expected local authorities to go commissioning psychological and psychiatric reports pre-proceedings. I know that interpretation is possible, but it's not the real world in which we live and the local authority's pre-proceedings assessments in the real world are social work in-house assessments, and the work that I was sending to the pilot was of a different specialty to that."
[Judiciary 5]

Interviewees also noted that where assessments are commissioned pre-proceedings, they are often perceived by family members to be biased in favour of the commissioning local authority. They suggested that this often means that the family are unwilling to accept the conclusions, and further assessments have to be commissioned within the proceedings in any event. However, a children's guardian in another location said that, in recent months, the courts had been refusing further experts more often and relying on local authority assessments, in order to meet PLO targets. Another children's guardian mentioned that s/he had

¹⁷ 'Public Law Outline – April 2010' (paragraphs 11.1 to 11.3).

experience of other cases where a very good multi-disciplinary team (outside of the pilot) was contracted to a local authority. Although there was scope for families to question whether it was truly independent, the service had a high reputation and s/he had known the team to disagree with the local authority on a number of occasions. It appears that there may be a number of these services developing in London, as a local authority legal adviser also noted that the authority were usually able to obtain pre-proceedings reports from a local multi-disciplinary team with which the authority had a contract.

One advantage noted by interviewees from using local multi-disciplinary teams was that the team members were in a position to identify local resources available to meet the children's future needs. This can assist the children's guardian and the court when scrutinising the care plan, and often cannot be provided by an expert from outside the area, who is usually unaware of the specific services that are available locally.

In relation to the second issue, public funding of expert witness services via the Legal Services Commission is intended to cover assessment and not therapy, and it appears that in some cases the boundaries can become blurred. For example, a solicitor (adult party) noted that the pilot team would give parents feedback on their parenting "there and then".

In one case, the local authority expressed concerns that a team working with parents could blur the boundaries between assessment and treatment. However, the mother's solicitor thought that what the court wanted was the team's observations on how the mother responded to the suggestions for addressing her behaviour, and therefore the approach employed by the team was appropriate to the assessment required. In another case the children's guardian noted that the pilot team had been commissioned to provide a report based on the work it was already doing to rehabilitate the child to the mother's care. One of the pilot teams expressed some disquiet about the fact that it often had to assess families where no attempt had been made to address mental health issues before the court proceedings were instigated.

This evidence suggests that there are cases where the Commission is, at least in part, funding therapeutic work that should be being provided by local authorities and/or health services. However, disentangling what constitutes assessment and what constitutes therapy is likely to prove very difficult in many cases.

In order to obtain data to try to evaluate issues relating to costs and value, we asked the pilot teams to provide data regarding the estimated and actual costs of the pilot cases via data collection Forms 1 & 2. In addition, interviewees were asked for their views regarding expenditure on expert evidence. In particular, we sought views as to whether the reports commissioned under the pilot were good value for money. We also looked for data about the way in which the pilot teams charged for services and whether we could ascertain the true costs of the services provided, including whether expert witness services were intended to be income generating.

In respect of costs, the lack of data regarding the cost of expert witness services has been noted by both the Family Justice Review Panel¹⁸ and the Ministry of Justice.¹⁹ The Commission has previously conducted data collection exercises in relation to the costs of expert witness evidence generally, but given the paucity of pilot cases it has not been possible to conduct sensible analysis of comparative costs.

Few interviewees felt able to offer an opinion on the costs charged by the pilot teams. Those who did feel able to comment generally felt that:

- *The pilot teams had charged rates that were lower than the usual rates charged by expert witnesses.*

The majority of interviewees who expressed an opinion felt that the rates charged by the pilot teams were lower than the usual rates charged for comparable expert witness services. One local authority noted a significant difference, stating that the pilot team had been appointed because it had estimated its costs at about two-thirds of another team (outside the pilot). In another case, the pilot team had not charged for court attendance, which kept the total costs lower than anticipated by the instructing solicitors. Although this saving was attributed to the pilot arrangements by the solicitors, it is not clear why court attendance was not charged for.

One interviewee, a solicitor (adult party), felt that the costs of instructing a pilot team were higher than the usual costs. One local authority and one children's guardian commented that they felt the costs charged by their

¹⁸ 'Family Justice Review: Interim Report', Op.Cit. (Annex L).

¹⁹ 'Legal Aid, Sentencing and Punishment of Offenders Bill' (op. cit.) (Annex 1: Experts' Fees, paragraph 10).

local team were expensive for a “local resource”. However, it is not clear whether this was based on a perception that the team’s overheads or the professional standing of its members (or both) were lower than those of multi-disciplinary teams in other areas.

- *Multi-disciplinary teams tend to be instructed in complex cases, so the cost of services provided by a team is always likely to be higher due to complexity factors.*

Multi-disciplinary teams were often seen as being an appropriate resource for complex cases, and, therefore, inevitably more expensive. One judge who had conducted several cases with different multi-disciplinary teams (both inside and outside the pilot) commented that in general multi-disciplinary team reports are an expensive option “even if there is cohesion, practicality and coordination between experts”.

- *If opinions were going to be required from experts in different disciplines then instructing a multi-disciplinary team was usually cheaper than instructing individual experts.*

A children’s guardian noted that a report prepared by the pilot team was considerably cheaper than s/he would have expected from clinicians of that calibre acting separately:

“I know it was about £13,000 because I’d had another expert in another case who’d charged a phenomenal amount of money – and I’m talking two and a half times that – for doing a much smaller piece of work. So when I compared the two, as I was going through the two cases together, I just thought this is good value.” [Children’s Guardian 9]

In a case where a report included input from several specialists outside the pilot team, but from the same NHS Trust, the local authority thought that the cost of the report was quite low in comparison to how separate experts would have charged. In another case, the children’s solicitor noted that the cost of the report prepared by the pilot team was relatively low, as there were three doctors treating the child, and that reports from that number of specialists would have cost more if they were reporting as individuals.

Another potential cost saving from using multi-disciplinary teams as opposed to individual experts was noted by a children's guardian, who felt that there was less scope to challenge a team opinion, which reduced the potential for further experts being commissioned and may result in fewer contested hearings and consequential savings of court time and legal costs:

"We were able to have this one assessment done, and then that was it. There wasn't a lot of room I think for dissenting from it because there was more than one expert involved in it at once." [Children's Guardian 3]

Whilst few interviewees felt able to make any meaningful comparisons regarding the costs of the expert witness services provided by the pilot teams, they found it easier to offer a view on whether the services provided represented good value for money. The majority of interviewees held the view that, whether or not they could say that expert evidence provided by a pilot team had cost less than using separate experts, a report from a multi-disciplinary team would normally be expected to provide better value for money both in the short and long-term.

One of the children's solicitors explored the notion of value for money by placing the use of multi-disciplinary teams in care proceedings in a broader context:

"I suppose it's the equivalent of do you go and buy a cheap suit that will last you three or four months, but it's cheap, or spend twice as much and get one that will last three or four times as long. That's a particularly crude analysis but that sort of idea. I think that the cost can't be the only guide ...but if you're looking globally, and it's all going to be government money that's funding these children along the line, whether it's going into preventing them from having a crappy life, moving into crime, saving on foster care, saving on a whole variety of issues and then mental health later on, if you get the better result at the start of their life you're going to save thousands upon thousands longer term ...That's the problem we face, it's very difficult to look at it in a simple monetary manner." [Children's Solicitor 2]

The structured, inclusive approach which one of the pilot teams took to its assessments was seen as contributing to the value of the report:

"For that money they did do a lot of work; they had a planning session with all the lawyers and social workers and they had a couple of sessions with my clients, they had the children in, they did a lot of work. It wasn't one of those

where somebody sees you for an hour, reads a few papers and churns out a report, somebody did actually do some work.” [Solicitor (Adult Party) 6]

Interviewees also saw inherent advantages in having the experts in one place, thereby making communication and other arrangements more practical. As one children's guardian explained:

“It is one of those complicated cases where there does genuinely need to be a range of professions, and had they not all come from the same team I would probably be in the position of having to try and coordinate, getting all of them together for a variety of meetings. And just practically - I have met with the foster carer, social worker with this team ...because it’s with this team it’s far ...easier to arrange ...when it comes to the actually physically getting people together.” [Children’s Guardian 2]

Overall, the reports in the pilot were seen by most interviewees as providing good value for money, although interviewees were not always able to distinguish between the value added by the multi-disciplinary team approach and the high reputation of the particular experts in the team.

In respect of the true costs of the services provided, the pilot teams outlined how they approached costing their expert witness services. Each of the pilot teams adopted a different approach, with the key features described being:

- *Fees charged for expert witness services were calculated in a variety of ways.*

A variety of approaches were taken to charging for expert witness services. One team charged a flat fee per assessment, regardless of the nature of the assessment, with an additional fee for any supplemental work required. Another team charged a fixed fee per person assessed, based on a set number of hours for each individual assessment.

Other teams charged on the basis of hourly rates. The approach to calculating hourly rates varied, with one team indicating that the rate differed depending on the specialism of the team member, and another indicating that the hourly rates for publicly funded work were lower than those charged for privately funded expert witness services.

