

**Submission to**  
**Lord Carter's Review of Legal Aid Procurement**  
**The expert witness dimension**

**Prepared by**  
***the UK Register of Expert Witnesses***

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The expert witness dimension

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## Executive Summary

This is the submission of the *UK Register of Expert Witnesses* to Lord Carter's Review of Legal Aid Procurement that began work on 5 July 2005. It draws together 264 contributions from expert witnesses currently listed in the *Register*.

The core problem for the Legal Aid system is how it can pay 'proper' fee rates to expert witnesses and thereby retain experienced expert witnesses willing to provide opinion evidence. Based on the analysis of the *UK Register of Expert Witnesses*, the answer seems to lie in a combination of **early involvement of experts, staged instructions** and **pre-trial assessment of expert evidence**.

The existing trend towards the **earlier involvement** of experts noted by the DCA in *A Fairer Deal for Legal Aid* must be reinforced. Expert opinion evidence, if used early enough, can stop weak cases from 'getting off the ground'. Trying to save public funds by paying expert witnesses less is tantamount to locking the stable door after the horse has bolted. Stopping the weak cases from ever starting, through the better use of experts earlier in the case management process, will return much greater cost savings than tweaking the fees of expert witnesses.

An approach already employed by many experienced litigation lawyers in the civil arena is **staged instruction of experts**. Potentially large expert witness assignments are broken into smaller, more easily managed, stages, and each stage of reporting acts to inform the next.

The current court system requires that two 'Rolls Royce' reports are obtained, covering all aspects of the expert evidence, even if at trial a large proportion of the technical evidence is not disputed. The introduction of a staged reporting system would demand that a 'Rolls Royce' report be prepared only when the nature of the evidence, and the 'seriousness' of the case, justified it.

If introduced at the same time as changing the 'gladiatorial' culture in the criminal courts, **pre-trial assessment of expert evidence** has much cost-saving potential. Such assessment could take the form of meetings of experts, *Daubert*-style appraisal of expert evidence or even pre-trial hearings of expert evidence leading to juries being given the 'agreed' expert opinions without ever seeing an expert witness at trial.

The legal aid system is in danger of creating a professional class of expert witness willing to accept 'meagre' fee rates in lieu of the professional fees experts can attract elsewhere. If this is to be avoided, approaches such as those noted above will need to be explored in place of simple-minded attempts to reduce further the fees payable to experts under legal aid.

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The expert witness dimension – Introduction

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## Introduction

This is the submission of the *UK Register of Expert Witnesses* to Lord Carter's Review of Legal Aid Procurement that began work on 5 July 2005. The first draft of this response was posted on the *Register's* website (<http://www.jspubs.com>) in October 2005. The 3,000 experts in the *Register* were then invited to consider the response and feed back their own views. We also enabled experts to contribute by lending their support to, or record their rejection of, the views contained in our initial response through an on-line polling system. In the end, 264 contributions were received from expert witnesses currently listed in the *Register*.

The aim of Lord Carter's Review of Legal Aid Procurement, with respect to expert evidence, is to seek more efficient and effective use of expert witnesses. After last year's ill-informed attempt by the Legal Services Commission (LSC) to reduce their spend on expert witnesses by the simple expedient of cutting expert fees in half, Lord Carter's review is most welcome. It offers the chance to design a coherent strategy by which the Department for Constitutional Affairs (DCA) and the LSC can deliver cost-effective and efficient use of expert evidence within the constraints of public funding limits. There is surely no better place to find these answers than amongst the expert witnesses themselves.

The *UK Register of Expert Witnesses* has been asked to draw together views of expert witnesses about the use of expert evidence in complex and costly cases, including fraud cases, with particular emphasis on:

- What costs are incurred when experts are used, and what factors cause these costs to escalate?
- Is there scope for greater efficiency in using expert witnesses?

It is self-evident that most expert witnesses will not have been instructed in the tiny number of complex and costly (fraud) cases. Yet, the lessons to be learnt from the generality of cases that are neither overly complex nor particularly expensive also apply to these exceptional cases.

The core problem for the Legal Aid system is how it can pay fee rates to expert witnesses that are about half of those paid in the privately funded arena and yet retain a pool of experienced expert witnesses willing to provide opinion evidence. Based on the analysis of the *UK Register of Expert Witnesses*, the answer seems to lie in a combination of:

- Early involvement of experts
- Staged instructions

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The expert witness dimension – Introduction

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- Pre-trial meetings of experts to identify issues

### ***Criminal -v- Civil***

Before looking at these aspects in more detail, it should be noted that the DCA reminds us, in *A Fairer Deal for Legal Aid*, that the changes in eligibility for legal aid introduced over the last few years means that most public funding now finances criminal cases. As we shall see, the reforms in the civil arena brought about by Lord Woolf have much to teach the criminal courts about how expert evidence can be deployed more efficiently. And that is despite the differences between the jurisdictions, such as the standard of proof and the higher frequency of trials in criminal cases. In much of what follows, our suggestions relate specifically to the criminal courts.

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## The expert witness dimension – Earlier involvement

## Earlier involvement

Through the *UK Register of Expert Witnesses* helpline, we have heard of a number of criminal prosecutions that collapsed at a late stage because the expert evidence, which demonstrated the weakness of the prosecution case, only became available late in the proceedings. For example:

*“Recently I have been involved in three cases where lack of experience has led to a report being submitted to CPS and charges brought when a more careful analysis would have shown that the officer had ignored several key pieces of data. The approach at present seems to be to collect and use data that supports the charge rather than preparing an unbiased report that can be presented to the Courts. It seems that that is where the major funds are being wasted, rather than in the legal aid process. By tidying up the initial investigation significant costs could be avoided.”*

In such cases, scarce financial resources are wasted simply because the expert evidence doesn't inform the decision making within the Crown Prosecution Service (CPS).

Survey response (n = 231)			
	Agree	Neutral	Disagree
Do you agree that the current system wastes money by not having expert evidence available early in the life of a case?	90.1%	6.9%	3.0%

*Survey conducted on www.jspubs.com during October and November '05*

Including expert evidence in the initial case assessment process within the CPS is likely to have a beneficial effect in either preventing weak cases going forward or securing early guilty pleas. Such expert involvement might be achieved by the CPS, or LSC, commissioning experts on a case-by-case basis, on block contracts or by forming panels of experts within the CPS.

As can be seen from the survey results (see next page), the vast majority of expert witnesses believe that the current system of commissioning individual experts on a case-by-case basis is the best of these options.

The problem with block contracts, or panels of experts is summarised neatly by the following extract from one of our respondents:

*“It seems great in theory to have ready access to experts on a regular contract basis at an early stage, but I also think that term contracts can lead to mediocrity and reinforcement of extreme/entrenched views that are then very hard to shift – [it is]*

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## The expert witness dimension – Earlier involvement

*easier for an expert on such a contract to advance a 'pet' theory without it being properly tested. This is the problem with court appointed experts in the continental system – a closed shop introducing a comfortable 'in-crowd' that cannot easily be challenged by party appointed experts."*

<b>Survey response (n = 231)</b>			
Do you think expert input to early case management is best achieved by:	<b>Agree</b>	<b>Neutral</b>	<b>Disagree</b>
a) commissioning individual experts on a case-by-case basis?	90.2%	7.1%	2.7%
b) having a system of block contracts for experts?	9.8%	24.9%	65.3%
c) forming panels of experts within the LSC and CPS?	21.8%	29.5%	48.7%

*Survey conducted on www.jspubs.com during October and November '05*

### **An existing trend that needs encouraging**

The CPS is already moving in the direction of earlier involvement of experts. In *A Fairer Deal for Legal Aid*, the DCA notes:

*"4.10 Close collaboration with the Crown Prosecution Service, the Association of Chief Police Officers (ACPO) and the Forensic Science Service (FSS) has resulted in plans to enable forensic evidence to be made available much earlier in the life of a case, enabling defendants to receive well informed early advice from their lawyers on the strength of their case.*

*"4.11 Currently the first appearance of forensic evidence will often not be until late in the progress of a case. This means that much of the early legal advice to defendants cannot take account of key forensic information that may determine the outcome of the case. However, a 'first match report' of DNA evidence can be produced early in the process. In appropriate cases this provides the prosecution with the opportunity to base a charge on the match report and agree summary forensic evidence. Managing cases involving DNA in this way reduces delay and assists with early identification of trial issues. We are now investigating with the CPS and FSS whether early reports could also be provided for other evidence, such as finger printing, drugs analysis and firearms analysis. For a defendant who is aware of his or her own guilt, legal advice that there is hard scientific evidence of that fact is likely to be a key determinant in considering an early guilty plea."*

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## The expert witness dimension – Earlier involvement

But, the range of expert evidence goes well beyond that derived from forensic science analysis of a scene of crime. For example, in a case involving alleged theft by a shop assistant, expert evidence on weaknesses in point of sale security was crucial in securing an acquittal. Such evidence could have been made available at the very earliest stage of that prosecution. If it had, it would have saved thousands of pounds of trial costs.

