

Submission to Lord Carter's Review of Legal Aid Procurement

The expert witness dimension

Civil sphere supplement

**Submission to
Lord Carter's Review of Legal Aid Procurement
The expert witness dimension:
Supplement relating to the Civil Sphere**

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

Dr Chris Pamplin
Editor
UK Register of Expert Witnesses
11 Kings Court
Newmarket
CB8 7SG
Tel: 01638 561590
email: editor@jpubs.com

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Executive Summary

This is a supplementary submission by the *UK Register of Expert Witnesses* to Lord Carter's Review of Legal Aid Procurement that focuses on the civil justice system. It has been prepared in response to a specific request from the Deputy Secretary to the Review. It is based on work undertaken in 2005 and draws together contributions from 238 expert witnesses listed in the *Register*.

In its November 2004 consultation paper on the use of experts, the Legal Services Commission (LSC) put forward proposals on expert fees. However, based as they were on guesswork, these proposals failed to arrive at a convincing analysis of the current position. We provide evidence from our own bi-annual surveys of expert witnesses that fees have increased by less than 10% above the rate of inflation since 1997.

From such poor groundwork, the LSC arrived at proposals that carried with them a significant danger of reducing the pool, and overall quality, of experts willing to work in publicly-funded cases. This negative effect is likely to be most acute for the Community Legal Service. Indeed, we predict a serious impact on supply and competition within the expert witness marketplace for civil cases if the 'meagre' fee scales on offer in the criminal arena are imposed on expert witnesses in the civil arena. This prediction is supported by 92% of our expert contributors.

We identify a number of inflationary pressures flowing from the Access to Justice Act 1999, and offer suggestions – involving a staged approach to the instruction of experts – for how the effects of these pressures can be ameliorated.

The LSC proposed removing the system of prior authorities. Whilst appreciating the difficulties of assessing applications for prior authorities, we consider its removal would have a serious impact on the supply of expert witnesses, a view endorsed by 82% of our expert contributors. We suggest that a staged approach to the instruction of experts would offer a way for the LSC to make more informed decisions on applications for prior authority.

The LSC identified problems arising from experts working without having adopted written terms of engagement. We welcome, as do 89% of our expert contributors, any pressure that can be applied to ensure expert witnesses adopt clear, written terms of engagement.

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Introduction

We have been asked by Nick Hunt, Deputy Secretary to Lord Carter's Review Team, to submit our views specifically on the 'procurement of experts with legal aid money in the civil sphere, especially in areas such as clinical negligence, child care cases, education and mental health'. Unfortunately, the short timetable available, combined with the number of other consultations the *UK Register of Expert Witnesses* is already working on, means we have not been able to address this request with new research. However, a large part of our response to the Legal Services Commission (LSC) consultation paper – 'The Use of Experts' – is directly relevant. This supplementary submission is based on that earlier work. Overall, 238 expert witnesses contributed to this work.

About the UK Register of Expert Witnesses

J S Publications has published the *UK Register of Expert Witnesses* since 1988. The *Register* has developed over the years from a simple directory publishing project into a support organisation for expert witnesses. Most of our time is now spent on the professional support and education of expert witnesses.

Perhaps the most important feature of the *UK Register of Expert Witnesses* is the vetting we've undertaken since the product's inception way back in 1988. Indeed, our many conversations with lawyers have highlighted the importance they place on knowing that listed experts are vetted. In the past year we have introduced re-vetting. Now, all experts have the opportunity to submit to regular scrutiny by instructing lawyers in a number of key areas, such as report writing, oral evidence and performance under cross-examination. The results of the re-vetting process are published in the printed *Register*, in the software and on-line.

The printed *Register* is distributed free of charge to a controlled list of around 10,000 selected litigation lawyers. The on-line version of the *Register* is also available free to anyone with an Internet connection, and currently attracts around 25,000 searches per year.

Educational resources for experts and those who instruct them

We provide registered experts with a variety of free educational resources. These include our quarterly *Your Witness* magazine, a series of more than 50 factsheets, court reports on cases that have implications for expert witnesses, CPR Viewer software and our expert *e-wire* service. This information flow ensures that experts in the *Register* have the opportunity to be amongst the best-informed experts, with respect to expert witness-specific issues, in the country.