Another team indicated that no additional costing of overheads, such as secretarial support, had been undertaken.

- *Expert witness services were intended to be income generating.*

The majority of the pilot teams indicated that it was intended that the provision of expert witness services should be income generating. It was noted that a financial model where teams are funded annually to undertake a set number of assessments/reports was preferable to being funded on a case by case basis. In particular, teams felt that it was very difficult to develop and expand a service which was funded piecemeal, as expansion of the service can only be achieved with increased staff provision, but increased staff provision cannot be resourced without additional case work.

Despite the fact that expert witness services were usually intended to be income generating, a number of the teams felt that expert witness work was subsidised. One team noted that the hourly rates charged for expert witness services were lower than those charged for clinical Child and Adolescent Mental Health Services work. Another team noted that it made no charge for clinical appointments, and a third felt that it was unable to charge for all the hours worked on a case (although it was thought that an expert working privately would do so).

- *Expert witness services were seen as an adjunct to clinical duties.*

The majority of team members were expected to combine their expert witness work with their clinical duties. In some cases clinicians were given reduced clinical caseloads to create capacity to undertake expert witness work. In other teams clinicians undertook expert witness work in addition to their normal clinical commitments. Where expert witness services were provided in addition to normal clinical duties, team members received additional remuneration for their expert witness work.

Whilst each of the teams was able to outline the approach which was taken to costing expert witness services, the complexity of the budgetary arrangements, particularly within NHS Trusts, and the fact that different pilot teams had different financial objectives makes it very difficult to ascertain the true costs of the services provided.

In summary, the data suggests the following conclusions in respect of research questions 6, 9, 12 & 13:

- i) The lack of data means that it is impossible to evaluate whether the pilot arrangements are more cost effective than the traditional arrangements for commissioning expert witness services.
- ii) Whilst the expert witness services provided by the pilot teams were generally thought to represent good value for money, there is no evidence to suggest that this was a result of the pilot arrangements rather than the fact that the report was being provided by a multi-disciplinary team as opposed to a series of individual experts.
- iii) The overlap between assessment and therapy means that the Legal Services Commission is likely to be contributing to the funding of therapeutic interventions in some cases.
- v) Any concern that the Commission is, to any significant degree, funding assessments, which should be completed by local authorities as part of their pre-proceedings obligations under the Public Law Outline was not evidenced during the pilot.

5.5 Impact on Clients

This section focuses on the impact of the pilot on clients, including the children who were the subject of the proceedings, the adult parties and local authority children's services departments, in response to question:

10) *What is the impact of the pilot on clients?*

We were dependent on the perceptions of lawyers, children's guardians and social workers for feedback regarding the potential impact of the pilot on the lay parties.

Given that only 8 of the 31 pilot cases were referred as a result of the pilot, there was very little evidence to suggest that the pilot had any significant impact on clients, save that it is likely that the referral to the pilot team would have enabled the expert evidence to be provided more quickly (as the teams were available to start work promptly); and there may also have been benefits from the fact that the pilot teams were well placed to identify local resources for any ongoing work with the family that may be required. Additionally, in one of these 8 cases, the

children's solicitor noted that meeting the two experts had been a positive experience for the child. Had the pilot not been available, a team may not have been instructed in this case, so in that way the pilot arrangements had a positive impact on this child.

We also asked interviewees whether the use of a multi-disciplinary team generally had had any impact for clients. A number of interviewees noted benefits for the *child* from the use of a multi-disciplinary team. Ten interviewees (children's solicitors, children's guardians and social workers) stated that the children had benefitted from the reduction in people (and places) that the child had to encounter, in comparison with assessments by separate experts. In addition, this advantage was also noted by one of the judges:

"I think they are less fazed by going to see one team, I think when it's all in the same place they know they are seeing different disciplines, different sorts of expert within the same team. Whereas, if they see a plethora of different experts with different styles, who are all independent, I think they very often feel, particularly children, feel that they have been put through the mill rather more thoroughly by seeing three completely unrelated people so I think there is an advantage there." [Judiciary 1]

Other benefits for the children arising from the use of multi-disciplinary teams were described as follows:

- The team could recommend an appropriate therapeutic package due to the breadth of knowledge within the team.
- The team was able to provide crucial evidence about the likely range of the children's needs, especially what they would experience when they reached adolescence.
- It was helpful for the foster carer to have a single contact point, where she could talk about the children's difficulties.
- The team could facilitate an assessment in a residential unit.
- The team's multi-disciplinary composition contributed to it working in an age-appropriate way, as a range of professional perspectives contributed to the assessment process, which is not possible when the evidence is provided by a single expert.

Eight interviewees said that the fact that the report had come from a multi-disciplinary team had had no impact on the child.

Only one interviewee, a children's guardian, felt that commissioning evidence via a multi-disciplinary team had had a negative impact upon the subject children, due to the children needing to travel long distances to attend appointments.

A number of interviewees noted benefits for the *adult parties* from the use of a multi-disciplinary team. Again, the reduction in people (and places) that the adult parties had to encounter, in comparison with assessments by separate experts, was seen as an advantage:

"Certainly the experience for my clients of doing it all in one place, in one go, would've been much, much better." [Solicitor (Adult Party) 6]

"...it was a client with learning difficulties, and for her it was just easy to understand that a group of people were going to work with her, her dad and her daughter ...rather than you're getting sent off to see different people, and not being able to see how they all fit together." [Solicitor (Adult Party) 7]

It was also noted that a multi-disciplinary team can be perceived as independent, thus assisting adult parties who find it difficult to work with the local authority to engage with the assessment process. One of the pilot teams held a network meeting at the outset of each case, which gave an opportunity for the parents and all the professionals involved to meet and to express their own perspective on the proceedings. This was seen as very valuable by one of the children's guardians interviewed, who noted that it did not happen with other types of expert. It was also noted that adult parties benefitted from ongoing interaction with a team, because this gave them more information about changes they needed to make, and they and the court could then see whether and to what extent change had been achieved. This avoided the situation where parents could feel ambushed, often just before a court hearing, by a negative view received from the expert.

The only concern which was raised regarding the impact of multi-disciplinary teams on adult parties was that it was acknowledged that a team opinion was likely to be very influential in the decision-making process, and could be difficult to challenge. This may lead to parents and other family members feeling overpowered, with no scope to seek an alternative view. As one judge noted (speaking of a non-pilot case):

"I do remember one case where I think the client felt that they were all against her and that they must have, as it were, colluded to be difficult with her. It may have been more of a reflection on the client than on the

assessors, but I think she felt that she was up against three of them instead of one.” [Judiciary 1]

In two cases, the solicitors and children's guardians said that the parents were too alienated to engage with any type of expert, and the use of a multi-disciplinary team could not overcome this.

Some benefits for *local authorities* from the use of multi-disciplinary teams were also noted. Representatives of local authorities felt that there was “tight partnership working” where a multi-disciplinary was instructed, which contrasted with the use of single experts, where there was far less communication amongst the experts and children’s services. As one local authority social worker noted:

“I think in this case, with the multi-disciplinary assessments that I’ve been involved in, it is very much that you are speaking to people you are being kept in the loop, you do information share ...there is kind of a pre-assessment meeting where you go and information is shared and the objectives of the assessment are quite clear, and then there are like feedback meetings whether it’s a mid-way or a monthly or whatever and then there is an end meeting as well where the kind of recommendations are fed back, you get that I think with multi-disciplinary which you don’t get with singular experts.” [Local Authority 1]

However, another local authority was critical of the team in its area recommending what the local authority saw as unrealistic levels of contact and plans for trial rehabilitation, which caused the social workers anxiety and for which they found it difficult to prepare the children. Similar concerns may, of course, arise about the recommendations of children’s guardians and single experts.

In summary, the data suggests the following conclusions in respect of research question 10:

- i) There is very little evidence to suggest that the pilot had any significant impact on clients, save that it appears to have facilitated quicker access to expert witness services in a small number of cases.
- ii) The use of multi-disciplinary teams to provide expert witness services was noted to have a number of potential benefits for clients (principally the reduction in exposure to different professionals/venues in comparison to assessment by a number of single experts, and the ability of teams to engage with adult parties and local authorities during the assessment process).
- iii) Some concern was expressed that the opinion of a multi-disciplinary team was likely to be very influential in the decision-making process, and can be difficult for the parties (including social work professionals) to challenge, possibly resulting in them disengaging from the proceedings.

5.6 Impact on Solicitors

This section focuses on the impact of the pilot solicitors, including children's solicitors, solicitors acting for adult parties and local authority lawyers, in response to question:

11) *What is the impact of the pilot on solicitors?*

Solicitors were asked about the impact of the pilot on their casework. The only aspect of the legal casework which was identified as changing under the pilot was the procedure for paying the experts commissioned.

