Your Witness

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Intermediate track and 20-page reports

The new intermediate track was ushered into our civil courts by the 1 October update to the Civil Procedure Rules (CPR). A critical change for expert witnesses employed in such cases is the imposition of a **20-page limit to their expert reports**. While we discuss this in more detail overleaf, the core of our advice warrants previewing here. Any expert instructed in a case allocated to the intermediate track should carry out such work, and prepare reports of such length, as is necessary to fulfil their duty to the court and to properly assist the court in accordance with that duty. If that can't be done within 20 pages, so be it. The overriding duty of the expert as set out in the very first rule of the CPR – to enable the court to deal with cases justly and for witnesses to give their best evidence – must hold sway.

If the 20-page report limit is not compatible with an expert's overriding duty, the expert should inform their instructing lawyer at the earliest opportunity. That fact alone may well guide the court towards reallocating the case to a more accommodating procedural track, or generate permission from the court for a lengthier expert report.

Experts, free speech and the Government

Expert witnesses who appear frequently in court are likely to be eminent in their field. They will often contribute articles to professional journals, and may be called upon to address conferences and even government departments. There are, of course, some experts who hold views not shared by their peers, and some experts may even hold somewhat controversial views. But this is the nature of the scientific process. Provided there is rigour behind the science, holding unconventional theories and opinions is no crime.

Society generally falls short of gagging experts, even those whose beliefs are not widely accepted. Indeed, peer review by the wider scientific or academic communities could not take place if we did. In the last few years, however, there have been numerous examples of universities attempting to 'no-platform' experts with whom they disagree. This is often nothing to do with the expert's knowledge or erudition in their field, but because of other beliefs the expert has expressed in unrelated areas. The Government has been quick to condemn such actions, and has even created the role of the Free Speech Tsar to champion the individual's right to freedom of speech.

It is, then, quite bizarre for the Government to have built its own 'no-platform' programme, as we discuss on page 6!

Pro Bono Connect launches

With the demise in legal aid and successive measures attempting to reduce costs and fees, many ordinary litigants can no longer afford to pay the fees of experts and lawyers. The Ministry of Justice (MoJ; itself having suffered a 40% drop in funding since 2010) initially adopted the tactic of capping fees and allowances, introducing 'no win-no fee' agreements and encouraging reliance on legal insurance. More latterly, the MoJ seems to have accepted that legal advice and assistance are the privilege of the rich, and for lesser folk they are a luxury that can be dispensed with.

The expansion of no-fee jurisdictions has left over-worked judges in the first-tier tribunals struggling to cope with the cohorts of litigants in person who are, for the most part, wholly uninformed on the law, the legal procedures and the merits or otherwise of their case. And the county courts are faring little better.

It is against this backdrop that the pro bono sector has become ever more visible. We invited experts from the *UK Register of Expert Witnesses* to join Pro Bono Connect's expert panel in the summer of 2023. The new service was launched at the Supreme Court in early November, and we report on the launch on page 7 of this issue.

Gearing up for edition 37

Preparations for edition 37 of the *UK Register of Expert Witnesses* have begun. As last year, we will not be routinely sending out paper drafts to every expert witness member of the *Register* for checking, signing and returning. Instead, we will e-mail personalised invitations to you during early January with a secure link giving online access to your draft documents. If there are no changes or minor amendments, online renewal is easy and requires no paper printing. More extensive changes can be e-mailed, or the draft printed and amended directly on the paper.

Of course, we understand that the vagaries of e-mail systems and spam filters will inevitably mean some of these e-mails will fail to arrive. Accordingly, we will follow up by telephone, e-mail and post, as needed.

The vast majority of members are happy with the online approach to renewal. But if it isn't for you, please let us know and we will post a paper draft of your entry in the New Year.

If you will be away from work during January 2024, you may wish to contact us now so that we can make alternative arrangements for your membership renewal. Meanwhile, everyone at J S Publications sends their best wishes to you for a happy and safe Christmas and New Year.