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We have also helped experts to deal with some of the problems that have arisen from the unfortunate inability of the expert witness associations to work together productively. The most notable being our work to produce a *Combined Code of Guidance for Experts* from the two competing codes. This was in place for four years before being replaced by the recently published Civil Justice Council Experts Protocol – a most welcome development.

However, we also recognise that the quality of expert evidence is in large part controlled by the quality of the instructions received. Sadly, we have observed a marked decrease in the quality of instructions to expert witnesses in recent times. To try to help combat this trend, we have published *Practical Guidance for Expert Witnesses in Civil Cases*. Subtitled “What lawyers think experts should know but seldom get round to telling them!”, this guide helps lawyers and experts to work together more productively.

Our daily contact with expert witnesses – drawn from across all disciplines, and including some who undertake an occasional instruction and others who work almost exclusively as expert witnesses – has given us a detailed understanding of this ‘litigation support industry’.

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The Legal Services Commission (LSC) Consultation Paper set out proposals to deal with the increasing cost of expert evidence. The LSC sets out in paragraph 9.2 of its paper the claim that expenditure on expert witnesses has increased significantly in recent years:

Information from our regional offices, from solicitors and from other sources (e.g. the Bond Solon survey published in February 2003 showing that the average annual income for expert witnesses rose from £35,000 in 1999 to £50,500 in 2002, with some earning as much as £260,000 a year, despite this work being an adjunct to a professional career) shows that rates and amounts paid to experts, unlike those paid to lawyers in Commission-funded cases, have increased significantly in recent years. Information from our regional offices often shows wide variations in experts' fees – particularly in civil cases.

LSC Consultation Paper paragraph 9.2

However, the LSC was hampered in its approach to expert fees because it does not gather data to enable it to know its annual spend on experts. Neither can it assess the differences there might be between the fees of experts working in the civil and criminal arenas, nor the various specialties.

The Commission does not collect data on specific types of disbursements. Experts' fees appear in solicitors' bills as disbursements and it is the solicitors' responsibility to pay the experts. However, we estimate that experts' fees account for about two thirds of our expenditure on disbursements.

LSC Consultation Paper paragraph 5.10

Whilst it is a common trick of the tabloid press to seek out extreme examples to prove a point, the LSC's case was not well served by adopting the same tactic. Detailed reports of our surveys are freely available on our website and could have been used in the preparation of the Consultation Paper.

Recommendation 1: *Ensure the LSC gathers data on its annual expenditure on experts at a level of detail sufficient to allow it to speak with authority of the trends in this aspect of legal aid expenditure.*

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UK Register of Expert Witnesses fees surveys

We will deal with a number of specific aspects of the LSC's proposals later, but first will offer some evidence on what has happened to expert witness fees over the past 8 years, based on our own surveys.

Since 1997, we have undertaken a detailed biannual survey of the views, experiences and working practices of experts listed in the *UK Register of Expert Witnesses*. The sample size of all our surveys is above 2,700, with between 500 and 700 experts responding on each occasion. So as to appreciate the make-up of this constituency, it is important to know something of the *UK Register of Expert Witnesses*.

The *Register* lists expert witnesses drawn from across the range of specialisms. Some are relatively junior; others are at the top of their profession. It lists some experts who undertake mostly criminal work, a larger group who undertake mostly civil work, and a smaller group who do both. In the current edition of the *UK Register of Expert Witnesses*, which lists almost 3,000 expert witnesses, there are:

- 1,971 experts who undertake some criminal work
- 2,749 experts who undertake SJE instructions
- 2,515 experts who undertake publicly funded cases.

We subdivide the responses to our surveys into broad groups of specialism, and the results over the four surveys conducted are presented in Table 1.