Outside of the pilot, expert witness services in proceedings under section 31 Children Act 1989 are commissioned by the parties, with permission from the court. When granting permission to instruct an expert, the court will usually be invited to certify that the expert's fee is an appropriate expense for the purposes of public funding. The letter of instruction should then identify which parties are responsible for paying the expert's fee, and in what proportion. When the expert renders an invoice, each solicitor accounts to the expert for their share of the fee,

with publicly funded parties claiming their share from the Legal Services Commission, and the local authority accounting for its share directly.

Under the pilot, the pilot teams contracted with the Commission to provide expert witness services at either an agreed hourly rate or on the basis of a fixed fee per assessment. Permission to instruct a pilot team still had to be obtained from the court, and a letter of instruction provided. Once the team had completed its assessment, the Commission was responsible for paying the proportion of the teams' fee for which the publicly funded parties were liable directly to the team, with the local authority accounting for its share to the team as in non-pilot cases.

Therefore, the pilot funding arrangements generally had no impact upon local authorities, as they accounted for their proportion of the fees charged by the pilot teams in the same way as for experts operating outside of the pilot. As a result, only one local authority lawyer commented on the pilot funding arrangements, noting that in one case the Commission had raised a query regarding the apportionment of costs between the parties, which required the local authority to spend further time in communication with the court to resolve the issue.

Children's solicitors and solicitors for adult parties noted a range of views regarding the pilot funding arrangements, varying between those who found the process easier, through feeling poorly informed, to finding it problematic and time-consuming.

Unsurprisingly, the solicitors who were happy with the pilot funding arrangements were those who encountered no difficulties with the process and felt that the direct accounting between the pilot team and the Commission saved solicitors a considerable amount of administration. One children's solicitor, who was very pleased with the process for agreeing and paying fees, noted:

"The funding comes via the Legal Services Commission, so it obviously saves us time as solicitors not having to do the [payments on account] and pay all the invoices because they're paid directly." [Children's Solicitor 3]

That view was echoed by another children's solicitor:

"For me it was fantastic, I didn't have to do anything ...always strikes me as being a nonsense with the current system, where we have to sort out the fees." [Children's Solicitor 2]

However, not all solicitors were as satisfied, with a number feeling that the pilot funding arrangements were unclear, and that even the Commission did not understand them. In particular, there appeared to be confusion regarding whether solicitors needed to claim the fees due to a pilot team under their public funding certificates, and also concern that the Commission had queried the fee payable to the pilot team despite the fact that the case was being dealt with under the pilot arrangements. As one solicitor acting for adult parties in two pilot cases explained:

“It’s just the size of the disbursement because they’re both high-cost cases, and you know they just want to know why it’s so much ...the LSC are a law unto themselves; they want invoices, they want details, they want chapter and verse as to why we’re spending that much money.

Q: So has this been any simpler than the normal process?

No, no, no, no. The fact that it’s a pilot, the fact it’s multi-disciplinary, no it’s no relevance.” [Solicitor (Adult Party) 4]

A children’s solicitor who was generally happy with the pilot funding arrangements echoed the concern that solicitors were anxious that they may have applied the scheme incorrectly and that they may face difficulties when processing their final bill in a pilot case.

In summary, the data suggests the following conclusions in respect of research question 11:

- i) The only aspect of the legal casework that was identified as changing under the pilot was the procedure for paying the experts commissioned.
- ii) As local authorities continued to account directly for their share of the pilot teams’ fees, the pilot funding arrangements generally had no impact on local authorities.
- iii) Amongst solicitors views on the administrative efficiency of the pilot funding arrangements were mixed.

5.7 Defining Complexity

This section focuses on the issue of complexity, and, in particular, whether it is possible to identify factors which, if present, would suggest that proceedings are likely to require complex expert witness services, in response to question:

- 14) *Is it possible to determine the complexity of a case at the point the need to instruct an expert witness is identified, and whether this can be used to develop definitions for cases that could allow the LSC to investigate purchasing specific services at defined prices?*

It was envisaged that the pilot cases would be complex by virtue of the fact that they required input from a team of experts (i.e. at least two experts from different disciplines). Interviewees across the constituency groups were asked whether it was possible to identify factors, which indicated that proceedings were likely to be complex. Additionally, the data capture Forms 1 & 2 asked the pilot teams to indicate whether there were any factors which suggested complexity at the outset of the case, and whether the assessment undertaken was actually complex and, if so, why.

There were varying views regarding what constituted complexity. In particular, a case which involves a difficult balancing exercise for the court is not necessarily a case which is complex evidentially, requiring complex expert witness services. As one judge explained:

“I don’t think complexity is the right word; I mean there are plenty of complex cases where all we need is a psychological assessment of a parent, but you imposed a straightjacket that perhaps we need psychiatric assessment of the same person, or a psychological assessment of the child, many of which we wouldn’t want and in fact we’d be discouraged from seeking. So complexity is the wrong word.” [Judiciary 5]

One of the pilot teams noted that the converse was also true, and a case that is very complex clinically may not involve complex or difficult decision making for the court:

“Some of these cases are hugely complex, but what is the question that needs to be answered in order for the court to make a decision? ...you can provide understanding around the complexity without necessarily ...moving closer to answering the question ...should the children live with their parents or should they be in care may be fairly easy to answer ...whereas the question

of why do these parents have such a lot of difficulty looking after their children is a very complicated question.” [Pilot Team E]

The fact that a case required input from a multi-disciplinary team did not necessarily mean that it was viewed as complex, either by the pilot team or by interviewees in the other constituency groups.

Previous research by Masson et al²⁰ identified the following as ‘complexity factors’:

Cases involving more than 1 child: different pathways, different placements or different orders.

All cases: concurrent criminal proceedings, more than 1 local authority, potential immigration issues, more than 6 experts, more than 1 interlocutory dispute.

Some of these factors were also identified by interviewees in the ACE pilot.

The factors which were identified by the pilot teams as indicating complexity generally fell into two categories: cases where factors existed which meant that coordinating the assessment process was complex, and cases where the issues made the assessment complex.

Where the complexity stemmed from the logistics of the assessment process, the factors identified as making the process complex were:

- parent/family member resident overseas;
- clinicians having to travel long distances to undertake assessments where the family was unable to travel;
- siblings placed in separate placements significant distances apart;
- court requiring short timescales for reports;
- results of an expert assessment already commissioned awaited, which may impact on the scope of the proposed assessment;
- letter of instruction and/or court bundle delayed;
- key documentation missing;
- one party awaiting sentence, which may impact on the scope of/requirement for the proposed assessment;

²⁰ ‘Care Profiling Study’, Op.Cit. (page 61).

- family members failing to attend scheduled appointments;
- excessive adversarialism on the part of advocates.

In cases where the issues meant that the assessment was complex, the following factors were identified as indicating complexity:

- child has a history of absconding;
- inpatient assessment required;
- domestic violence, particularly where there is a history of violent relationships;
- substance (drug and/or alcohol) abuse;
- sexual abuse;
- balancing children's potentially competing needs where there is a significant age gap between siblings;
- mental health condition;
- antagonism by family towards professionals;
- dispute regarding whether cause of child's difficulties were organic or environmental;
- subject children having different fathers;
- mother becoming pregnant during proceedings;
- court unable to determine perpetrator of injury to child after fact finding hearing;
- previous expert assessments where opinion/diagnosis is disputed;
- learning disability;
- ongoing involvement with therapeutic services.

Two factors were identified as indicating either that the logistics of the assessment were complex, or that the issues involved in the assessment were complex, or (in some cases) that both aspects of the assessment were complex. These factors were the volume of case papers exceeding the amount anticipated (noted by three teams), and media interest (noted by one team).

The pilot teams were asked whether they were able to predict the extent of complexity at the outset of the case, but they did not think this was often possible. Sometimes the assessment of the complexity of the case changed during the course of the proceedings. It was rare for a case to develop as being less complex than originally described. This happened in only two cases: in one case where parents and other adult parties stopped actively contesting the proceedings; and in a second case where one of the children was injured by a

parent during the course of the proceedings, who was thus excluded from being a potential carer for the child.

The more common scenario was for an assessment, which initially appeared to be straightforward, to “unravel in an unpredictable way” and escalate the involvement of the team. One pilot team provided an illustration from amongst its pilot cases, describing the progress of proceedings that commenced following the death of a child. The child’s siblings were taken into care, where they made disclosures of sexual abuse. Issues arose regarding interim contact, and allegations of further abuse were made. Additional expert evidence was commissioned regarding whether the children’s evidence was reliable. A fact finding hearing was conducted, which resulted in a parental admission. During the proceedings, the pilot team was involved in producing a series of reports, and directed to conduct observed contact sessions at short notice.

Analysis of the Form 1 data provided by the pilot teams shows that, upon receipt of the initial referral, it was anticipated that:

- 3 assessments would involve four experts.
- 10 assessments would involve three experts; and
- 17 assessments would involve two experts.

The Form 2 data shows that of the completed cases:

- 4 required a team of five experts;
- 2 required a team of four experts;
- 6 required a team of three experts; and
- 7 required two experts.

The fact that 4 of the cases required a team of five experts, when none of the cases had originally been predicted to require a team of that size, gives support to the assertion that cases tend to escalate and become more, rather than less, complex.