### Stop weak cases as early as possible

A common refrain in the responses we have received is that if prosecution authorities had better initial filtering systems then many cases would never 'get off the ground'. Trying to save public funds by paying expert witnesses less is tantamount to locking the stable door after the horse has bolted. Stopping the weak cases from ever starting, through the better use of experts earlier in the case management process, will return much greater cost savings than tweaking the fees of expert witnesses.

### **Better Counsel**

With expert witnesses being involved at the earliest stages, Counsel would be better placed to determine precisely what expert evidence is required. Furthermore, having received a report, Counsel would be better able to assess whether it addressed the core issues in the case. Early involvement would also encourage direct lines of communication between expert witnesses and Counsel. The confusion that can arise from the historical bureaucracy that requires experts to communicate with Counsel through a solicitor is a source of additional cost and delay.

Survey response (n = 231)			
	Agree	Neutral	Disagree
Do you agree that expert witnesses should be expected to communicate directly with barristers?	81.9%	13.4%	4.7%

*Survey conducted on www.jspubs.com during October and November '05*

There is evidence from our respondents that some counsel already facilitate early and close dialogue with expert witnesses. But this is not always the case. Take, for example, this expert's experience:

*"Some of my most successful work has been with a limited number of barristers who will discuss the case with me from the very beginning and then advise their instructing solicitor to consider the points which I have identified in relation to the prosecution evidence. In this way my written instructions are much more precise*



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The expert witness dimension – Earlier involvement

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*and my report can concentrate on the issues in dispute rather than having to provide a global report dealing with all aspects of the case. Often this has led to several shorter reports which have concentrated on specific aspects of the prosecution case as it evolves.”*

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The expert witness dimension – Staged instructions

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## Staged instructions

In its November 2004 consultation paper *The Use of Experts*, the LSC proposed that the seriousness of a crime be taken into account when selecting an expert witness. This is allied closely to the question of proportionality in relation to quantum in civil cases. In both areas, the same two basic considerations apply:

- expert witnesses should not be expected to work for inadequate payment (unsurprisingly, 94.6% of our respondents agreed with this assertion)
- expert witnesses, not having management of a case, do not have sufficient information to enable them to determine what aspects of a case can be omitted from consideration.

It follows, therefore, that if cost savings are required, they have to be realised by the solicitor instructing the expert witness to undertake a programme of work that can be completed within the budget available.

It is important to distinguish here between decisions as to:

- (i) those aspects of a case that need to be explored in order to ensure the court considers enough evidence to reach a fair judgment, and
- (ii) those technical aspects of a particular strand of expert evidence that can be safely ignored.

The former decision must reside with the lawyers who have the management overview of the case. The latter decision must properly reside with the expert witness. Although, as the case of Dr Williams in the Sally Clark trial shows, an expert will be wise to include the reasons for ignoring some potential area of analysis.

But there is a paradox. Lawyers, who are not experts themselves, often have some difficulty knowing what can safely be omitted in pursuit of proportionality. The answer to this conundrum lies in greater use of staged instructions by solicitors.

### ***'Reconnaissance' reports***

An expert witness could be instructed to prepare an initial report. This would be designed to conduct a 'reconnaissance' of the expert matters raised by the case and to identify potential areas for more detailed analysis. If the quantum in a civil case, or the seriousness of the offence

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## The expert witness dimension – Staged instructions

in a criminal case, warrants investigation of particular avenues of expert enquiry, further report stages could then be sanctioned.

This approach, already adopted by experienced litigation lawyers in the civil arena, results in breaking potentially large expert witness assignments into smaller, more easily managed, stages. And each stage of reporting acts to inform the next.

<b>Survey response (n = 231)</b>			
	<b>Agree</b>	<b>Neutral</b>	<b>Disagree</b>
Do you agree that our suggested staged approach to the instruction of experts would be likely to help achieve proportionality between the cost of expert evidence and the quantum in a civil case, or the seriousness of the crime?	79.5%	13.5%	7.0%

*Survey conducted on www.jspubs.com during October and November '05*

This approach would also ensure that scarce resources are used to better effect. The expert witness can be instructed to prepare a 'reconnaissance' report at relatively low cost. If this reveals specific areas for detailed analysis, or if early meetings of experts (see the next section) reduce the points of disputed expert evidence to a few key areas, additional resources can be made available for a detailed report on just those points.

### ***Pay only for what is truly required***

The current system requires two 'Rolls Royce' reports be obtained, covering all aspects of the expert evidence, even if at trial 75% of the evidence is not disputed. The staged reporting system would demand that a 'Rolls Royce' report be prepared only when the nature of the evidence, and the 'seriousness' of the case, justified it.

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## The expert witness dimension – Pre-trial meetings of experts

## Pre-trial meetings of experts

Following introduction of the Civil Procedure Rules (CPR), the adversarial tendency towards evidential ambushes has been reduced greatly in the civil arena. The openness enshrined in the CPR means that expert evidence is disclosed early, and the experts in a case are able to identify the real areas of disagreement well in advance of any trial. This model should be applied in the criminal jurisdiction.

<b>Survey response (n = 231)</b>			
	<b>Agree</b>	<b>Neutral</b>	<b>Disagree</b>
Do you agree that openness with respect to expert evidence enshrined in the Civil Procedure Rules should be adopted in the criminal jurisdiction?	85.9%	9.7%	4.4%

*Survey conducted on www.jspubs.com during October and November '05*

If expert witnesses from the prosecution and defence had the opportunity to exchange opinions in pre-trial meetings of experts, it is likely that:

1. much of the expert evidence could be agreed, saving time at trial
2. the real areas of disagreement would be identified – with possible further reports then being commissioned
3. the true nature of the expert evidence would become clear, leading to an early guilty plea or the halting of a weak prosecution case.

<b>Survey response (n = 231)</b>			
	<b>Agree</b>	<b>Neutral</b>	<b>Disagree</b>
Do you agree that pre-trial meetings of experts should be introduced in criminal cases?	84.2%	11.3%	4.5%
Do you agree that pre-trial meetings of experts would lead to a better, and earlier, assessment of the expert evidence?	92.3%	4.3%	3.4%

*Survey conducted on www.jspubs.com during October and November '05*

Our respondents tell us that some judges are pre-empting the new Criminal Procedure Rules Part 33 by ordering expert discussions and the preparation of joint statements. Our respondents have found this exercise an effective means of identifying the core issues in the technical evidence, provided all the experts understand their primary duty of independence and objectivity.

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The expert witness dimension – Pre-trial meetings of experts

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### ***Possible problems with meetings of experts***

More than one expert reported that unless the current 'gladiatorial' culture in the criminal justice system can be changed, there is little chance of meetings of experts working in practice.

*"The criminal system is so much more gladiatorial I am not sure that opposing parties will welcome experts talking to each other. In a recent case in which experts were asked to report on photocopies of photographs I was reporting for the first defendant. The second defendant's expert submitted a report which put the first defendant 'in the frame' as it were. However when he arrived at court and saw the original photographs he agreed with my opinion and was rapidly sent home by second defendant's counsel without giving evidence. The case then collapsed on the grounds that, quote, 'The expert evidence is contradictory and there is no other way of determining who was responsible for injuring this child'."*

There is also a concern that some experts regularly used by the prosecution seem not to understand that their primary duty as an expert witness is to be independent and objective. For example:

*"I have a reservation about the use of pre-trial meetings of experts. Put simply, it is that some experts regularly used by the prosecution do not seem to see their task as objective but, perhaps inspired by history (Spilsbury et alia) or perhaps inspired by television drama, as one of obtaining a conviction."*

Now it is clear that expert witnesses working for the prosecution will have a different mindset to that of a defence expert. The difference is summarised by one of our respondents in this way:

*"Typically a prosecution expert (horrible phrase) comes from an investigatory background and looks to see whether there is evidence that points to a crime and a perpetrator. A defence expert looks for anomalies, alternative explanations and the like."*

Importantly, however, this difference in mindset should not result in an expert forming a different opinion on a given set of evidence – but merely change the type of language used to convey that opinion.