Professional category	1997			1999			2001			2003			2005		
	Number of respondents	Report writing (per hour)	In court (per day)	Number of respondents	Report writing (per hour)	In court (per day)	Number of respondents	Report writing (per hour)	In court (per day)	Number of respondents	Report writing (per hour)	In court (per day)	Number of respondents	Report writing (per hour)	In court (per day)
Medicine	166	£124	£870	249	£136	£890	200	£149	£927	230	£153	£1,041	264	£171	£984
Nursing, etc.	42	£76	£535	36	£68	£512	39	£100	£718	42	£91	£749	28	£104	£658
Engineering	116	£73	£560	94	£71	£567	63	£85	£663	79	£86	£694	84	£96	£631
Accountancy and Banking	34	£116	£821	49	£135	£987	24	£133	£895	26	£151	£1,105	34	£161	£1,059
Science and Agriculture	68	£89	£543	79	£79	£577	53	£78	£648	37	£82	£690	35	£89	£614
Surveying and Valuing	35	£77	£629	49	£83	£642	36	£104	£787	24	£121	£984	28	£122	£888
Architecture and Building	28	£75	£612	19	£77	£612	17	£84	£712	27	£92	£744	33	£97	£610
Others	58	£76	£525	96	£71	£521	50	£127	£622	78	£109	£802	68	£97	£657
Overall	547	£88	£637	671	£90	£664	482	£108	£747	543	£111	£851	574	£117	£763

Table 1: UK Register of Expert Witnesses survey results since 1997.

It is apparent that:

- the average hourly fee has increased by 33% from £88 in 1997 to £117 in 2005
- compounding an inflation rate of 2.5% across that 9 year period would account for a 25% increase, so the real-terms increase has been around 8%
- charging rates have a bimodal distribution, with medical consultants and accountants charging something like 50% more per hour than other experts.

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It is no coincidence that expert witness costs in civil cases have increased since April 1999. While one of the main aims of the Access to Justice Act was to decrease the costs of expert evidence, the changes have, in fact, had quite the opposite effect.

Survey response (n = 190)			
	Agree	Neutral	Disagree
Do you agree that the statistics drawn from our biannual surveys of expert witnesses, showing that fees have increased by ~8% above the rate of inflation since 1997, are a fair reflection of the actual increase in expert witness fees over that period?	58.7%	25.1%	16.2%

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

Inflationary factors affecting expert witness fees

How CPR has caused expert witness costs to increase

Whilst the CPR have been a source of major improvement in the conduct of civil litigation, one consequence has been the move towards every expert report being written as if it will be put before the court. Great care must be taken over the writing of such reports. This inevitably increases costs, and is one reason why the cost of expert reports has risen in recent years. However, the vast majority of cases never get to court – instead they settle. In such cases the expert's report is used as a negotiating tool between the parties.

Survey response (n = 190)			
	Agree	Neutral	Disagree
Do you agree that there are inflationary pressures flowing from the Access to Justice Act 1999?	57.1%	34.2%	8.7%

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

Is it necessary for reports used in this way to be as detailed as those that will go before the court? If not, then a reduction in costs could be achieved by ensuring experts are instructed to prepare an initial 'reconnaissance' report at an agreed cost, proportionate to the (likely) quantum of the case, that would allow the parties to seek a negotiated settlement. Only in the small number of cases that do not settle would the additional expense of a 'fully detailed' report, for use in court, need to be incurred.

Recommendation 2: *The adoption of staged instructions as set out in our initial submission to Lord Carter's Review Team would help to reverse the inflationary pressures flowing from the Access to Justice Act 1999.*

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We stress the point, however, that it must be for the lawyer (who has conduct of the case and an overview thereof) to instruct the expert to undertake a programme of work that can be completed within a cost regime proportionate to the quantum of the case. The choice of what can or cannot be left out of a report should not, and must not, fall to the expert, who is not competent to make such judgments.

Survey response (n = 190)			
	Agree	Neutral	Disagree
Do you agree that our suggested changes would be likely to ameliorate the inflationary pressures flowing from the Access to Justice Act 1999?	45.5%	401.5%	12.9%

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

How MROs have caused expert witness costs to increase

The Access to Justice Act widened the scope for conditional fee agreements (CFA). The resultant growth of claims farms and the widespread adoption of CFAs to handle PI cases have resulted in a rapid increase in the number of medical reporting organisations (MRO) in recent years. There is a large, and growing, groundswell of medical doctors who are against their use. Our own analysis is that the MRO market tends to increase costs by selling on reports for two or three times the fee charged by the doctor, and simultaneously reduces report quality by interposing an (often non-legal) intermediary between the instructing solicitor and the medical doctor/consultant.