Interviewees across the other constituency groups were also asked to identify the factors that were likely to indicate that a case was complex. The issues raised all related to the complexity of the assessment required, rather than difficulties in coordinating the logistics of the assessment, and were:

- domestic violence;

- mental health condition;
- history of previous proceedings;
- subject children having different fathers;
- residential assessment already undertaken;
- sexualised behaviour/sexual abuse;
- issues relating to attachment.

However, some interviewees also indicated that they did not believe the proceedings were complex, and that there had been another primary reason why the case was referred into the pilot. For example, in one case the local authority noted that the judge had “pushed for [pilot team]” as it was immediately available to provide a psychiatric assessment of the child, thus reducing potential delay. A children’s solicitor also reported attempting to refer a psychiatric assessment of parents to a pilot team on the basis of the speed of the assessment rather than its complexity. However, this referral was rejected by the pilot team as not meeting the pilot criteria.

In another case, a children’s solicitor confirmed that the principal reason for referring a case to the pilot team was the knowledge and expertise one of the team members, whom the parties wanted to undertake the assessment. Other interviewees also noted that the case had been deemed suitable to refer into the pilot, due to the pilot team’s acknowledged expertise in dealing with cases of the type referred. At the other extreme, a children’s guardian commented that s/he saw the local pilot team as suitable for low-risk rehabilitation cases, but that if there was a high risk, such as a physical injury, s/he would prefer to instruct another expert.

Interviewees did not regard the number of parties as an indicator of complexity, and some of the pilot cases which featured the most challenging issues regarding diagnosis and behaviour involved the ‘usual’ parties (local authority, parents and child), with the complex features often relating to one party only.

Whilst there are some factors, particularly those cited by both the pilot teams and other interviewees, which may be adopted as indicators of complexity, there are difficulties with framing a robust definition of complexity, particularly one that can be applied at the point of referral, that would govern assessment costs in a meaningful way. Firstly, it is unlikely that the logistical factors, which make administering the assessment process more difficult, could be anticipated on referral. Secondly, the data suggests that cases are more likely to increase rather than decrease in complexity, with the factors leading to increased

complexity also being unanticipated upon referral. Developing a pricing structure which takes account of these variables would not be impossible; for example a 'swings and roundabouts' scheme based on average costs per case, or a system of base fees plus 'bolt-ons' payable for additional complicating factors, should they arise. However, as has already been noted in section 5.4, there is currently a lack of data regarding the cost of expert witness services, and the absence of such data suggests that it would be difficult for a reliable pricing structure to be devised.

An additional consideration which arises is whether a scheme which results in only complex cases being referred to multi-disciplinary teams would be conducive to ensuring a sustainable supply of expert witnesses. As one pilot team observed, the fact that they were a multi-disciplinary team meant that only cases requiring complex assessments were referred. The team had not accurately predicted the impact which the complexity of the cases would have on their workloads, as the team had anticipated a more even spread of work, including 'standard' cases (albeit cases requiring input from more than one clinical discipline). Another pilot team noted the need for multi-disciplinary teams to have the flexibility to take-on more straightforward cases for training purposes. If the multi-disciplinary team model is to encourage new clinicians to undertake expert witness work, then it would seem that teams would need to have the flexibility to undertake a range of cases.

In summary, the data suggests the following conclusions in respect of research question 14:

- i) Whilst some factors have been identified which could be adopted as indicators of complexity, it is unlikely that a robust definition of complexity, particularly one applicable at the point of referral, could be framed from the available data.

5.8 Lessons to be Learnt

This section endeavours to identify those aspects of the pilot that appear to have had an impact and those that have not, and also to highlight the key lessons which can be learnt from the pilot, in response to questions:

- 7) *What elements have worked and what elements have not in the pilot regarding the stated objectives of the pilot?*
- 8) *What lessons can be learnt from the pilot to inform any rolled out approach?*

The principal objectives of the ACE evaluation were to ascertain whether the pilot had any significant impact on the sustainability of supply of expert witness services, and the quality and cost of such services.

Only 8 cases were referred to multi-disciplinary teams as a result of the pilot. This means that the capacity of the research to generate positive lessons about the pilot is limited. However, interviewees were also asked about their experiences of commissioning expert evidence via multi-disciplinary teams outside of the pilot. Therefore, in addition to discussing matters specifically relating to the pilot arrangements, we also set out below the lessons to be learnt about multi-disciplinary expert witness services generally.

- *Sustainability of supply*

Given that 23 of the 31 pilot cases would have been referred to pilot teams in any event, the pilot itself had minimal impact on the supply of experts.

Similarly, the pilot did not succeed in encouraging a significant number of clinicians to join teams, and some of the teams which took cases found themselves operating at capacity on volumes of cases that were much lower than that anticipated under their contracts. Whilst the principle of multi-disciplinary working had significant support, the pilot does not appear to have led to a significant increase in clinicians engaging in expert witness work. The level of workflow from practitioners, institutional commitment (from NHS trusts) and capacity within pilot teams suggest that it is unlikely that roll out of the pilot in a similar form, and without further accompanying changes, would ensure a sustainable supply of

experts in public law children's proceedings. As one judge put it:

"I had hoped that the use of multi-disciplinary teams might encourage more doctors to put themselves forward to do this difficult work, but I haven't seen any evidence that the pilot schemes have in any way kind of increased the number of experts available to the courts." [Judiciary 2]

- *Quality*

In general, the level of satisfaction with the quality of the expert witness services in the pilot cases was high.

There is a clear message across stakeholders that reports by multi-disciplinary teams provide good value for money as they are generally seen as being of high quality, leading to better outcomes and improving the parties' experience of proceedings.²¹ In particular, the capacity of multi-disciplinary teams to identify the need for additional assessments and also to resource those assessments (either from within the team or from the wider NHS Trust) has the potential to avoid delay and possibly reduce costs. The majority of the teams operated primarily as local services, assessing families that lived in the geographical areas which the teams serviced clinically. This meant that teams were also better able to make informed recommendations about care planning specific to local resources, including, where appropriate, accessing therapeutic services, recommendations which experts from outside the area may be unable to provide. As one judge put it:

"...the advice I received was local advice and therefore it did actually bear some relevance to the resources and facilities in the locality that people might be taking advantage of in the future." [Judiciary 5]

(There is, however, some evidence from other sources which suggests that local linkages between experts and the provision of publicly funded services may lead to some subtle fettering of the expert's advice.)²²

²¹ This is consistent with the findings of 'The Munro Review of Child Protection: Final Report – A child-centred system' (Department for Education, May 2011) (paragraphs 6.56 & 6.57).

²² See 'Lamb Inquiry: Special Educational Needs and Parental Confidence' (DCFS Publications, 2009) (paragraphs 6.6 & 6.7).

- *Costs*

The lack of comparator data and the paucity of cases under the pilot mean that it is impossible to evaluate whether the pilot arrangements are more cost effective than the traditional arrangements for commissioning expert witness services.

The expert witness services provided by multi-disciplinary teams were generally thought to represent good value for money.

Paying expert witnesses direct, rather than via instructing solicitors, has the potential to reduce the administrative burden on solicitors, but the benefits of the pilot funding arrangements were not fully realised during the pilot as the interfaces between solicitors and the Legal Services Commission appear to have been unclear. Additionally, if the Commission assumes responsibility for paying expert witnesses directly, the Commission's administration costs are likely to increase.

Interviewees generally acknowledged that a team model could deliver good quality expert witness services, with the multi-disciplinary team containing a range of professional disciplines offering the best chance of achieving a holistic "one-stop shop" approach, which would minimise delay and deliver the best outcomes for children.

Interviews with stakeholders suggested a number of matters which might improve the viability of multi-disciplinary teams in the future:

- *The use of multi-disciplinary teams should not be restricted to cases requiring input from more than one clinical discipline, or to complex cases.*

The fact that pilot cases had to require input from at least two professional disciplines precluded cases from being referred into the pilot, and thus hindered access to the expertise of the pilot teams.

Bearing Good Witness envisages experts working in teams, with the team being instructed rather than a named individual, and a lead clinician then deciding on the allocation of work within the team. This model would not appear to preclude the instruction of a team where input from only one professional discipline was required. Stakeholders still benefit from the

'team approach', as the expert witness still has the security of working in a team environment, and the opinion may benefit from discussions at team meetings.

Interviewees also noted that restricting teams to assessments in complex cases inhibits the scope for encouraging new clinicians to undertake expert witness work, as less complex cases are necessary to allow clinicians to develop their expertise as expert witnesses. Additionally, as noted in our evaluation of research question 14, framing a robust definition of what constitutes a complex case is likely to be very difficult.