Unless the rules of court impose a clear duty on each and every expert witness in a criminal case to independence and objectivity, introducing pre-trial meetings of experts in criminal cases will not result in cost savings. The proposed Criminal Procedure Rules Part 33, currently in draft, go

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The expert witness dimension – Pre-trial meetings of experts

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some way towards this, but will need to strengthened further the requirement of independence and objectivity of all expert witnesses.

### ***Take the expert out of the courtroom***

It would be possible to extend the idea of meetings of experts into a system in which expert evidence is either assessed, or even 'agreed', in a pre-trial hearing (although perhaps that is too radical for now). These ideas have developed out of our analysis of recent problems within the criminal courts, cases such as Cannings, Clark and Anthony, in which prosecutions depended almost entirely on disputed scientific evidence.

### **Science in the courtroom**

There is a fundamental incompatibility between what science can offer and what the English legal system seeks. And that is 'certainty'. The courts want it; science cannot provide it. For any hypothesis to be scientific it must be capable of being proved wrong – if only the falsifying evidence could be found. 'Falsification', as it is known, means science can never provide absolute certainty.

In criminal cases, the court has to be sure beyond reasonable doubt before returning a guilty verdict – say something in excess of 90% certainty. By contrast, in the civil arena the standard of proof is on the balance of probabilities – so 51% is fine. Clearly, it is only in the criminal arena that the underlying nature of science has the potential to cause problems.

The Court of Appeal decision in the Angela Cannings Appeal (*R -v- Cannings* [2004] *EWCA Crim* 1) concluded:

*"If the outcome of the trial depends exclusively, or almost exclusively, on a serious disagreement between distinguished and reputable experts, it will often be unwise, and therefore unsafe, to proceed."*

The central tenet of the Court of Appeal decision is that where a court is presented with evidence that is solely, or mostly, opinion evidence, and where there is a strong divergence of opinion amongst the experts, the court should not feel confident to arrive at a verdict of guilt.

Because there was no means by which the expert evidence could have been tested in a pre-trial setting, it was not until the end of the trial that the court could have been aware that the case against Angela Cannings fell into this category. If a pre-trial meeting of experts had resulted in a clear conclusion that there were virtually no areas of agreement on the expert evidence, perhaps

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## The expert witness dimension – Pre-trial meetings of experts

the trial judge would have been better able to determine that the case was not one that ought to be put to the jury.

Survey response ( <i>n</i> = 190)			
	Agree	Neutral	Disagree
Do you agree that the problems that have arisen in the criminal courts are the result of the way the courts handled conflicting scientific evidence?	80.8%	15.1%	4.2%

*LSC Survey conducted on www.jspubs.com between December '04 and February '05*

### Pre-trial assessment of expert evidence

So, what sort of pre-trial assessments might be tried? It is perhaps helpful to first consider the dangers inherent in expert evidence before looking at a way of dealing with them.

Legitimate areas of enquiry concerning expert evidence are:

- the suitability and qualification of an individual expert and the reliability of that expert's evidence
- the problem of frontier science or pseudo-science, and what happens when there are new developments
- risk evaluation in relation to expert evidence that is not guaranteed to be free from error.

In the United States Supreme Court, *Daubert -v- Merrell Dow Pharmaceuticals Inc* (1992) 509 US 579 laid down a four-part test to be applied to all expert evidence that was scientific in nature.

These four parts are:

- whether the theory or technique 'can be (and has been) tested'
- whether the 'theory or technique has been subjected to peer review and publication'
- in the case of a particular technique, what 'the known or potential rate of error' is or has been
- whether the evidence has gained widespread acceptance within the scientific community.

As a result of *Daubert*, expert evidence in the US is more likely to come under closer scrutiny, and at an earlier stage, than in UK proceedings. The parties are aware of the requirements from the outset, and it is common for the court to hear interlocutory applications in relation to the admissibility or relevance of such evidence.

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## The expert witness dimension – Pre-trial meetings of experts

*Daubert* is not without its own problems. However, US lawyers have made some attempt to address the difficulties surrounding the nature of scientific evidence and its relationship to the judicial process. If our courts were to formulate similar rules, they would, in our assessment, be doing much to tackle the problem of how courts handle expert evidence. The House of Commons Science and Technology Select Committee in their report *Forensic Science on Trial* have endorsed this approach.

Survey response (n = 190)			
	Agree	Neutral	Disagree
Do you think pre-trial testing of expert evidence would be likely to deal with this problem?	69.8%	16.7%	13.5%

LSC Survey conducted on [www.jspubs.com](http://www.jspubs.com) between December '04 and February '05

### Pre-trial agreement of expert evidence

Whilst perhaps too radical for the present, it would be possible to move towards a system in which complex technical evidence was heard in a pre-trial setting, with the lawyers present but no jury. At trial, the jury would be given the 'agreed' expert evidence. This approach would deal with the 'cult of personality' that can develop at trial, exemplified by Professor Sir Roy Meadow.

Professor Meadow was a world-acclaimed authority, and by all accounts his mere presence in court had a way of winning over juries. What was more, the Court of Appeal noted that he had a certain arrogance. What is arrogance if not a species of self-belief? What do lawyers and the courts crave? Certainty. Is it any wonder that Professor Meadow was called back time after time?

However, if the expert evidence in the *Cannings* or *Clark* cases had been heard in a pre-trial arena, not only would the effect on the jury of any expert's 'star quality' be nullified, but the chance of the actual evidence being properly scrutinised by the system would have increased. Something for which *Cannings*, *Clark* and *Meadow* would all have been grateful.

A modification on this scheme is proposed by Professor Geoffrey Beresford Hartwell of the University of Glamorgan Law School:

*"One radical possibility is that the Court itself should consider appointing an expert with an understanding of the subject to chair meetings, presque sub-hearings, from which a record of agreement and disagreement would be prepared for use in Court. It would be that rapporteur's findings (he or she would be a Special Assessor, perhaps – with powers to direct further enquiry where appropriate) that would be the*



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*evidence in Court, unless circumstances were exceptional. The additional cost of the Special Assessor would be offset by the saving in court time. An additional benefit would be that a jury would hear a distilled version of the expert evidence without the distracting effect of cross-examination.”*

### **Rebuttal reports**

We identified one source of escalating expert witness cost as being the use of rebuttal reports. We suggested that with the introduction of pre-trial meetings of experts, consideration should be given to prohibiting such reports because they tend to create a vicious circle leading to more and more reportage as each rebuttal report is itself rebutted. We think that once a meeting of experts has identified the real areas of disagreement, further testing of the expert evidence should be left to cross-examination. There is, however, ambivalence to this idea amongst our expert respondents.

<b>Survey response (n = 231)</b>			
	<b>Agree</b>	<b>Neutral</b>	<b>Disagree</b>
Do you agree that, in tandem with pre-trial meetings, rebuttal reports should no longer be allowed, such rebuttals being left to cross-examination?	50.8%	27.8%	21.4%

*Survey conducted on www.jspubs.com during October and November '05*

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The expert witness dimension – Conclusion

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## Conclusion

By involving expert witnesses in the earliest stages of case management, and where possible using initial 'reconnaissance' reports, experts will be able to help case assessments to be more efficient and effective. Staged instruction of expert witnesses will allow scarce resources to be used to best effect by identifying those aspects of the expert evidence that truly justify additional resourcing. In the criminal arena, a move to pre-trial meetings of experts, for the purpose of identifying the areas of agreement and disagreement in the opinion evidence, should shorten trials and provide a better assessment of the expert evidence. Trials will be shorter because only the real areas of disagreement need to be covered in oral evidence in the courtroom. Opinion evidence should be better assessed because there will be more time for its impact to be understood by the court, the lawyers and the experts.

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The expert witness dimension – Annex 1: Polling results

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## **Annex 1: Polling results**

### ***Work profile of the contributors***

We asked each contributor to tell us:

- What percentage of his or her workload is expert witness work
- How the expert witness workload is split between criminal, civil and family cases
- How much of each category is publicly funded

These data have allowed us to prepare the following work profile analysis:

- 61% of our expert contributors undertake some publicly-funded criminal cases, with 18% spending more than 20% of their time on such work.
- 58% of our expert contributors undertake some publicly-funded civil cases, with 13% spending more than 20% of their time on such work.
- 13% of our expert contributors undertake some publicly-funded family cases, with just 3% spending more than 20% of their time on such work.

### ***Results***

The results of the survey are presented in table form within the body of the response.