Chris Pamplin

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Intermediate track in civil claims

With effect from 1 October 2023, an intermediate track has been created for cases in the civil courts. Civil Procedure Rule (CPR) 26.9 creates the new track, and CPR 28 offers the details.

New intermediate track with fixed recoverable costs

Cases falling into the new track

The intermediate track is for cases with a **claim value between £25,000 and £100,000** issued on or after 1 October 2023. For cases falling below £25,000, the fast track will still be the normal track for allocation of those cases not appropriate for the small claims track. The multi-track is reserved for cases with a claim value of more than £100,000.

In addition to the monetary value of the claim, intermediate track cases must be those:

- that can be **tried within 3 days** at most and
- where there are **no more than two expert witnesses giving evidence for each side**.

The court must be satisfied that the claim may be justly and proportionately managed under the procedure set out in Section IV of CPR 28. Additionally, the **claim must be brought by one claimant against either one or two defendants, or by two claimants against one defendant**. If there are any more parties, then it is off to the multi-track for the case.

Near-universal fixed costs

The new regime extends Fixed Recoverable Costs (FRCs) beyond the fast track to the intermediate track, and thus to almost every area of civil litigation. It is argued by those who advocate them that FRCs give greater control over costs because the parties will know in advance what is recoverable. This is said to control legal expenditure and facilitate earlier resolution to disputes. However, critics of the FRC regime suggest that the opposite is true because fixed costs apply in staged amounts. Stage 1 costs are applied from the pre-action stage up until the service of a defence. These critics argue that, from the point liability is denied, there is little incentive for the parties to try to resolve the dispute at the pre-action stage, thus leading to more claims being issued, not fewer.

Complexity bands... add complexity!

Within the fast and intermediate tracks cases will be allocated to one of four complexity bands. The complexity band and the stage the claim has reached will determine the level of costs recoverable for each stage of the claim. The higher the band to which the claim is assigned, the higher the recoverable costs.

CPR 26.16, Table 2, sets out how claims in the intermediate track should be assigned. But there is currently little guidance on how the provisions are to be interpreted.

Twenty-page reports – a bad idea?

The mechanics of the track will, no doubt, be ironed out in due course. In any event, they are of little direct consequence to experts. What does concern experts, however, is the effect on recoverable costs (including expert fees) which assignment to the intermediate track will have, and the specific provisions in the new rules that impact directly on experts and their reports.

The requirement that has caused, by far, the most concern to experts is contained in CPR 28.14(3). The rule includes the provision that for cases being heard on the intermediate track the **expert's report '*shall not exceed 20 pages, excluding any necessary photographs, plans and academic or technical articles attached to the report*' unless the court orders otherwise**.

This provision, introduced without any consultation with expert witness bodies or the legal community, has led to vociferous cries of foul play. Had the provision been implemented via an amendment to CPR 35, for example, it would have been flagged up in such a way that experts would have been alerted to the intended changes. There is a widely held feeling that the change has, instead, been engineered by stealth or, at least, without proper and due regard to the views of experts.

One must suppose that the rationale behind the provision is that less complex cases should not require an expert report exceeding this length. Indeed, by limiting the number of pages, the court is better able to control the duration of proceedings and the attendant costs.

It appears to us, however, that this reasoning is seriously flawed. The purpose of the expert report is to assist the court. An expert report is rarely padded with superfluous or unnecessary material, but it must contain all that is necessary to explain the expert's procedures and reasoning. From time to time, a well-constructed report will contain summaries of what has gone before and an introduction to a new head or topic of the expert's evidence. And while the issues and facts of a case may not be complex, the expert evidence is often technical in nature and outside the knowledge of the judge or the ordinary man.

Similarly, while the facts of a case may be reasonably straightforward, there may be many of them, with some agreed and some not. Where an expert has based their opinion on such facts, the report must be of sufficient length to elucidate and accommodate them.

The damages value of a claim is, in any event, no measure of its technical complexity. There are many high-value claims that require little expert elucidation. Conversely, there are plenty of smaller claims that call for significant expert input.