The increase in the cost of expert evidence created by the MRO is significant but is not included in the statistics we are able to gather. This is because experts can only tell us what they charge the MRO, not what the MRO charges the lawyer.

We anticipate that it will not be possible to prevent the use of MROs – that power lies only in the hands of the medical experts. But the LSC has the power to prevent contracted solicitors from using an MRO, thus cutting expert costs. In addition, it must be possible for the activities of MROs to be regulated in two particular respects:

- the mark-up applied should be made clear to the client, lawyer, insurer and expert
- they should be prohibited from interfering with the direct line of communication between the solicitor and the expert.

Taken together, these changes would, we believe, ameliorate the worst aspects of MRO involvement in cases.

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CJC enshrines the lack of transparency

There is a perception that such high mark ups are accepted by the system because of the lack of transparency in the billing. This cannot be acceptable, and yet the action of the Civil Justice Council (CJC) has given positive support for this lack of transparency.

The CJC held a meeting in November 2004. A key purpose of this meeting was to discuss a proposal put forward by the Association of Medico-legal Reporting Organisations (AMRO) to 'streamline' medical reporting in some claims. Under the spotlight were personal injury claims arising out of road traffic accidents (RTAs) with a value of less than £10,000, and where liability is agreed.

Now these may seem pretty specific criteria, but they catch in their net a very large number of fast-track personal injury claims. The outcomes of these deliberations are reported on the CJC website, but in short they were:

1. There should be a rebuttable presumption that in non-litigated road traffic claims under £10,000 medical evidence should be obtained from a GP.
2. Predictable fees for the cost of obtaining such medical evidence should be the subject of an industry agreement facilitated by the CJC.
3. These provisions should, after review, be extended to all fast-track cases.
4. There should be no enquiry by the paying party into the breakdown of the cost of obtaining a medical report where the clinician does not provide the report directly.

Furthermore, in amplification of point 4), the CJC specifically noted that there should be 'no disclosure of agency charge'.

We believe enshrining the lack of transparency in this way is wrong. We know that the *Society of Expert Witnesses* thinks likewise and has raised the matter with the House of Commons Science and Technology Select Committee.

If there was transparency in the billing we predict that a large part of the MRO mark up would not be allowed on assessment of costs. This is exactly what happened in the Ipswich County Court in July 2005 in the case of *Earle -v- Centrica plc* when the judge determined that the claimant was not entitled to recover the MRO's fee of £150 (the expert's fee being £285).

Recommendation 3: *There should be a requirement for full transparency in the billing so that the fees of any intermediary used in the commissioning of expert reports are readily identifiable.*

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How top quality experts can save money

Whilst experts are not the only people involved in the conduct of litigation, their involvement can be a decisive factor in the path a case takes. If instructed at the earliest stage, an experienced expert can help to focus the attention of the lawyers on the real issues in question and enable cases to run more smoothly, or even settle.

The LSC Consultation proposed introducing fee scales into the civil sphere modelled on the fee scales already in place in the criminal sphere, thereby achieving a halving of the fee rates currently paid to experts in the civil arena. This crude focus on fee scales would tend to drive the experienced expert away from publicly-funded cases. Such experts are quite able to find proper, market-driven, remuneration elsewhere. That will leave only those experts prepared to work for the lower fees, who are likely to be less experienced. There is a significant danger that the net result will be a lowering, rather than a raising, of the quality of experts prepared to undertake Community Legal Service and Criminal Defence Service cases.

Fee bands

If fee bands linked to those currently set in the criminal arena are introduced in civil cases then, based on our own survey data, expert witnesses would lose roughly half of their current fee income in such cases. There is already considerable concern within expert witness and judicial circles about the low level of expert fees in criminal cases. Consider the following:

“The second matter that has been the subject of considerable complaint by defence solicitors and experts is the low level of publicly funded experts’ fees. I have had a look at the current scales, and, without going into detail on the figures, they are meagre for professional men in any discipline. I am not surprised that solicitors complain that they have often had difficulty in finding experts of good calibre who are prepared to accept instructions for such poor return. The best expert witness in most cases is likely to be one who practices, as well as giving expert evidence, in his discipline, rather than the ‘professional’ expert witness – one who does little else. Justice is best served by attracting persons of a high level of competence and experience to this work. If we expect them to acknowledge an overriding duty to the court and to develop and maintain high standards of accreditation, they should be properly paid for the job. I hope that the Legal Services Commission will take an early opportunity to review and raise appropriately the levels of their publicly funded remuneration.”