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The expert witness dimension – Annex 1: Polling results

		Ramzi Freij	N	Simon Clarke	N		
Prof Alastair J M Watson	N	Richard Emery	N			J W F Harriman	N
		Richard ReNuf	N				
		Richard Slee	N				
				Stephen Walsh	N	Neil Mackay	N
Prof Christopher A Brookes	N	Robert A Scott	N	Steve Redhead	N	Mrs Daphne R Wassermann	N
		Robert W Foster	N	Stewart Kidd	N	Mr Philip Reed	N
Prof Jan P Stuart	N			T G E Gillanders	N		
		Royston Jones	N	Terry Beale	N		
		Silvain Edouard Josse	N				
		Simon Carter	N	Tim Vogel	N		

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## The expert witness dimension – Annex 2: Correspondence

**Annex 2: Correspondence**

This annex presents all the correspondence received on the consultation from expert witnesses listed in the *UK Register of Expert Witnesses*.

***Correspondence received by e-mail***

<b>Private</b>	No
<b>From:</b>	Donald Campbell <bellerophon@msn.com>
<b>Date:</b>	Mon, 31 Oct 2005 14:05:56
<b>Message</b>	<p>In the section stating that costs can only be reduced by Solicitors restricting the area of work done by experts, if the expert feels something is of relevance and within his/her area of expertise, surely that expert would be failing in their duty to the Court if they failed to raise that point or points when instructed not to by the instructing Solicitor?</p> <p>Also, the disgraceful delay in payment has to be of relevance - I think that all experts should adopt the approach I have been adopting in the last six months of simply refusing to release work until the cheque clears - in my experience this has not given rise to any problems with the honest firms and the slight reduction in referrals (about 10%) hasn't actually affected income as the bad payers don't give you income anyway!</p>

<b>Private</b>	No
<b>From:</b>	Humphrey Creed <Humphrey.Creed@horwath.co.uk>
<b>Date:</b>	Mon, 31 Oct 2005 14:45:00
<b>Message</b>	<p>In my field of work i.e. accountancy, there is considerable scope for the expert to delegate work to less experienced "experts" thereby saving costs. By using a suitable mixture of staff at various rates of pay it is possible to obtain a composite rate which is acceptable to the Legal Services Commission. Whilst this may not be possible in all fields of expertise the Court has to recognise that the expert cannot be expected to carry out all the mundane procedures himself. Rather than propose that less experienced experts should be instructed in low value cases (however that may be determined) the Commission ought to allow for experts to pay assistants at a sensible rate thereby reducing the overall costs of the case. In a complicated fraud case expecting an expert to look at each document in case they are relevant is an expensive exercise. If cheaper members of staff are used then costs can be contained.</p> <p>With kind regards</p> <p>Head of Forensic Accounting Horwath Clark Whitehill LLP St Bride's House 10 Salisbury Square London EC4Y 8EH</p> <p>Telephone 020 7842 7267 <a href="http://www.horwathcw.com/services/special/forensica.htm">http://www.horwathcw.com/services/special/forensica.htm</a></p>

<b>Private</b>	No
<b>From:</b>	Jack Franses <jfranses@talish.demon.co.uk >
<b>Date:</b>	Mon, 31 Oct 2005 14:42:51
<b>Message</b>	Sir, I requested that my fee's should be the same as I charge every day not a max of £150 for

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	<p>a day in court and maybe two days. My normal fee's are £100 per hour. I resigned from participation in the Antiques Road Show beeb 1 because their fees were £45 plus all expenses to the road show. the Last one was in Bradford If you are on tele because you find a client who does not know the worth of the item sho you appewar twice - you are paid another £45. It took two days work for £90. instead of £2,000.</p> <p>Jack Franses.</p>
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<b>Private</b>	No
<b>From:</b>	Paul Roger <paul.roger@btinternet.com>
<b>Date:</b>	Mon, 31 Oct 2005 15:38:16
<b>Message</b>	<p>Most of my expert witness work is in the criminal arena.</p> <p>Meetings of experts earlier than the day of the hearing is unusual partly because in my speciality professional witnesses of fact are allowed by the court to give expert evidence as well.</p> <p>This should stop and the case should be decided on the areas of disagreement of the experts following their meeting early in the procedures</p> <p>It would cut time involved for all as well as freeing court time and targetting court time towards the salient arguments to be decided</p> <p>Fees should realistically reflect the time energy and knowledge of the expert and the commitment that the expert provides to the cause of justice</p> <p>It should be realised that very few experts get paid for their time involved in these cases from any source other than LSC and few experts are salaried so the supply of a day's advice should be adequately compensated. If this reduces time taken over each case which it should if experts are properly used then the return will be in the increased throughput of our justice system</p> <p>The LSC have on occasion suggested that I can supply a report on a straightforward (to them) case and allowed 4 hours of time to do this. All experts will surely realise that it is almost impossible to read and annotate even the shortest bundle in this time span. So perhaps a more realistic approach may ensue?</p> <p>It would be encouraging as otherwise I fear the bad old days of the professional expert may return and that must surely be contrary to the wishes of us all</p>

<b>Private</b>	Yes
<b>From:</b>	
<b>Date:</b>	
<b>Message</b>	

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<b>Private</b>	No
<b>From:</b>	Ian Jayne
<b>Date:</b>	Mon, 31 Oct 2005 16:07:38
<b>Message</b>	<p>One issue to resolve ... My contract (and other experts) initially goes to the solicitor instructing. The penalties are clear. (Late hearing cancellations etc)</p> <p>When a matter reaches court in publicly funded cases all costs thereafter go the courts who do not seem to have any knowledge of penalties and conditions such as costs quoted for mileage, hourly rates etc and then we get into a taxing game which is a dead horse and donkey bargaining situation with no conditions on our side. Frankly I am quite fed up with the whole situation, I am sure others are too.</p> <p>Justice has a cost, if HM Gov wants fair justice it has to be fair to experts. I am seriously considering 'pulling the plug' as I am sick and tired of bargaining (which in itself costs time and money not really recoverable but I am seriously thinking of charging for it)</p> <p>It may be if we all had to send in estimates to the LSC first then we would all know where we stood but then again perhaps if they cut fees I fro one would tell them to go and take a running jump. I am not a Philanthropic Society working for the benefit of others (and next to nothing)</p> <p>ALSO</p> <p>Recently I was cut down by LSC about 30% on an estimate for a report in a Section 1 RTA case, (£2500 to £1800) then when it went to court the evidence lacked depth as I did not/was not able to put the time in I should or could have. The Judge directed I and the (police) expert got together and it worked. We made progress but it cost more that I had quoted initially! AND the trial was delayed (I'm still waiting to get paid from the instructing solicitors for the initially report but the Courts have paid up for my time incurred directed by His Honour -I wonder why?)</p> <p>You get what you pay for! (But if you don't pay it costs more eventually. Where's the sense in that I ask?)</p> <p>Ian Jayne</p>

<b>Private</b>	No
<b>From:</b>	Geoffrey Lloyd <longacre73@waitrose.com>
<b>Date:</b>	Mon, 31 Oct 2005 16:50:55
<b>Message</b>	Dear Chris



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	<p>There is no point in my completing the survey but thank you for contacting me. I just do not do any cases which are publicly funded and have not done so for some time. This partly because few cases have come my way in recent years and partly because legal aid cases are a pain with inevitable arguments over fees and long delays in payment. So, I am no longer in the market. And if such a case came to me I can deflect it elsewhere as others in our team are still willing to do legal aid cases.</p> <p>Fortunately, much of my work is commercial stuff where legal aid is less likely to arise. And roughly half my work comes from defendant insurers. From a brutal self interest viewpoint this suits me fine! The cases tend to large - usually well into 6 figures - and my money is secure (even though insurers are appallingly late payers.</p> <p>Best regards</p> <p>Geoffrey</p> <p>Geoffrey H. Lloyd FCII MAE MEWI Chartered Insurance Practitioner Principal, Associated Insurance Experts 73 High Street Little Wilbraham Cambridge CB1 5JY</p> <p>Tel: (voice &amp; fax) 01223 812138</p> <p>www.insurance-experts.net</p>
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<b>Private</b>	No
<b>From:</b>	Richard Emery <Richard@4keys.co.uk>
<b>Date:</b>	Mon, 31 Oct 2005 17:06:32
<b>Message</b>	<p>Dear Chris</p> <p>Just to confirm some of the points covered in our conversation:</p> <p>Q5. There will be occasions when the Expert needs to advise their instructing Counsel that either</p> <p>there are matters within the instructions that are unlikely to yield anything relevant or that need greater attention because of their importance, or,</p> <p>there are matters outside of the scope of the instructions that are likely to be very relevant to the outcome of the case.</p> <p>It appears to me that this is about having an open channel between the Expert and Counsel, something that is often difficult to obtain.</p> <p>Q10, 11 &amp; 12 Pre-trial meetings of experts are important but we must not lose sight of the need for a pre-trial review of the expert evidence. I had a case dropped by the CPS on the afternoon before the trial was due to commence and my only conclusion was that nobody within the CPS had actually read and considered my report until that time, because my report had stated very, very clearly that the CPS case was fundamentally flawed.</p> <p>Q11 I think that the question of rebuttal reports in criminal cases needs to be limited in the following way:</p> <p>Expert for one side (typically the Defence) produces a report</p> <p>Expert for other side produces a response</p> <p>First expert replies to that response</p> <p>Without prejudice meeting of experts, resulting in joint statement of points agreed and areas of difference</p> <p>Additional reports would then only be allowed with specific agreement of the court if new</p>