Feedback received from experts in the *UK Register of Expert Witnesses* highlights that medical expert reports, particularly those prepared by psychiatrists or psychologists, tend to be longer than the average, simply because of the necessity to fully and accurately review the medical records.

So, it must surely be for the expert to decide what should be included in their report and what is likely to assist the court in its decision-making process. By imposing a somewhat arbitrary report limit of 20 pages, the expert may well be

faced with the impossible dilemma of deciding what should be left in and what should be cut. If an expert is subsequently cross-examined on technical evidence that was excluded or not fully covered because for the 20-page report limit, or is criticised for not including something that later transpires to be significant, this rule will make the court look rather inept and place the expert in an uncomfortable position.

In imposing a reporting limit, the provision puts an unreasonable and unacceptable burden on the expert, and it is incompatible with the expert's primary duty to the court. Indeed, no one would contemplate limiting the number of paragraphs in a statement of claim or a defence, or suggest that the judge's decision be limited to a fixed number of words. Who, then, decided that it would be a wizard idea to hamstring the expert?

The Expert Witness Institute (EWI) wrote to the Civil Procedure Rules Committee calling for the removal of CPR 28.14(3) from the draft amendments ahead of the new track coming into effect. It pointed towards the impact on the work of experts and the quality of expert evidence, and warned of the potential unintended consequences. Given that the Rules Committee did not consider it necessary to consult in advance of the draft rules, it is, then, of no surprise that it has disregarded the concerns of the EWI, and the rules came into effect as drafted on 1 October 2023.

Coping with the report length limit

So what is an expert to do? Were the matter not so potentially serious, some of the suggestions might be thought comical. These have included that experts should type their reports in a smaller font, or use larger paper and narrower margins!

Of course, at the pre-action stage, no one can be entirely certain of the track to which a case will be allocated. However, the stage 1 **FRCs will be applied retrospectively to all work carried out pre-action if the case is subsequently allocated to the fast or intermediate tracks**.

So an expert would be well advised to **seek guidance from their instructing solicitor**, and to **ensure a contractual entitlement to full fees for work carried out** at this stage, whatever allocation is made subsequently.

It is our opinion that an expert should carry out any work or prepare any report to the extent necessary to fulfil their duty and to properly assist the court in accordance with that duty. If that cannot be completed within 20 pages, then so be it; the overriding duty of the expert (see CPR 1) must hold sway.

Influencing court allocation process

The allocation procedure is important. Upon the filing of a defence, the court will make a provisional allocation and serve notice on the parties who will be required to complete and return a questionnaire. The questionnaire will, amongst other things, identify the expected duration of the trial, the need for expert evidence, the fields of expert evidence and the number of experts the parties consider to be necessary.

At this stage, then, the court must decide whether a case expected to take less than 3 days and falling between a value of £25,000 and £100,00 should be allocated to the intermediate track. Multiple experts or complex issues should result in allocation to the multi-track, which will take it outside the FRC regime.

If the expert evidence cannot reasonably be given in a report of 20 pages or fewer, or the number of experts required will exceed two per side, this should have been communicated to the court. This is information relevant to the complexity of the case or the likely duration of any trial. Remember, **judges have retained the discretion to allocate more complex claims valued at less than £100,000 to the multi-track so that such cases will not inappropriately be captured by the FRC regime**.

Working on the intermediate track

However, if the case is allocated to the intermediate track there are consequences for the expert. In addition to limiting the length of the report, the allocation will mean that, in practice, **the expert will need to agree fees with the instructing party in advance and ensure that they are within the FRC limits** for the type of case and assigned complexity band.

Expert witnesses will also need to comply with the court's directions and timetable for producing their reports and giving oral evidence. Any delay or non-compliance may result in sanctions or cost consequences for the instructing party.

The experts will, of course, also be expected to cooperate with other experts and to narrow down the areas of dispute, if possible. In addition, they should expect to face time limits for their oral evidence at trial, and will need to take steps to ensure that such evidence is given as concisely as possible.