A Review of the Criminal Courts of England and Wales

by The Right Honourable Lord Justice Auld, September 2001

<http://www.criminal-courts-review.org.uk>

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To propose imposing such 'meagre' fee scales across the board for expert witnesses in publicly funded civil cases seems calculated to create the same complaints in the civil arena.

As we note in the next section, there is clear potential in the civil courts to tackle some of the causes of increasing expert witness fees without risking the negative supply and competition effects the current proposals are likely to cause.

Recommendation 4: *The LSC needs to work together with the DCA, CJC and others to engage in an honest and open discussion with experts on the factors that contribute to the cost of expert reports. If this is done, we predict that several features of the current litigation landscape could be identified which, if tackled, would not only drive down costs but also enhance access to civil justice and promote its better administration.*

Staged instruction and proportionality

In the civil justice system, CPR imparts a duty to have regard for proportionality (mostly with respect to the quantum) when selecting an expert witness. The LSC is very keen on this approach, as it seems to see the opportunity to use proportionality to reduce its costs. Indeed, it is so taken with this approach that it suggests the seriousness of the crime be treated as a type of proportionality in the criminal arena. In both areas, the same two basic considerations apply:

- expert witnesses should not be expected to work for inadequate payment
- expert witnesses are not competent 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 available budget. But solicitors, who are not experts themselves, often have some difficulty knowing what can safely be omitted in pursuit of proportionality. We suggest in our initial submission to Lord Carter's Review Team that the answer to this conundrum perhaps lies with greater use of staged instructions by solicitors.

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Procedures

Removal of prior authority

Prior authority is one of the reasons expert witnesses stay in the publicly funded market, despite low fee rates. The LSC engages in a circular argument when it notes, as a justification for removing prior authority, the fact that it is uncommon for experts' fees to be adjusted on costs assessments (see paragraph 10.7 of the LSC Consultation Paper). Of course they aren't – prior authority prevents such interference on cost assessment.

Survey response (n = 190)			
	Agree	Neutral	Disagree
Do you agree that removal of the prior authority system would have a serious impact on the number of expert witnesses willing to undertake publicly funded work?	82.4%	14.4%	3.2%

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

An alternative: staged instruction

The suggestion we make – of changing to staged instruction of experts as a way of working towards achieving proportionality – would also help the LSC case workers to make informed judgments on applications for prior authorities. Initial expert reports would be modest affairs at a modest cost. If the initial report revealed the need for a further reporting stage, the LSC case worker would have the benefit of the initial report to inform the decision.

Survey response (n = 190)			
	Agree	Neutral	Disagree
Do you agree that a staged approach to the instruction of experts would offer a way for the LSC case workers to make more informed decisions on applications for prior authorities?	77.3%	20.5%	2.2%

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

Terms of Engagement

Based on our surveys, the number of expert witnesses who use written terms of engagement has increased from 32% in 1995 to 46% in 2005. We are regularly asked to help expert witnesses with payment problems that have arisen, in part, from the lack of written terms of engagement. Indeed, we continually encourage experts to adopt a clear set of terms, and

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have published suggested written terms in our newsletter and factsheets. Any encouragement the LSC or any other body can offer in this regard is to be welcomed.

Survey response (n = 190)			
	Agree	Neutral	Disagree
Do you agree that any pressure the LSC can bring to ensure expert witnesses adopt clear, written terms of engagement is to be welcomed?	89.3%	6.5%	4.1%

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

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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:

- 57% of our expert contributors undertake some publicly-funded criminal cases, but only 10% spend more than 20% of their time on such work.
- 65% of our expert contributors undertake some publicly-funded civil cases, with 13% spending more than 20% of their time on such work.
- 15% of our expert contributors undertake some publicly-funded family cases, with just 4% 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.