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	<p>evidence needed to be investigated.</p> <p>I hope that this helps</p> <p>Best regards</p> <p>Richard Emery 30 Farley Copse Bracknell RG42 1PF</p> <p>Home: (+44/0) 1344 486 195 Work: (+44/0) 1344 484 235</p>
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<b>Private</b>	
<b>From:</b>	
<b>Date:</b>	
<b>Message</b>	

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<b>Private</b>	No
<b>From:</b>	John Belstead <John_Belstead@compuserve.com>
<b>Date:</b>	Mon, 31 Oct 2005 13:27:20
<b>Message</b>	<p>Thank you for the opportunity to respond to this. Two principal problems. Firstly the criminal system is so much more gladiatorial I am not sure that opposing parties will welcome experts talking to each other. In a recent case in which experts were asked to report on photocopies of photographs I was reporting for the first defendant. The second defendant's expert submitted a report which put the first defendant 'in the frame' as it were. However when he arrived at court and saw the original photographs he agreed with my opinion and was rapidly sent home by second defendant's counsel without giving evidence. The case then collapsed on the grounds that, quote, "The expert's evidence is contradictory and there is no other way of determining who was responsible for injuring this child". Secondly a current issue is the split of responsibility for fees. Currently the instructing solicitors ask for our fee levels and get permission to instruct us (from the LSC?) and pay promptly for the reports. However in Court, despite the previously agree fee levels, the fee claim goes to the costings clerk who, in my experience, routinely challenges the amount of fee claimed.</p> <p>John Belstead</p>

<b>Private</b>	
<b>From:</b>	
<b>Date:</b>	
<b>Message</b>	

<b>Private</b>	No
<b>From:</b>	Nigel Young <nigel.young@computer-expert.co.uk>
<b>Date:</b>	Mon, 31 Oct 2005 22:21:58
<b>Message</b>	<p>I have completed the survey and have agreed and disagreed with approximately the same numbers of suggestions and points.</p> <p>In my experience there is often regular direct contact between expert and counsel in criminal cases, the solicitor being only too pleased to get out of the way. (Less welcome is a tendency for the Defendants to try to contact the expert.)</p> <p>In principle an expert cannot assess what are the key issues but in practice an experienced expert knows when to wait for the legal specialists to give their view and when to "assist". If such assistance relates to a technical issue it is reasonable for an expert to consider it. It is up to counsel whether to use a particular technical argument. Putting the matter more crudely, an expert cannot wait for solicitors and counsel to formulate detailed questions in a criminal case.</p> <p>I am likewise not entirely convinced of the benefits of staged instructions and disallowance of rebuttal reports. In some areas, including my area of forensic computing, it would be difficult to distinguish the preparation of rebuttal reports and the further investigation necessary to ensure proper consideration of all relevant issues by the Court.</p> <p>I am opposed to block contracts for experts because it would put experts with a limited specialism under improper pressure to take cases that fell outside their area. This would particularly affect individual experts.</p> <p>I am strongly opposed to the idea of forming panels of experts within the LSC and CPS. I cannot see how such experts can long maintain the independence of view that is essential to</p>

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	<p>maintain their usefulness. They will suffer “capture” by their employers even if, implausibly, they start off independent. It is too often forgotten that experts working in prosecution and defence environments are looking for different things.</p> <p>Typically a prosecution expert (horrible phrase) comes from an investigatory background and looks to see whether there is evidence that points to a crime and a perpetrator. A defence expert looks for anomalies, alternative explanations and the like. It is hard enough to think across this barrier in a single case. To do it when one is employed by (say) the CPS is unreasonable.</p> <p>On the other hand I am very strongly in favour of meetings of experts. In my discipline these are so common as to be unremarked, though they have to be unofficial. We tend to agree a very high proportion of technical issues. This reduces the need for oral evidence in Court but it does not help with reducing the charges because it tends to be too late and the prosecution expert has no control over what charges the CPS brings. (Adding a panel of experts within the CPS would not help because the meeting of experts has to be between the prosecution and defence experts who have studied the technical details of the case in detail. The CPS group would only have done this if they were involved in the investigation.)</p> <p>Nigel Young FAE</p>
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<b>Private</b>	No
<b>From:</b>	Professor Geoffrey M. Beresford Hartwell <geoffrey@beresfordhartwell.com>
<b>Date:</b>	Tue, 1 Nov 2005 16:22:01
<b>Message</b>	<p>I have a reservation about the use of pre-trial meetings of experts. Put simply, it is that some experts regularly used by the prosecution do not seem to see their task as objective but, perhaps inspired by history (Spilsbury et alia) or perhaps inspired by television drama, as one of obtaining a conviction.</p> <p>In my experience, this handicaps discussion between experts, especially as a defence expert may not know of evidence which the prosecution have decided neither to use nor to disclose.</p> <p>I do not profess to know the answer to the problem. One radical possibility is that the Court itself should consider appointing an expert with an understanding of the subject to chair meetings, presque sub-hearings, from which a record of agreement and disagreement would be prepared for use in Court. It would be that rapporteur's findings (he or she would be a Special Assessor, perhaps - with powers to direct further enquiry where appropriate) that would be the evidence in Court, unless circumstances were exceptional. The additional cost of the Special Assessor would be offset by the saving in Court time. An additional benefit would be that a jury would hear a distilled version of the expert evidence without the distracting effect of cross-examination. The cross-examination would have taken place already.</p> <p>A possible disadvantage is that one might lose the benefit of defence and prosecution experts hearing the evidence of ordinary witnesses of fact and opining on it. If that were important, then there could be means for a second referral to the SA. On balance, I think that would be rare, but it is an area to develop.</p> <p>I would be happy to discuss this. Brunel University is actively interested in promoting research into the formation and nature of expertise, a Professor of Psychology has teamed up with colleagues from the Law School and from Sociology to lead a project over the next few years.</p> <p>Professor Geoffrey M. Beresford Hartwell</p> <p>BHA Cromwell House University of Glamorgan Law School Brunel University Law School</p> <p>78 Manor Road Wallington Surrey</p>

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<b>Private</b>	No
<b>From:</b>	Professor Chris Brookes <chris.brookes@virgin.net>
<b>Date:</b>	Tue, 1 Nov 2005 17:56:18
<b>Message</b>	I would simply like to add that, in my experience of forensic engineering, the concept of joint investigation enshrined in Lord Woolf's CPR report does not appear to have resulted in faster resolution of the technical issues and even deadlines set by the Court are treated in a cavalier manner. (For example, solicitors generally do not agree on the appointment of a Single Joint Expert and attempts to do so exacerbate the delay in examination of artefacts - often resulting in degradation and corrosion of surfaces which, otherwise, would exhibit characteristics of considerable importance in diagnosis. In most of my cases, I actually start my investigation some 2 - 3 years after the incident.) Consequently, it is my view that if the essentials of Woolf's CPR are embodied in new procedures for criminal cases, then there needs to be a more rigorous method of enforcement.