A further criticism raised in respect of the pilot was that the composition of the teams was dominated by expertise in child and adolescent psychiatry and in child psychology, with insufficient provision of adult psychiatrists and paediatric services to assist the courts with regard to cases involving matters such as non-accidental injury and factitious illness. In some cases the pilot team was able to bring in expertise from outside the team to provide any additional assessment work required. In other cases, external experts had to be instructed in addition to the team. In order to be able to offer a service which provides a 'one-stop' approach in the majority of cases, it appears that an expert witness team would need to include expertise in paediatrics, adult psychiatry and psychology, and child psychiatry and psychology. In addition, the team would need to be able to access specialist provision (such as radiology) as required. Interviewees also noted that a genuinely holistic service would also be able to provide drug/alcohol screening, and that social work input was also very beneficial where a parenting assessment was required.²³

- *To be effective, multi-disciplinary teams need to be properly resourced.*

Each of the pilot teams operated on a different financial basis, with some clinicians undertaking expert witness work as part of their contractual duties, and some doing it in their own time. A number of clinicians highlighted difficulties in balancing the competing demands of clinical work and the courts. If multi-disciplinary teams are to become a real source of improved and sustainable capacity, the importance of expert witness work

²³ The requirement for this additional provision is supported by the 'Care Profiling Study', Op.Cit. (Table A2.31), which notes that, of the cases sampled, 13% required drug testing and approximately 25% required external social work input.

has to be recognised at an institutional level (such as the NHS Trust) and resourced accordingly.

Clinicians in a number of teams expressed concern that clinical work could suffer as the demands of expert witness work were often underestimated, with one team commenting:

“...so we simply had to drop NHS commitments and do it because there’s no leeway in the system whatsoever. I also think that increasingly, and this has been a very difficult year as we have had two vacancies, but it was happening even before the vacancies, people were having to take their own time to do things, there simply isn’t the time to do the work within the day. Some people are regularly taking documents home to read, their court preparation is in their own time. I’ve had to work weekends, so have other people.” [Pilot Team A]

It follows that key to achieving the right balance between clinical work and court work are the support of the NHS Trust and the development of a model of delivery which clinicians feel able to support. In particular, clinicians noted the need to either be released from sufficient clinic work to ensure that expert witness work could be completed within normal contractual hours, or to provide additional remuneration for clinicians undertaking expert witness work in addition to their normal clinical duties. Some of the teams were operating, at least in part, because of goodwill and enthusiasm of the team members. This is a necessary, but not sufficient, element of a broader roll-out of multi-disciplinary teams. One team summarised the vital importance of proper resourcing, noting:

“...the problem is that the pilot was run on goodwill, on the basis that a pilot of this nature would provide a better service, and so people were doing it because they thought it was the right thing to do but without any time ...in job plans. The adult psychiatrists and forensic psychiatrists were very, very wary about it, it has to be said that a couple of consultants ...agreed to do it but actually when in the end they were asked to do it were unable to deliver that, the adult forensic psychiatrists always maintained that they couldn’t do it without being paid to do it.” [Pilot Team C]

In addition to ensuring that clinicians have sufficient capacity to be able to undertake expert witness work, interviewees also noted that appropriate administrative support was essential to enable teams to deliver a good service. The difficulties identified in relation to lack of administrative

support were that clinicians had to spend time collating reports, cover was not made available for periods of annual leave and sick leave by administrative staff, and solicitors felt that they were duplicating work as a result of having to liaise with individual clinicians/secretaries rather than a central contact point for the team.

- *The reservations that lawyers have regarding the provision of expert witness services by teams would need to be overcome.*

A number of interviewees noted that lawyers were reluctant to instruct a team as they feared losing control over who would undertake the work. The principal concerns identified were that lawyers were unaware of who was in the team and so were reluctant for the team to be instructed, and that lawyers wanted to ensure that a prominent member of the team would be involved as an expert in the case.

Concerns were also raised in relation to the lack of transparency regarding team decision-making, and also the arrangements for deciding which team member gave oral evidence to the court.

Any scheme for the provision of expert witness services by teams would require an acceptance by lawyers that the task of providing expert evidence is allocated to a group of clinicians, rather than to a named individual. Whilst this approach is envisaged under the Family Procedure Rules 2010,²⁴ the ACE data suggests that lawyers are wary of the team model. Multi-disciplinary teams are more likely to be accepted and valued if the composition of the team is made known prior to instruction, and the individuals who are to provide the expert witness services are identified either when the lead solicitor makes the initial enquiry of the team or shortly after receipt of the letter of instruction. Additionally, concerns about the team model are likely to weaken as team members become more experienced and better known as expert witnesses.

²⁴ Practice Direction 25A (Experts and Assessors in Family Proceedings) Family Procedure Rules 2010, paragraph 1.1, notes that “where the guidance refers to ‘an expert’ or ‘the expert’, this includes reference to an expert team”.

In summary, the data suggests the following conclusions in respect of research questions 7 & 8:

- i) Expert witness services provided by multi-disciplinary teams are felt by stakeholders to represent good value for money, with the ability to provide local knowledge-based recommendations for future services being seen as particularly valuable.
- ii) The multi-disciplinary model has the potential to ensure sustainability of supply as team members value the peer support provided by the team, and, where there is sufficient resourcing of it, the extra reassurance provided by team-based systems of quality assurance.
- iii) The instruction of multi-disciplinary teams should not be restricted to cases requiring input from more than one clinical discipline or to complex cases as this hinders access to the expertise of the team, and a range of case work is necessary to facilitate less experienced clinicians undertaking expert witness work.
- iv) The ideal model is a multi-disciplinary team capable of providing a 'one-stop' approach in the majority of cases. This suggests that expertise in paediatrics, adult psychiatry and psychology, and child psychiatry and psychology are all required within the team.
- v) To be effective multi-disciplinary teams need to be properly resourced with clear funding and staffing arrangements, and appropriate administrative support.
- vi) Lawyers and the judiciary would need to relinquish a degree of control over the choice of expert witness and accept that the task of providing expert evidence is allocated to a team rather than a named individual.
- vii) Paying expert witnesses direct, rather than via instructing solicitors, has the potential to reduce the administrative burden on solicitors. However, the impact on the Legal Services Commission's administration budget would need to be taken into account.

6. Letters of Instruction

We were also asked to evaluate the letters of instruction from the pilot cases. We were provided with copies of the letters of instruction from each of the pilot cases. In 27 cases (87%), the lead solicitor was the solicitor for the child(ren). In the remaining 4 cases the lead solicitor was acting on behalf of the local authority.

Each of the letters was subject to analysis against the requirements of the *Practice Direction – Experts in Family Proceedings Relating to Children* (1st April 2008) (the Practice Direction).²⁵ The letters were checked for compliance with Section 5 (Letter of Instruction), and consideration was also given to the evidence that each letter provided about compliance more broadly with the requirements of the Practice Direction.

One of the letters provided related to a supplemental report, with the letter regarding the main assessment commissioned being unavailable. We have, however, included data gathered from this letter in the analysis as the Practice Direction notes that whenever a letter of instruction is sent it “should conform to the principles set out in this guidance”.²⁶

The Practice Direction imposes a number of requirements in relation to the commissioning of expert evidence, including the letter of instruction. In particular, the Practice Direction highlights the following key considerations:

- disclosure requirements;
- timescales;
- content;
- funding arrangements.

We have, therefore, framed our analysis to consider each of these key issues.

²⁵ The Practice Direction (1st April 2008) was used rather than Practice Direction 25A (Experts and Assessors in family proceedings) Family Procedure Rules 2010, as the letters were all written prior to the commencement date for PD 25A (i.e. 6th April 2011).

²⁶ Practice Direction (2008) (paragraph 2.3).

6.1 Disclosure Requirements

Proceedings relating to children are confidential, and the Practice Direction emphasises that the court's permission is required to instruct an expert and to disclose documentation to the expert.²⁷

In 28 cases (90%) the letter of instruction expressly confirmed that the court's permission had been obtained to instruct the expert. In the remaining 3 cases, it was implicit that the court had given permission, as the letter confirmed the date by which the court expected the expert's report to be filed.

Only 2 letters (6%) expressly noted that a copy of the order appointing the expert was included with the instructions, with a further letter confirming that the order would follow once it was received from the court.²⁸ However, in all cases the expert was provided with the relevant case papers, so it may be that the appointing order was contained in the bundle, but not separately referred to in the letter of instruction.

The Practice Direction also emphasises that the court's permission is required before the child may be assessed by an expert.²⁹ Ten letters noted that permission had been given. Of the remaining cases, it appeared that direct work either was or may have been required with the child in 15 cases (48%), but the required permission was not noted in the letter of instruction. It may be that permission was obtained but omitted from the letter, but it would obviously be concerning if permission was not actually being obtained, as any evidence arising out of the assessment would be inadmissible without permission from the court, and the assessment may amount to a contempt.³⁰

6.2 Timescales

The Practice Direction requires that the issue of expert evidence should be raised "as early as possible", and, in public law proceedings, the proposal to instruct an expert should be considered "by or at the Case Management Conference".³¹ Only one letter specifically recorded that the direction for the expert's instruction was obtained at the Case Management Conference (CMC). Four letters suggest that the instruction was obtained at the CMC, as they refer to the next hearing being the Issues Resolution Hearing (which should be the hearing following the

²⁷ Practice Direction (2008) (paragraphs 1.5 & 1.6).

²⁸ As required under Practice Direction (2008) (paragraph 2.5).