'Unless the court orders otherwise'

It is important to keep in mind that the wording of CPR 28.14(3) applies to the 20-page limit of expert reports – ***'unless the court orders otherwise'***. Accordingly, **the court should be notified at the earliest possible stage if such a limitation will be prejudicial to the efficacy and content of the expert report**. If necessary, an order should be sought to permit the limit to be exceeded where it is reasonably necessary.

Most judges will, we think, take a sanguine view and be unlikely to refuse a request made on reasonable grounds. To do so would be contrary to the effective weighing of the issues in the case and will serve only to make their job more difficult. Even if no permission has been given, is it a realistic prospect that an expert report restricted to relevant opinion and expressed in concise terms extending to 20.5 pages is likely to excluded? You would hope not. But the way things are going, who knows?!

Experts not consulted on these changes

If the 20-page limit is too restrictive, warn your lawyer

Anonymity of expert witnesses

While the contents of an expert's report may be sensitive in nature and may require provisions ensuring its confidentiality, the identity of the expert is rarely an issue. However, in a small number of cases, circumstances have led experts to seek anonymity.

Courts are wary of shielding the identity of a witness

Protection from harassment or harm

In rare cases it might be necessary to protect the identity of the expert witnesses. If there is a real risk of harassment, harm or serious intrusion into an expert's private life, such protection may well be required.

The court is also likely to consider applications to protect the identity of an expert witness where that witness is involved in matters of national security or anti-terrorism. Such experts might be placed at personal risk if identified. In addition, if the expert's identification might jeopardise national security measures and procedures, the court will also consider requests for anonymity.

The courts have traditionally, however, been very reluctant to act contrary to the principles of open justice. Indeed, they are wary of granting any application that shields the identity of a witness. Successive cases have emphasised the importance of openness (see, for example, *Solicitors Regulation Authority*[1]). Lord Dyson, in *Al Rawi & Others -v- Security Service & Others*[2] said:

> *'the open justice principle is not a mere procedural rule. It is a fundamental common law principle.'*

A 'pressing need' is required

In *Re Ward (A Child)*[3], the first and second applicant expert witnesses applied for injunctions preventing the publication of their details in relation to care proceedings involving a child. In earlier proceedings, the court had made an order permitting the identification of parties to the proceedings but granting an interim injunction preventing the identification of the various professionals, including the experts. At the conclusion of proceedings, the restrictions were to be lifted. The experts argued for its continuation.

Munby J said in his judgment:

> *'When all is said and done, it seems to me to be a very strong thing to say that the identities of expert witnesses giving evidence in care cases... should be concealed from the public. And quite apart from the more severely pragmatic of the reasons for needing to know who are the experts giving evidence in such cases, does not the public in this context have an interest not merely in knowing what is being done in its name but also in knowing who the experts are whose evidence may have led... to a child being removed from his parents and placed for adoption?'*

Only a 'pressing need' can counter the strong public interest in openness

He decided that the expectation of anonymity relied on by the experts was justified neither in principle nor in practice. The only basis was the fear or risk that, if identified, they would be subject to targeting, harassment and vilification, with the consequential public interest being the drain on the already diminishing pool of experts prepared to undertake child protection work. Those risks were not such as to demonstrate the '*pressing need*' which alone could begin to counter-balance the very powerful arguments, founded in the public interest, for denying expert witness anonymity. Such arguments in favour of identifying social workers might be somewhat less powerful. But the various factors put forward were not sufficient to counter-balance the arguments in favour of openness. Neither did they establish a pressing need for a kind of protection not conferred on experts by the general law.

In rare instances, however, the court may grant an anonymity order for a party or witness, including an expert witness.

Anonymity can apply after a case concludes

Civil Procedure Rule (CPR) 39.2(4) gives the court the power to order that the identity of any party or witness must not be disclosed.