<b>Private</b>	No
<b>From:</b>	Eddie Josse <EddieJosse@aol.com>
<b>Date:</b>	Tue, 1 Nov 2005 15:08:23
<b>Message</b>	I have sent in a reply with the ticks etc. At the end of the day if the system does not pay a reasonable rate, the experts will say 'stuff you' and then there will be complaints in parliament etc that justice cannot be served. I have turned down cases where the rate has been quite ridiculous. I have to say that in the majority of cases, I have got what I requested - modest as it is - even in the cases where the original offer was poor.  Eddie

<b>Private</b>	No
<b>From:</b>	Dr Malcolm Bourne <Malcolm.Bourne@PrestonPCT.nhs.uk>
<b>Date:</b>	Wed, 2 Nov 2005 10:41:39
<b>Message</b>	I am a Child Psychiatrist and with my Child Therapist colleague, we mostly work (in terms of our non-NHS, expert witness work) in the area of complex child care cases, and also undertake some psychiatric assessments in criminal proceedings. We quote a rate of £175.00 per hour between us - it's just gone up after 2 years at £170.00 per hour!  Pretty much by definition, the child care cases we are asked to give opinions in, are the most complex ones reaching the courts; i.e. they have to be if the court cannot already make its decisions based on reports from the Local Authority, Guardians and Parents (and their legal representatives). Doing thorough assessments in these cases is inevitably a time-consuming and highly skilled and difficult process. In a case where, for instance, there are two parents and a Local Authority, and a child or children represented through their guardian, we would generally aim to interview/observe the child with each or both parents; the child and parents separately, if the child is old enough; and the Social Worker(s) and Guardian. The latter can be done by telephone if needed. We then usually have a bundle of documents with sometimes hundreds of pages and then end up writing a report from 15-30 pages long. And believe me, there's no unnecessary padding in there and the bits that always go in, e.g. lists of qualifications, declarations, etc., are already on a template which saves time and therefore money.  Our costs therefore run from about £3000 to £5000 or sometimes more in one of those cases - they tend to be less, around £1500-2500 in doing a psychiatric assessment of an individual in a criminal case. And whereas we appreciate this is not in itself a small sum (I have to admit I don't really know how much experts in completely different fields - engineering or fraud etc - end up charging), we are talking about giving an opinion about where a child should live and what therapeutic input they might need; in other words, the life of a child. Mistakes at that level will end up costing services many times those amounts in the future; not to mention of course

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	<p>the emotional cost to the child and parents. And £175.00 an hour split two ways and after tax (income tax i mean, not court taxation which our contracts sidestep) is not a massive hourly income.</p> <p>We acknowledge that the public purse should not be spent unnecessarily; court processes themselves can be very wasteful of money. (Last week I and another expert attended court in a criminal case; after about 2 hours of counsel and magisterial deliberation we both were released without giving evidence and I suspect that those agreements could have been reached without asking for us to attend and then paying for that; but maybe not.) Meetings of experts are undoubtedly very useful and can save a lot of court time. But subjectively at least it appears that the LSC are somewhat arbitrarily seeking to reduce rates and fees, sometimes drastically, whatever the case and whatever the inherent and resulting value of the work of the expert witnesses. "Expert Witness" can be a phrase bandied about too easily but in my experience there is real and rare expertise involved here.</p> <p>Dr Malcolm Bourne Consultant Child &amp; Adolescent Psychiatrist The CATT Partnership</p>
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<b>Private</b>	
<b>From:</b>	
<b>Date:</b>	
<b>Message</b>	

<b>Private</b>	No
<b>From:</b>	David Harris <david.alphacomp@btconnect.com>
<b>Date:</b>	Thu, 3 Nov 2005 10:14:49
<b>Message</b>	<p>Dear Chris,</p> <p>I have already responded using the on-line questionnaire but feel that a few words may assist.</p> <p>I have been undertaking accident investigation for more than 25 years. Initially for the Dorset Police as an independent consultant and then as a free lance agent. My previous background was twenty years as a research physicist with the atomic Energy Authority.</p> <p>During my time I have seen police forces gain in ability to analyse RTA's as they developed specialist teams. Then a few years ago they changed the system so that policemen were moved around between branches. In principle a good idea, in practice a disaster. The result has been that there are now fewer PC's with real expertise in most forces. Many of the cases that I am currently involved in suffer from poor data gathering, even worse analysis and an unwillingness to make the data freely available for civil cases.</p> <p>As a result it is imperative that experts are asked to consider a case as early as possible.</p> <p>Recently I have been involved in three cases where lack of experience has led to a report being submitted to CPS and charges brought when a more careful analysis would have shown that the officer had ignored several key pieces of data. The approach at present seems to be to collect and use data that supports the charge rather than preparing an unbiased report that can be presented to the Courts. It seems that that is where the major funds are being wasted, rather than in the legal aid process. By tidying up the initial investigation significant costs could be avoided.</p>

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	<p>One idea that I think would work would be for the clients solicitor to appoint an expert immediately it is thought that charges may be forthcoming. If that expert then worked with the police from the earliest opportunity many of the problems would be resolved before charges were brought. In the event that the problems could not all be resolved prior to a court appearance it would probably involve minimum court time resolving the outstanding issues.</p> <p>A little spent early on may well save much at a later date. Especially as most of the early work would be done verbally with notes rather than carefully worded reports.</p> <p>At the end of the day the problem all hinges on breadth of experience of those involved in the investigations and a willingness to be unbiased when analysing a situation.</p> <p>With the advent of more electronics in vehicles the problem of sorting out vehicle induced incidents from driver induced incidents will become much more difficult. Somehow I doubt that the Police are up to the challenge, they tend to believe the Motor industry's view that vehicle control systems do not fail. My experience is very different. The problem is that so much evidence is destroyed by well intentioned but poorly trained investigators or others arriving at the scene. For example if the battery is disconnected all the history in an ECU is lost.</p> <p>I hope these muddled reflections are of use.</p> <p>Regards David</p>
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<b>Private</b>	No
<b>From:</b>	George Walker <george@bramleyhouse.fsworld.co.uk>
<b>Date:</b>	Thu, 3 Nov 2005 14:20:48
<b>Message</b>	<p>I have sent an email response to your questionnaire but feel you are not correctly informed about some aspects.</p> <p>Barristers have always been able to contact expert witnesses directly.</p> <p>Judges increasingly ask if experts can produce an agreed statement in criminal matters and highlight any areas of disagreement.</p> <p>Rebuttal statements also highlight areas of disagreement and are therefore of assistance to both sides.</p>

<b>Private</b>	No
<b>From:</b>	Peter Matthews <peter@petermatthews.fsnet.co.uk>
<b>Date:</b>	Thu, 3 Nov 2005 15:53:10
<b>Message</b>	<p>Thank you for the copy of the Questionnaire you have put together in order to respond to Lord Carter's Review.</p> <p>My case, I think, is perhaps a little unusual in that only a small proportion of my business as a Drainage &amp; Wastewater Treatment Consultant is Expert Witness work. All is of a civil nature and so far I have never come across anything or a situation that was legally aided.</p> <p>My view of the situation is that as the Expert Witness' duty is to the Court, it would be for the Experts on both sides to meet at an early stage and come up with a joint solution to the problem. This, as I would see it, would reduce considerably the amount of Court time and other legal expenses.</p> <p>I trust this is of assistance.</p> <p>Regards, Peter Matthews.</p>

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<b>Private</b>	No
<b>From:</b>	James Mackie <James@mackie.biz>
<b>Date:</b>	Thu, 3 Nov 2005 20:04:43
<b>Message</b>	<p>Much time would be saved if Claimant's experts could be used to help draft Particulars of Claim.</p> <p>If Parties of Claim were more realistic and shorter and drawn up with expert help - the experts could be instructed to only consider these.</p> <p>If both experts wrote reports which only addressed the key specific questions posed it may be unnecessary to hold meetings between experts because areas of agreement and disagreement would be clear.</p> <p>James Mackie 01451 832442</p>

<b>Private</b>	
<b>From:</b>	
<b>Date:</b>	
<b>Message</b>	



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<b>Private</b>	
<b>From:</b>	
<b>Date:</b>	
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<b>Private</b>	No
<b>From:</b>	Eur Ing Dr Gordon Hayward <consumer.safety@btinternet.com>
<b>Date:</b>	Fri, 4 Nov 2005 16:10:51
<b>Message</b>	<p>Dear Dr Pamplin</p> <p>I don't disagree with your proposed submission, but I think it is important to test proposals against the several different types of criminal case in which experts get involved and be aware of all the differences to the way their evidence is handled in civil cases.</p> <p>So first, criminal cases may be put before magistrates (lay or stipendary), crown court juries or higher courts (some without juries). The prosecuting authority may not be the police but HSE or a local authority or other state body.</p> <p>The charge may be one brought under general criminal acts (eg murder, theft, incitement, perjury) or highly specific and technical legislation. The defence may be that the events did not involve the accused as alleged or that the events took place but were not illegal, or of course a mixture.</p> <p>Civil court judges must often have to struggle to understand the reasoning expert's give for their reasoned judgements - yet they have the benefit of being able to read experts reports at their own speed and to compare one experts report with another. Juries do not get to read experts reports at all. If the line of reasoning of the expert is given to them at all it is what the barrister for that side manages to get the expert to express orally in the witness box or isolated diagrams or tables shown to the jury as exhibits. The jury will only learn about some paragraphs of the report through the cross-examination.</p> <p>An expert report written to be read is very different to the script to be spoken, mainly because each reader goes at their own pace: they can re-read a long sentence and can be given forward and back references to help them understand a point made (or repeated) very briefly.</p> <p>Whether an expert's report is produced as an exhibit or copied out almost word for word as a statement seems to depend on the court.</p> <p>Whenever they have to consider expert evidence, judges and juries essentially have to be taken on a rapid learning course in a technical subject or field of human activity. I am of course biased, but my experience and expectation is that this is much more difficult in mathematically based subjects (or mathematical aspects of subjects) compared to subjects based on observation and classification. It may sometimes be necessary to take a lay person who never really understood mathematical concepts in school physics through a chain of conceptual thinking that you and your colleagues have had years to get used to at each stage of A-level,</p>