²⁹ Practice Direction (2008) (paragraph 1.5).

³⁰ Practice Direction (2008) (paragraph 1.5).

³¹ Practice Direction (2008) (paragraph 1.9).

CMC under the Public Law Outline). Factors suggesting that the instruction took place later than the CMC included:

- other expert evidence already having been obtained;
- fact-finding exercise having been undertaken;
- parallel criminal proceedings having been completed.

If expert evidence is not being commissioned early in the proceedings, this has implications for the length of proceedings, which may result in delay³² and have a negative impact on the timetable for the child.³³

The Practice Direction requires that an expert's report is "filed in accordance with the court's timetable".³⁴ Twenty-six letters (84%) confirmed the filing date. One letter contained a date for filing an initial report, but not the filing date for the final report. Three letters indicated that the filing date was to be agreed with the expert upon receipt of the instructions. It may be that the filing date was contained in the court order appointing the expert, and that the order was included with the documentation supplied by the expert. However, leaving the expert to search out the filing date, rather than setting it out clearly in the letter of instruction, risks the filing date being overlooked, making compliance with court deadlines less likely and possibly resulting in delay in concluding the proceedings.

The Practice Direction requires that the lead solicitor must provide the letter of instruction to the expert "within 5 business days after the relevant hearing".³⁵ Only 1 letter definitely complied with this timescale. In 11 cases either the date of the hearing where the expert was appointed was not given, or the letter of instruction was undated, so the timescale from the date of hearing to instruction could not be calculated. In the remaining 19 cases (61%) the required timescale was not complied with. The longest gap between hearing and instruction was 52 business days,³⁶ and the average period, in the cases where the required timescale was not complied with, was 20 business days (i.e. four times longer than the prescribed period).

³² Contrary to section 1(2) Children Act 1989.

³³ The timetable set by the court taking into account the significant steps in the life of the child who is the subject of the proceedings (Public Law Outline - April 2010, paragraph 3.2).

³⁴ Practice Direction (2008) (paragraph 3.3).

³⁵ Practice Direction (2008) (paragraph 5.1).

³⁶ A business day is a day other than a Saturday or Sunday, Christmas Day or Good Friday or a bank holiday (Family Procedure Rules 2010, rule 2.3(1)).

Delay in receiving the letter of instruction was also noted by the pilot teams in interview, with the following comment being typical:

“...solicitors are notoriously bad at getting instructions in, in a timely manner, and we’ve had one case where the instructions were received five days before filing.” [Pilot Team D]

A member of the same team, who also undertook expert witness work in a private capacity, commented that delay in receiving instructions was not confined to the pilot cases, and was also common in cases where single experts were instructed.

Additionally, it was noted that communication between solicitors and experts whilst the proceedings were ongoing could also be problematic:

“I think one of the problems with the lead solicitors, because we’re having this problem across the board really, every once in a while you get a brilliant one, but mostly the communication is very poor ...they somehow don’t see, they’re not aware that you need to keep the experts informed somehow, it’s not high on anyone’s agenda so it’s just all very puzzling really.” [Pilot Team A]

The teams also explained why delay in receiving the letter of instruction or updating information was problematic, emphasising particularly the impact which delay had on the timescales for preparation of the report:

“...we’ve kind of given an estimate and said we’d start the case by this date, we can complete by then and the letter of instruction doesn’t arrive and you haven’t started your assessment but they’re still expecting that you’ll have the report done by that date, and that sort of concertinas your assessment and puts pressure on other cases.” [Pilot Team B]

The same team noted that, in order to combat the difficulties caused by delay in receiving the letter of instruction, the team now provided time estimates for reports which ran from the date of receipt of instructions.

When asked about the reasons for the delay in receiving instructions, one of the pilot teams assumed that delay was the result of pressure of work:

“...I can only guess that they are overworked or just very busy.” [Pilot Team A]

However, one judge noted that solicitors may not appreciate that delay in providing the letter of instruction could impact on the provision of the report in

pilot cases, as experts usually did not have capacity to commence work immediately in any event:

“In the private sector you engage somebody but the papers sit in their filing cabinet for probably three possibly four months and then it comes to the top of their waiting list, they work intensively on the case, send their report and they’re finished. That means that the solicitors don’t rush with their letters of instruction because they know they’re going to be sitting in a filing cabinet for three to four months and in fact it might almost be preferable to give up-to-date instructions rather than instructions which are becoming antique.”

[Judiciary 5]

6.3 Content

The Practice Direction requires that “the context in which the expert’s opinion is sought” is set out.³⁷ Twenty-nine of the letters (94%) included a section setting out the background issues, although in several cases the information provided was brief. One of the two letters which did not provide any background information noted that the expert had previously been involved with the family, and referred the expert to the bundle for an update in respect of the relevant background circumstances.

The Practice Direction notes that specific questions should be set out for the expert to answer, and refers to the suggested questions contained in the Annex to the Practice Direction.³⁸ In the letters we reviewed, the number of questions posed ranged from two to twenty. Only one letter adopted the suggested questions contained in the Annex.

The pilot teams noted several concerns regarding the questions contained in letters of instruction. Firstly, the teams felt that solicitors often misunderstood the terminology that they were trying to apply, thus leading to confusion regarding the type of expert to be instructed and the type of assessment required:

“Well we’ve had a set of instructions, I’m just thinking of one example, where it was ‘psychiatrist/psychologist’, and I guess that’s down to me to decide which, looking at the questions, who would be the most appropriate to answer them.” [Pilot Team D]

“I think doing the instructing probably, you know, they don’t exist in this world so they are trying to ...use language which isn’t that familiar, thus leading to confusion.” [Pilot Team E]

³⁷ Practice Direction (2008) (paragraph 5.1(1)).

³⁸ Practice Direction (2008) (paragraph 5.1(2)).

"I was just thinking I could remember one where one solicitor actually used some psychometric tests which may not have been appropriate for the case they were referring, but might have picked it up from a psychologist's report."
[Pilot Team B]

Secondly, it was noted that the questions asked could be very repetitive:

"They're not very good on the whole are they? You can get 25 questions which are very repetitive." [Pilot Team F]

"There is often repetitive subsections of subsections so you end up with 30 questions literally and many of them could be collapsed." [Pilot Team E]

"And so the last court report I did I think there were 28 questions and you know they ...weren't well phrased, they weren't well thought through, there was huge overlap." [Pilot Team A]

One team wondered whether poorly phrased questions were the result of over-reliance on precedent letters:

"I think solicitors tend to write a letter of instruction based on a previous template." [Pilot Team B]

Another team noted that it appeared that nobody took overall responsibility for ensuring that the letter of instruction concentrated on the issues that the court needed to resolve in order to decide the case, with the questions posed by each party being included in the letter regardless of whether they added anything to the instructions:

"...they will each chip in their question which might be slightly different from the other solicitor's question, and then they just tack it on so that's when you get the sort of repetitive questions that are slightly different, and I mean it would be useful sometimes also just to know what the court actually wants to know." [Pilot Team E]

A judge highlighted the effectiveness of collaboration between the parties, and also the judiciary, to ensure that the questions posed were correctly focussed:

"There's an awful lot of, I think, extremely admirable inter-cooperation between solicitors and barristers, and indeed with the judge ...and there's an awful lot of to-ing and fro-ing and emails and chats in chambers, and usually a very good letter of instruction is cobbled together; it's good cobbling."
[Judiciary 4]

These observations would appear to give some support to the Family Justice Review Team's proposal that the judiciary should control the letter of instruction as well as the choice of expert.³⁹ However, greater judicial input into the instruction of experts, whether via discussions with the advocates or by drafting the questions to the expert, would have obvious resource implications, and may be impractical in the family proceedings courts where the majority of children's proceedings are heard by lay magistrates. We do not have any data in order to be able to comment upon whether the benefits of greater judicial input into the letter of instruction would outweigh the potential increase in costs.

The teams also suggested that the focus of the questions would be improved if the expert was asked to have an input into the phrasing of the questions:

"...some of them are happy to take our advice and some of them aren't and of course if they won't take our advice that's quite difficult for us too and we don't think the questions are formulated in such a way that we can give a sensible answer." [Pilot Team D]

Two of the teams also noted that more use should be made of the Practice Direction Annex questions:

"...it's so helpful, and it would be such an importance in a way for lawyers who don't know how to ask some of the questions to have reference to it." [Pilot Team A]

"...the courts produce guidance on instructing experts ...and that has got quite nicely set out the sort of questions they should ask. It is very hard to see that they have read that. I mean there are occasional solicitors but basically they haven't read it." [Pilot Team E]

The teams also noted that poorly drafted questions can result in delay and also additional costs:

"...solicitors need to get much better at writing letters of instruction, it causes problems and it increases costs." [Pilot Team F]

"So we'd spent a whole day and a half probably getting our minds around the first report which was completely useless from the court's point of view because it didn't address the legal question. So that was a serious waste of time." [Pilot Team A]

³⁹ 'Family Justice Review: Interim Report' (Family Justice Review Panel, March 2011) (paragraph 4.239).