> CPR 39.2(4) *The court must order that the identity of any person shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that person.*

So **the court will only order non-disclosure where it is considered necessary to protect the interests of that party or witness**. The rule allows the court to make an order anonymising the judgment.

Anonymity orders are usually made following a private hearing if the court considers there is a continuing need to protect the interests that originally justified the hearing being held in private. However, the court's power to grant anonymity orders is quite separate and distinct from its powers to order private hearings. Accordingly, where a party or witness wishes to shield their identity, the application can be made independently, or in addition to, an application for a private hearing.

The court can impose **reporting restrictions** or an **anonymity order** instead of an order that there be a **private hearing** where the interests of justice would not be served by the latter (see *V -v- T & Another*[4]). Consequently, the court has the power to anonymise its judgment, or the identity of a witness, even after a public hearing has been held (see *W -v- JH & Another*[5]).

In practice, however, the general rule is that material will have entered the public domain once it is read or has been referred to in open court. In *HMRC -v- Banerjee*[6], a request by a doctor for an anonymity order to protect his privacy was rejected by the High Court as the information was already in the public domain.

The Supreme Court ruled in *Secretary of State for the Home Department -v- AP*[7] that the test to be applied by the court when deciding whether to grant an anonymity order is **whether there is sufficient public interest in publishing a**

report of proceedings that identifies the party (or, by implication, any witness) to justify any resulting curtailment of that party's rights to respect for private and family life under Article 8 of the European Convention on Human Rights (ECHR). Lord Roger was critical of the lower courts. He thought they were too ready to grant such orders without prolonged thinking and clear explanation. In cases where there is no physical risk to those involved, it is necessary, in accordance with *Guardian News & Media Ltd & Others*[8], for a balance to be made between the right of the Press to freedom of expression under Article 10 of the ECHR and any other right protected by law, such as the right to respect for private and family life under Article 8.

Experts and anonymity orders

The court is, however, more likely to grant an anonymity order in respect of an expert witness in cases where there are real and reasonable concerns regarding physical risk to the witnesses.

We last covered this topic in *Your Witness* 6 years ago. It might be thought that little has changed during that time to affect issues around expert anonymity. But there is one obvious development, and it has had a significant impact... the growth, and growing influence, of social media, and the speed with which information is disseminated.

Social media posts can be erroneous, untruthful and/or malicious. They can be broadcast without checks and safeguards, and, once in the public domain, it is almost impossible to remove or control them.

In September 2023, the case of *University Hospitals Birmingham NHS Foundation Trust -v- Thirumalesh*[9] asked the court to consider expert witness anonymity in Court of Protection proceedings. In that case, the court was asked to determine whether a transparency order should be discharged. The first respondent in the case had a rare, progressive mitochondrial disease with numerous associated health problems. Her treating NHS trust had brought Court of Protection proceedings in respect of her medical care, in which it was determined that she lacked capacity both to litigate and to make decisions about her medical treatment. She subsequently died. Her family indicated that they were considering bringing clinical negligence claims.

The issue was whether to lift, wholly or partially, a transparency order that had been made during the proceedings, which prohibited the publication of the names of, or any information that would identify:

- the respondent and/or her family
- the hospital trust
- the hospitals attended by the respondent
- the experts in the case, and
- treating clinicians or any health/care professional engaged.

The Court ruled that the competing ECHR Article 8 and Article 10 rights clearly came down in favour of identifying the second respondent and her family. Now that the proceedings were over, there was no justification for not being able to name them.

The Court was conscious that, although the family had no intention of taking any steps that might lead to the harassment of named individuals, modern methods of communication, particularly social media, meant that they would have no control over the narrative. The publicity generated by the case had been heated, and there was likely to be heightened interest immediately following the lifting of restrictions.

With regard to the clinicians involved, if anonymisation was lifted, the consequences were unpredictable. But there was a clear risk that abuse and harassment might follow. Were that to happen, it would be a very considerable interference with their Article 8 rights. That risk was seen to be at its highest in the few weeks following lifting. The Court, therefore, took the view that there should be a '*cooling-off*' period. The Court ordered that the transparency order, insofar as it related to clinicians/nursing staff, should be continued for a period of 8 weeks before automatically being lifted.