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## The expert witness dimension – Annex 2: Correspondence

	<p>undergraduate, post-graduate and post-doctoral research.</p> <p>For example, a barrister recently advised me that I could not expect a judge in a civil case to understand the difference between force and stress or stress and strain. In fact what I needed to go on to explain was the difference (in an international standard) between the requirements for aluminium alloys in tensile strength, lateral buckling compressive stress and local buckling compressive stress, and why the latter could not be expressed as a single figure but only as several empirically- derived curved lines on a graph, one axis of which was a dimensionless ratio depending on the thickness and pattern of loading. Even worse, I am sure that at some time I am going to have to try to explain why in some situations the critical measure of loading a structure is not maximum stress but maximum stress intensity factor, a parameter measures in the un-visualisable units of <math>MN m^{-3/2}</math>.</p> <p>To return to cost of using experts in criminal cases. I think that it may be helpful to think of expert evidence as somewhat akin to legal arguments that –if possible are presented to the judge at preliminary hearings and he decides what a jury will hear as fact and when in relation to other evidence. Obviously he/she may benefit from ordering meetings and joint statements of experts in some cases on some issues, and in some cases there will remain defined issues on which the judge allows expert opinions to be subjected to cross-examination in front of a jury – especially where they need to weight it against other witness testimony. However, in many cases it would adequate for the opposing side to have put written questions on the expert's report and received written responses.</p> <p>Perhaps also, there is a case for distinguishing between expert evidence on forensic issues (ie directed to establishing the truth about what happened) and expert evidence on judgmental issues (ie directed to establishing what is legally acceptable or reasonably expected). I cannot see that the latter needs to be presented to a jury and – in the main – would be better argued in written reports (which may in any case need to be reviewed by an appeal court later). Arguably judgmental expert issues are not ones which have to be decided beyond reasonable doubt, but on the balance in the judge's mind.</p> <p>I further suggest that wherever I have referred to juries, the same could be said of magistrates, who may be faced with deciding guilt on highly technical interpretations of regulations, where the facts of the case are not disputed. Would magistrates clerks be permitted to order expert meetings or hold hearings themselves to decide how to advice the bench on legal interpretation of regulations? Would they be any good at it?</p> <p>If tight management of criminal cases is not to be introduced, then it is difficult to see how expenditure can be related to need.</p> <p>One other radical proposal would however help to simplify the bureaucracy. And compensate experts for a low rate of fee by removing some of the hassle and delay.</p> <p>One could be to set a standard national rate for payment (and terms of engagement) of experts for all preparation work court attendance and all travel and have it paid directly from central funds irrespective of whether it is commissioned by the police, local authorities or defence solicitors working on legal aid. Where a defence is not funded out of legal aid then the costs recoverable in the event of them winning a case would be limited to the paying their experts at that rate (with the number of hours subject to possible challenge as at present).</p> <p>Paying all experts at one rate will be unpalatable to medics who are currently at the top of the tree, but the effect could be softened by making all fees at the standard rate an un-taxable compensation payment to the individual (as court attendance fees are already). That way they would be worth more to someone earning above the higher rate income tax threshold. [This also has the advantage of getting more money out of another government budget.] Anyway, hospital consultants should not be spending so much time on criminal cases that this significantly dents their income while fingerprint experts who get most of their income this way should end up with a net gain.</p> <p>Mainly however, the effect would be to pay experts quickly and with certainty, in return for a fee less than the maximum they might be able to charge commercially in a civil case. Obviously, fees would have to be charged back to budget heading controlled by the court, the legal aid board the police, or whichever government authority authorised the expenditure, but there really is no reason why it should need to go through the defence solicitors bank accounts. The standard terms could also set a reasonable cancellation fee structure</p>
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	<p>There would of course also need to be standard rates for expenses and laboratories would need to charge commercial fees for use of equipment.</p> <p>Where there could be problems is with experts who continue to receive a salary from their employer while preparing and giving evidence. Their employing institution could not use a tax-free attendance allowance to hire staff cover and nor would it amount to an adequate charge-out fee.</p> <p>Please make use of any of this you agree with, but do keep aware of the wide range of ways experts are used in the criminal system.</p> <p>Best wishes</p> <p>Eur Ing Dr Gordon Hayward</p> <p>Consumer Safety Expert Network Phone/fax +44 (0) 20 8 343 1754</p>
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<b>Private</b>	
<b>From:</b>	
<b>Date:</b>	
<b>Message</b>	<p>[Editor's note: See article in BMA News by Jan Wise for the origin of the sausage metaphor!]</p>

<b>Private</b>	No
<b>From:</b>	John H Scurr <mhairi@medlegal.demon.co.uk>
<b>Date:</b>	Tue, 8 Nov 2005 10:35:44
<b>Message</b>	<p>Dear Dr Pamplin</p> <p>Re Expert fees</p> <p>Expert fees should reflect the amount of work done and at the same time reflect the value of the expert.</p> <p>As an expert in full-time surgical practice, providing reports and appearing in court has to compete with the fees generated in private practice.</p> <p>Simply cutting the fees will discourage the top experts from taking part in this process.</p> <p>Given the appalling way Professor Meadows was treated it is quite clear that experts should be charging at least twice their current fees.</p> <p>Professor Meadows was seriously let down by the legal profession. He was entitled to express his opinion and it was for the barristers to determine whether his opinion was correct.</p> <p>I personally have been involved in cases, very expensive cases, which could have been settled</p>

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	<p>at a much earlier stage if the barristers and solicitors had got their act together. In a recent case details of which I would be very happy to make available to you the NHS LA solicitor wasted an enormous sum of money in a case which they clearly had to settle.</p> <p>I would be very happy to provide Lord Carter with any information he requires.</p> <p>Kind regards.</p> <p>Yours sincerely</p> <p>John H Scurr Senior Lecturer Consultant Surgeon</p>
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<b>Private</b>	No
<b>From:</b>	Angela McPherson <asmcpherson@mindmatters.org.uk>
<b>Date:</b>	Tue, 8 Nov 2005 15:48:55
<b>Message</b>	<p>I note that the Register's proposed submission concentrates largely on criminal cases, an area in which I have chosen not to do medico-legal work in view of the low fee levels available. I support the proposal for the early involvement of experts in civil cases and in the field of personal injury/medical negligence and find that my own speciality of psychiatry suffers particularly from being consulted late in the proceedings. Often a request for a report comes after experts reporting on physical injuries have produced a joint statement and noted some unresolved psychiatric issues. A late request for a psychiatric report in these circumstances often leads to delay in completion of the litigation to the detriment of the claimant.</p> <p>I agree with the proposal that seeking an early reconnaissance report about the range of different expertise required in a particular case could help speed the process and reduce costs.</p> <p>My main area of work now is in the Family Courts, and there is no reference to this in the Register's proposed submission. I wonder if the LSC is less concerned about legal aid costs in child care proceedings, although cases are often complex and reports costly because of the high number of hours work demanded. The new Protocol is aimed at speed rather than excellence of assessment and this is often confounded by the inefficient use of Court time. I frequently give oral evidence in Family Courts and find that they are seldom able to define a specific time period when I will be required, and end up having to charge for a full days work.</p> <p>I am less certain about the use of 'reconnaissance' reports in family cases since I often find that carrying out an assessment of parents leads to conclusions different to those suggested by the court papers.</p> <p>In the less adversarial arena of the Family Courts the agreement to a single joint expert by all parties does save costs and the testing of the evidence by the Courts ensures that the expert is not becoming the decision maker. It has, however, been my experience that multiple cross-examination by all parties is often duplicative, and Court time could certainly be saved by counsel being less pedantic.</p> <p>With medical experts becoming less inclined to become involved in child care proceedings, it seems perverse of the LSC to be attempting to lower expert's fees, and this is only likely to lead to fewer experts doing this work and long delays in Family Courts.</p> <p>Dr Jeffrey S McPherson FRCPsych Consultant Psychiatrist</p>