Some solicitors felt that delays were caused by the fact that experts did not answer the questions asked, which often meant that a request had to be made for clarification:

“Well the problem we encountered on that one was that they did the assessment, they did the report, and when we got the report in they hadn’t answered all the questions that they’d been asked. And so it wasn’t helpful because we ended up with a report that didn’t address everything we’d asked and we had to actually go back to them and say ‘you haven’t answered the questions’.” [Solicitor (Adult Party) 7]

“...it didn’t answer the questions that had been asked in the letter of instruction, and that might’ve been because so many disciplines were used that perhaps nobody took responsibility for actually answering each and every question. So each expert may have thought they were answering the questions that were relevant to that particular expert, but the report wasn’t in a format that dealt with the questions in the order in which they were asked, or even at all. And to the extent that we had to go back to ask again that all the questions be answered in a written format, albeit the information was there to be picked out, we needed to have it in a form that answered it clearly for the court.” [Children’s Solicitor 5]

The Practice Direction requires that the expert is provided with an “indexed and paginated bundle”.⁴⁰ In all cases the expert was provided with either the full court bundle or an agreed list of documents from the proceedings. The pilot teams noted that in four cases some necessary documentation was missing:

- “Some delay in providing additional documentation. Needed chasing up.”
- “Some relevant documents had to be requested and obtained by solicitors from the local authority. No significant impact on report, but it would have been very helpful to have them earlier while seeing family.”
- “Had to obtain details of contacts later. Paediatrician also had difficulties obtaining medical histories.”
- “We wrote to the lead solicitor on a number of occasions. [They] obtained judicial authority for the release of the documents, which were essential for us to consider as part of our assessment.”

As well as the relevant case papers, the expert must also receive a copy of the Practice Direction.⁴¹ Only thirteen letters (42%) made reference to the Practice Direction. Of the remaining letters:

- six made no reference to any guidance for expert witnesses;

⁴⁰ Practice Direction (2008) (paragraph 5.1(3)).

⁴¹ Practice Direction (2008) (paragraph 5.1(3)(c)).

- ten referred to the ‘Code of Guidance for Expert Witnesses’ under the Protocol for Judicial Case Management (which was superseded by the Practice Direction on 1st April 2008);
- one referred (incorrectly) to the requirements of the Civil Procedure Rules; and
- one simply noted that the proceedings were subject to the Public Law Outline.

The fact that nearly one third of the letters referred to guidance which had been superseded for at least a year prior to the letter of instruction being written, tends to support the observation by the pilot teams that solicitors may be over-reliant on precedent letters.

The Practice Direction requires that the letter of instruction identifies the relevant people in the proceedings and also any other expert, and sets out that any discussions held must be accurately recorded.⁴² All of the letters identified the relevant people in the proceedings (although in one letter this was done on a separate schedule which was not provided to the research team). Four of the letters failed to specify the need to record any discussions held (although one of these letters related to a supplemental report, so the issue may have been previously addressed in the main letter of instruction). Twenty cases (65%) involved experts in addition to the pilot team. These additional experts tended to fall into two categories, either experts who had provided reports prior to the teams’ involvement (e.g. the community paediatrician who initially examined the child and raised child protection concerns), or experts who were instructed, in addition to the team, to provide evidence that the team could not.

6.4 Funding Arrangements

The Practice Direction requires that the letter of instruction sets out the contractual basis upon which the expert is retained.⁴³ Under the ACE pilot, the pilot teams contracted with the Legal Services Commission to provide expert witness services at either an agreed hourly rate, or on the basis of a fixed fee per assessment. Once the team had completed its assessment, the Commission was responsible for paying the proportion of the teams’ fee for which the publicly funded parties were liable directly to the team, with the local authority accounting for its share to the team as in non-pilot cases. Therefore, the usual funding

⁴² Practice Direction (2008) (paragraphs 5.1(6) & 5.1(7)).

⁴³ Practice Direction (2008) (paragraph 5.1(8)).

arrangements (with each individual solicitor accounting to the expert for their share of the fee) did not apply to the pilot cases.

Only 4 of the cases appear to have been designated as pilot cases in advance of the letter of instruction being submitted to the pilot team, as only 4 of the letters refer to the pilot arrangements. The remaining letters all contain, to varying degrees, general information about funding issues (e.g. the detailed assessment process and the need for the expert to invoice each of the parties separately). That so few of the letters referred to the pilot arrangements may be accounted for, at least in part, by the fact that two of the pilot teams operated 'opt out' procedures, with each case referred to them during the pilot period that met the qualifying criteria being treated as a pilot case unless the parties objected. These two teams dealt with 23 of the 31 pilot cases between them. Therefore, if the letter of instruction was written before the decision was made to process the case under the pilot, it would not be surprising that the letter made no reference to the pilot funding arrangements.

Additionally, the fact that the pilot funding arrangements were not explained in the majority of the letters may give support to the concern that the arrangements were often not well understood by solicitors (see section 5.6). Similarly, it may also give further support to the suggestion that solicitors are over-reliant on precedent letters, with one team noting:

"...I think [the Legal Services Commission's] expectation was the solicitor would write a letter of instruction with the Pilot in mind, ensuring that the information is enshrined in the letter. They've never done that, they've only done the old letter of instruction and we've chased the information." [Pilot Team B]

Of the 27 letters which made no reference to the pilot arrangements, none included an estimate of the expert's fees, with some specifically noting that the expert was to provide the estimate after receipt of the instructions. This would appear to conflict with the Practice Direction, which requires that any proposal to instruct an expert should contain "the likely costs of the report on an hourly or other charging basis".⁴⁴ This may suggest that judicial case management powers are not being exercised consistently to regulate the costs of expert evidence in proceedings relating to children, as not all magistrates/judges are requiring that information regarding the expert's fees is made available to the court prior to granting permission for the expert's instruction. Also, if the contractual basis upon which the expert is retained is not clearly set out it creates

⁴⁴ Practice Direction (2008) (paragraph 4.3(9)).

the potential for future disputes to arise between solicitors and experts in relation to payment of the expert's fees, a factor which is likely to become increasing relevant given that the Family Procedure Rules 2010 imposes joint and several liability on the instructing parties for the fees and expenses of jointly instructed experts, unless the court directs otherwise.⁴⁵

6.5 Miscellaneous

In eight cases it appears that the pilot team was unable to provide all of the expert input required to conclude the proceedings, as the letter of instruction noted that a separate assessment of at least one of the parties was being undertaken by an expert outside of the team. In seven cases the additional assessment was either a psychiatric or psychological assessment of an adult, and in one case it was a paediatric assessment.

This evidence is consistent with the conclusions of the ACE pilot evaluation, where interviewees noted that, in order to be able to offer a service which provides a 'one-stop' approach in the majority of cases, an expert witness team would need to include, as a minimum, expertise in paediatrics, adult psychiatry and psychology, and child psychiatry and psychology (see section 5.8).

6.6 Summary

The review of the letters of instruction from the ACE pilot suggests the following conclusions:

- i) There appear to be two particular aspects of the Practice Direction that are not being complied with, which have the potential to impact upon the provision of expert evidence to the courts.

First, delay in the provision of the letter of instruction may impact upon the expert's ability to report within the court's timescales. This may lead to delay in the proceedings and possible negative impacts on the timetable for the child.

Second, the failure of the questions to focus on the key issues in the case may affect the usefulness of the expert evidence in assisting the court's decision-making.

⁴⁵ Family Procedure Rules 2010 (rule 25.8(6)).

These issues could, at least in part, be addressed by: experts providing input into the framing of questions, training of solicitors to better understand the matters that expert evidence can address, and increased judicial co-ordination of the instruction of experts. However, these measures are likely to result in increased costs, and we are unable to comment upon whether the potential benefits would outweigh any increase in costs.

- ii) In a significant proportion of cases permission to instruct the expert appears to have been obtained without the court having been provided with the estimate of the expert's fees required under the Practice Direction. This may suggest that judicial case management powers are not being exercised consistently to regulate the costs of expert evidence in proceedings relating to children.
- iii) Reliance on precedent letters by solicitors appeared to be resulting in experts receiving inaccurate information on key issues, such as the role and duties owed by expert witnesses to the court and funding arrangements.

7. Conclusions

This section summarises our key conclusions. The small numbers of pilot cases and interviews undertaken is suggestive of the difficulties likely to be encountered in rolling out wider provision of expert witness services via multi-disciplinary teams. Our findings are necessarily limited to the experiences of the pilot teams, and of those stakeholders to whom we were able to speak.

7.1 Issues relating to take-up

Factors appearing to contribute to low take-up of the pilot arrangements included:

- lack of awareness of the availability of the pilot amongst legal and social work practitioners.
- A concern, particularly amongst lawyers, about loss of control over the choice of expert;
- the pilot referral criteria were too narrow; and
- the pilot period was too short.

Judicial support for the pilot was noted as having a positive effect in encouraging referrals.

7.2 The research questions: 'Key Messages'

The key messages from the data evaluation in respect of the research questions would appear to be:

Engaging and Sustaining Expert Witnesses:

- The pilot did little to make it easier for health professionals to become engaged as expert witnesses, with only eight cases being undertaken as a direct result of the pilot.
- Given its limited impact, it appears unlikely that the piloted approach, in its current form, would ensure a sustainable increase in the supply of expert witnesses.
- A number of facets of the team model were identified as being likely to encourage less experienced clinicians to undertake expert witness work (particularly, shared responsibility for decision making, the opportunity to learn from senior colleagues and to access training in respect of the role of the expert witness).

- A number of obstacles were identified to greater use of expert teams (particularly, restrictive referral criteria, the parties' desire to instruct their individual expert of choice, and lack of transparency in respect of team decision making).

Speed of Access and Reporting:

- The only cases where the pilot appears to have made it easier for solicitors and clients to access health expert witnesses were those cases that were referred to the pilot teams created in order to participate in the pilot, as these teams had capacity to accept cases immediately. However, the experience under the pilot was that new teams also struggled to provide capacity.
- Systems, which appear to contribute to ease of referral, include having a designated, accessible referrals process, and a designated contact person who is available and able to deal with queries as they arise.
- Timeliness in producing reports appeared to depend on the capacity of the team rather than being the product of external processes such as the pilot or judicial case management.

Quality of Reporting:

- Whilst the majority of the pilot reports were of good quality, there is no evidence to suggest that this is a result of the pilot as opposed to being a benefit of multi-disciplinary working generally.
- There is some evidence which suggests that multi-disciplinary teams may have more extensive quality assurance systems than single experts.

Funding and Cost Effectiveness:

- The lack of data means that it is impossible to evaluate whether the pilot arrangements are more cost effective than the traditional arrangements for commissioning expert witness services.
- Whilst the expert witness services provided by the pilot teams were generally thought to represent good value for money, there is no evidence to suggest that this was a result of the pilot arrangements rather than the

- fact that the report was being provided by a multi-disciplinary team as opposed to a series of individual experts.
- The overlap between assessment and therapy means that the Legal Services Commission is likely to be contributing to the funding of therapeutic interventions in some cases.
 - Any concern that the Commission is, to any significant degree, funding assessments, which should be completed by local authorities as part of their pre-proceedings obligations under the Public Law Outline was not evidenced during the pilot.

Impact on Clients:

- There is very little evidence to suggest that the pilot had any significant impact on clients, save that it appears to have facilitated quicker access to expert witness services in a small number of cases.
- The use of multi-disciplinary teams to provide expert witness services was noted to have a number of potential benefits for clients (principally the reduction in exposure to different professionals/venues in comparison to assessment by a number of single experts, and the ability of teams to engage with adult parties and local authorities during the assessment process).
- Some concern was expressed that the opinion of a multi-disciplinary team was likely to be very influential in the decision-making process, and can be difficult for the parties (including social work professionals) to challenge, possibly resulting in them disengaging from the proceedings.

Impact on Solicitors:

- The only aspect of the legal casework that was identified as changing under the pilot was the procedure for paying the experts commissioned.
- As local authorities continued to account directly for their share of the pilot teams' fees, the pilot funding arrangements generally had no impact on local authorities.
- Amongst solicitors views on the administrative efficiency of the pilot funding arrangements were mixed.

Defining Complexity:

- Whilst some factors have been identified which could be adopted as indicators of complexity, it is unlikely that a robust definition of complexity, particularly one applicable at the point of referral, could be framed from the available data.

Lessons to be Learnt:

Evidence from the pilot suggests that:

- Expert witness services provided by multi-disciplinary teams are felt by stakeholders to represent good value for money, with the ability to provide local knowledge-based recommendations for future services being seen as particularly valuable.
- The multi-disciplinary model has the potential to ensure sustainability of supply as team members value the peer support provided by the team, and, where there is sufficient resourcing of it, the extra reassurance provided by team-based systems of quality assurance.
- The instruction of multi-disciplinary teams should not be restricted to cases requiring input from more than one clinical discipline or to complex cases as this hinders access to the expertise of the team, and a range of case work is necessary to facilitate less experienced clinicians undertaking expert witness work.
- The ideal model is a multi-disciplinary team capable of providing a 'one-stop' approach in the majority of cases. This suggests that expertise in paediatrics, adult psychiatry and psychology, and child psychiatry and psychology are all required within the team.
- To be effective multi-disciplinary teams need to be properly resourced with clear funding and staffing arrangements, and appropriate administrative support.
- Lawyers and the judiciary would need to relinquish a degree of control over the choice of expert witness and accept that the task of providing expert evidence is allocated to a team rather than a named individual.
- Paying expert witnesses direct, rather than via instructing solicitors, has the potential to reduce the administrative burden on solicitors. However, the impact on the Legal Services Commission's administration budget would need to be taken into account.

7.3 Letters of Instruction

The review of the letters of instruction from the ACE pilot suggests the following conclusions:

- There appear to be two particular aspects of the Practice Direction that are not being complied with, which have the potential to impact upon the provision of expert evidence to the courts. First, delay in the provision of the letter of instruction may impact upon the expert's ability to report within the court's timescales. Second, the failure of the questions to focus on the key issues in the case may affect the usefulness of the expert evidence in assisting the court's decision-making. These issues could, at least in part, be addressed by: experts providing input into the framing of questions, training of solicitors to better understand the matters that expert evidence can address, and increased judicial co-ordination of the instruction of experts. However, these measures are likely to result in increased costs, and we are unable to comment upon whether the potential benefits would outweigh any increase in costs.
- In a significant proportion of cases permission to instruct the expert appears to have been obtained without the court having been provided with the estimate of the expert's fees required under the Practice Direction. This may suggest that judicial case management powers are not being exercised consistently to regulate the costs of expert evidence in proceedings relating to children.
- Reliance on precedent letters by solicitors appeared to be resulting in experts receiving inaccurate information on key issues, such as the role and duties owed by expert witnesses to the court and funding arrangements.

7.4 Overview

Overall, the pilot suggests the *potential* for local, multi-disciplinary team-based provision of expert evidence to increase the quality of that evidence. It also shows that team-based working may provide a framework for encouraging clinicians to engage in the provision of expert witness services. Were such engagement to increase, the number of clinicians available to provide expert evidence and the ability of experts to respond more quickly to the demands of the legal and care systems should also increase.

Those benefits have not been fully realised by this pilot. A significant reason is that concentrating on complex and/or multi-disciplinary cases limited the number of cases that could be accepted into the pilot. There are, however, broader, and potentially stronger, inhibitors of success. The Chief Medical Officer's reforms effectively sought to encourage the NHS to see the provision of expert witness services as a significantly higher priority than it currently does. That requires having sufficient staff (with sufficient experience and training) and also sufficient flexibility to work around normal clinical priorities. Currently, expert witness services are resourced in a variety of ways and, it seems reasonable to surmise, in ways supported (but not always costed) by the NHS.

Notwithstanding specific recommendations by the Chief Medical Officer that such work be done,⁴⁶ the feasibility of bringing together teams with the requisite specialisations, skills and capacity was not, as far as we aware, examined. Ensuring that sufficient expert witness service provision is available, and thus facilitating the expectation that judges would instruct local teams (as proposed by the Family Justice Review),⁴⁷ would require a significant level of change within the NHS and amongst expert practitioners. Important, but unanswered, questions raised by the pilot are whether contractual mechanisms can provide sufficiently large incentives to develop local teams, and whether teams would have the capacity to meet demand. Similarly, the potential role of commercial providers, who quality assure, develop and coordinate expert teams, remains largely untested by this research. Some basic questions about where current experts are located, and how they might be brought together and developed into teams need to be asked. Furthermore, there needs to be fuller engagement with clinicians and their organisations to develop models which will deliver capacity and sustainability. It may be that teams will function more effectively when dealing with single-discipline and less complex cases if these cases provide better development opportunities for new experts and pose fewer – or more manageable – capacity issues. The more complex cases might be contracted out on a more bespoke basis.

Our view from speaking to the teams is that expert witness services remain peripheral economically and culturally to the NHS generally, although the clinicians within the pilot teams were committed to the team approach. As well as ensuring that the planning and economic incentives for more widespread provision of expert witness services by multi-disciplinary teams are appropriate, a

⁴⁶ 'Bearing Good Witness', Op.Cit. (page 5).

⁴⁷ 'Family Justice Review: Interim Report', Op.Cit. (paragraph 4.239).

cultural commitment from NHS staff/organisations would also be required. The effect of delay on the wellbeing and health of the participants in care proceedings, especially (though not exclusively) the children, seems self-evident. Research in this area may go some way to persuading clinicians of the importance of expert witness work in terms relevant to the values of medical practitioners. If it is true that the NHS is not going to be persuaded on a purely economic basis that provision of expert witness services should be a priority, such research may prove essential.

Finally, if there is to be more widespread provision of expert witness services by multi-disciplinary teams, then clarification by the Family Procedure Rules Committee regarding how the relevant procedural rules should be applied to team based provision is likely to avoid potential disputes regarding ancillary, procedural issues.