<b>Private</b>	No
<b>From:</b>	Peter Uglow <peter.uglow@focusgroup.uk.com>
<b>Date:</b>	Tue, 8 Nov 2005 20:59:55
<b>Message</b>	Dear Sir,

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The expert witness dimension – Annex 2: Correspondence

	<p>I lead a team of Experts at Focus Group Ltd who deliver Telecommunications and Computer Forensic Services to CPS and Defence Solicitors.</p> <p>We perform a substantial amount of Prosecution work particularly in the field of Cell Site Analysis. In terms of providing expert evidence and advising CPS and Counsel at an early stage to prevent unsafe cases being taken forward, we vigorously suggest early meetings with Counsel, and the Police generally promote this idea and succeed in making the necessary arrangements. We often have direct contact with Counsel.</p> <p>For the defence however, the system is notably different. We rarely get direct contact with Counsel and often have to communicate through less than technically knowledgeable Solicitors. (It is difficult to explain the complexities of e-mail to a Solicitor who can't even use it!). If we could arrange meetings with Counsel at the earliest opportunity, rather than receiving third hand written instructions, the issues could be explained, discussed and instructed upon in one meeting with quotes being provided there and then.</p> <p>However, we have found considerable difficulty with getting fair payment for attending such meetings. We often find that instructions are given, reports are returned and we hear nothing until the day before the prosecution expert is going to give evidence, when we are asked to attend a meeting to discuss the issues. On the occasions we have attended, we are told that prior authority has been sorted (when it hasn't), it's too late to sort prior authority but if we end up having to go to Court we can add it to the bill, or the Solicitors will cover the cost. Needless to say, each time it has been a battle, many of which we have lost, to receive payment, which has resulted in us refusing to attend such meetings without proof of payment. This does nothing to assist the process of justice.</p> <p>Has anybody ever suggested that Experts could establish contracts with and deal direct with the LSC?</p> <p>I wholeheartedly agree with the early meeting proposal. Proper payment should be given to properly registered experts for travel and time to these meetings. I believe the results of this will be 'Rolls Royce' reports relevant to the case, not 'Rolls Royce' reports relevant to anything an expert can put in, having tried to read between the lines covering issues that might not have been instructed upon.</p> <p>Peter Uglow Director of Forensic Services Focus Group Ltd</p>
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<b>Private</b>	
<b>From:</b>	
<b>Date:</b>	
<b>Message</b>	

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## The expert witness dimension – Annex 2: Correspondence

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<b>Private</b>	No
<b>From:</b>	C H Naylor <dr@naylor.demon.co.uk>
<b>Date:</b>	Fri, 11 Nov 2005 07:59:11
<b>Message</b>	from C H Naylor FRCOG Consultant Obstetrician and Gynaecologist, Thanks. I am on holiday in New South Wales and back in London around 20th Nov. Please register my support and I shall contact later.

<b>Private</b>	No
<b>From:</b>	Bill Harriman <billharriman@btopenworld.com>
<b>Date:</b>	Thu, 10 Nov 2005 22:05:52
<b>Message</b>	<p>Dear Review Team</p> <p>I am always aware of the inequality of arms in criminal cases involving firearms between the Prosecution and the Defence.</p> <p>Much of my work is for the Defence and I am often faced with obstructiveness from the CPS and the police over access to firearms. I am no longer allowed to fire suspect weapons on Forensic Science Service premises and I suspect that this policy has been put in place to exclude independent experts in this field.</p> <p>It is very difficult to persuade the CPS &amp; the police to give me unfettered access to exhibits even though I am a nationally recognised practitioner of long standing (20 years) and holder of the requisite authority from the Home Office to possess firearms.</p> <p>In some areas that LAC caps my fees @ £100/hour. I charge £115 which mirrors the FOSS rate which is available to the Prosecution.</p> <p>There is also a disturbing trend of using untrained and often incompetent police personnel as firearms examiners for cost reasons. The FOSS is expensive and has a long lead time. A Firearms Linens Manager or Police Armourer has already been paid for. These people are automatically regarded as experts by the courts because they work for the police and have the word firearms in their job title. in my expedience, they are rarely impartial and are often partisan in the extreme.</p> <p>I hope this helps.</p> <p>Best Wishes</p> <p>Bill Harriman</p>



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The expert witness dimension – Annex 2: Correspondence

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<b>Private</b>	No
<b>From:</b>	John Jackson <JacHocking@aol.com >
<b>Date:</b>	Fri, 11 Nov 2005 10:50:14
<b>Message</b>	<p>You recently sought views on this. I find that many Solicitors' instructions are assembled from standard paragraphs on a word processor and that often, after receipt of the papers, I can define the issue on which an opinion is needed more precisely and request, after discussion with the solicitor, revised instructions that will result in a smaller, less costly report.</p> <p>If you want, I could send you (anonymised) an example of a letter of instruction, and e-mailed suggestion, and the solicitor's revised instructions.</p> <p>John Jackson, Managing Consultant, Jackson Hocking Limited Head Office: 41, High House Lane GB-B60 3AQ Bromsgrove Tel: +44 1527 873 777 (Voice)</p>

<b>Private</b>	
<b>From:</b>	
<b>Date:</b>	
<b>Message</b>	

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The expert witness dimension – Annex 2: Correspondence

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***Correspondence received by post***

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The expert witness dimension – Annex 2: Correspondence

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*Dr W J K Cumming*

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(Secretaries Jan Nicki & Gill)

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UK Register of Expert Witnesses  
JS Publications  
PO Box 505  
Newmarket  
CB8 7TF

WJKC/NC  
7th November 2005

Dear Dr Pamplin

Lord Carter's Review

I have completed the survey on line, but thought I would like to add a few other points.

My work is almost entirely civil and I have long since stopped accepting any criminal work entirely because of the fee structures that have been offered. However, in my civil work I am involved predominantly in dealing with people with severe head injuries or severe brain injuries secondary to birth trauma.

In the former, I predominantly work for a single firm who have a Catastrophic Head Injury Unit. They instruct me usually within three months of the accident and I frequently see their clients in hospital to assess their neurological condition and to make recommendations about the rehabilitation they require. I then see them at stages during that rehabilitation to ensure that what should be done has been done. Clearly, this is driven by the insurers who wish to reduce their costs if at all possible. It does mean, however, that there is very early involvement of the expert. As you would expect, I am not only dealing with a small group of solicitors, I deal with a very small group of Barristers, and frequently discuss cases with them after a preliminary report. I am sure that this is of benefit to all concerned.

My other point is that I do not come cheaply as an expert; I am working in a very narrow field, and I am working on cases where settlements up to £3-5 million are not uncommon. I believe, therefore, that fees should be proportionate to the complexity of the case and the value of the case. There is no future in saying that all doctors are the same, an orthopaedic surgeon turning out a report on a non-neurological whiplash should not be equated to someone like myself, where I am producing reports of immense complexity and great length.

Lord Wolfe's reforms underline proportionality, and I am sure that must be carried over into the LSC's view on payment.

I trust these views are helpful.

Yours Sincerely

WJK Cumming BSc MD FRCPI FRCP FAE MEWI CUEW  
**Consultant Neurologist**

## Submission to Lord Carter's Review of Legal Aid Procurement

## The expert witness dimension – Annex 3: The Surveys

**Annex 3: The Surveys**

## The Carter Review Survey

Date	31 October to 23 November 2005
Constituency	All experts in the UK Register of Expert Witnesses with e-mail addresses. A total of around 2,400 experts.
Format	Self-contained web survey with experts only notified by e-mail. This survey provided a moderate amount of background information and would take a little time to complete, which will tend to depress the number of respondents – but those who do respond will tend to have a clear view on most issues.
Location	<a href="http://www.jspubs.com/Surveys/Carter0510/Survey.cfm">http://www.jspubs.com/Surveys/Carter0510/Survey.cfm</a>
Responses	231

## The LSC Survey

Date	3 December 2004 to 21 February 2005
Constituency	All experts in the UK Register of Expert Witnesses (2841) and on the <i>e-wire</i> list (6736).
Format	Self-contained web survey with experts notified by e-mail and, for the experts listed in the <i>Register</i> , by mail. This survey provided a large amount of background information and would take some time to complete, all of which will tend to limit the number of respondents – but those who do respond will tend to have a clear view on most issues.
Location	<a href="http://www.jspubs.com/Surveys/LCD0411/Index.cfm">http://www.jspubs.com/Surveys/LCD0411/Index.cfm</a>
Responses	190