So far as the NHS trust and the hospitals were concerned, the trust would be immediately identifiable once the second respondent was named. To continue the transparency order would be futile. Because there were only four hospitals within the trust, there was inevitably a risk of identification, even if a specific hospital was not named. The court did not think that this would lead inevitably to the clinicians being identified, and was content for the order in respect of the trust and hospitals to be lifted.

Turning to the expert witnesses, Peel J applied the principle referred to in the judgment of Munby J in *Re Ward (A Child)*[3]. This, he said, created a high threshold for expert witness anonymity. There was no compelling reason why the transparency order in respect of the identity of experts should not be lifted. The balancing exercise between the private interests of the experts and other private and public interests came down in favour of the public interest.

As a postscript, it is interesting to note the very recently published results of the Bond Solon expert witness survey 2023, carried out in association with the Law Society Gazette. The reported results indicate that 90% of experts who responded believed that the authorities should conduct a risk analysis for expert witnesses, particularly in criminal or highly controversial cases. In response to the question 'G*iven the potential risks to expert witnesses, particularly in highly controversial or criminal cases, do you think judges should be more willing to order that an expert witness be given anonymity?*', 83.84% replied 'Yes'.

We suspect, therefore, that the subject of expert anonymity is likely to be revisited at some point in the not too distant future.

Overall, it is difficult for experts to preserve anonymity

References

[1] *Solicitors Regulation Authority -v- Spector* [2016] *EWHC* 37 (Admin).

[2] *Al Rawi & Others -v- Security Service & Others* [2011] *UKSC* 34.

[3] *Re Ward (A Child)* [2010] *EWHC* 16 (Fam).

[4] *V -v- T & Another* [2014] *EWHC* 3432 (Ch).

[5] *W -v- JH & Another* [2008] *EWHC* 399 (QB).

[6] *HMRC -v- Banerjee* [2009] *EWHC* 1229 (Ch).

[7] *Secretary of State for the Home Department -v- AP (No 2)* [2010] *UKSC* 26.

[8] *Guardian News & Media Ltd & Others, Re HM Treasury -v- Ahmed & Others* [2010] *UKSC* 1.

[9] *University Hospitals Birmingham NHS Foundation Trust -v- Thirumalesh* [2023] *EWCOP* 43.

'Secret dossiers' on experts

> *Government's Free Speech Tsar at odds with its blacklisting policy*

There's been plenty of comment recently highlighting the behaviour of some universities trying to 'no-platform' experts with whom they disagree. Indeed, the Government has been quick to condemn such actions and has championed the individual's right to freedom of speech. We were, therefore, surprised to learn that the Government itself has taken measures to block experts from speaking at government-funded public events!

Apparently, many government departments have been instructed to monitor experts' social media, conduct background checks and look for any evidence an expert has been negative about the Government.

The Observer breaks the story

These were the revelations made in the Sunday newspaper *The Observer*. It reported that guidelines had been issued requiring civil servants to carry out checks going back 5 years, and to maintain files on the individuals concerned.

The issue first came to light when three experts in early-childhood education discovered that invitations for them to speak at a government-funded event had been withdrawn because someone had deemed them to hold views critical of the Government's education policy. Shortly after, several more education experts found that the Department for Education apparently held records of their social media posts.

A chemical weapons expert also discovered that he had been barred from speaking, this time at a defence conference. It was claimed to be because officials had found posts on social media which they considered to be critical of the Government's immigration policy. The expert told *The Observer* that he knew of other experts who had been similarly tracked.

The matter was investigated by human rights lawyers at law firm Leigh Day, who shared their findings with *The Observer*. It transpired that the practice is much wider than first thought.

The chemical weapons expert instructed Leigh Day to launch proceedings for judicial review of the government-issued guidance. He is seeking a declaration that the guidelines are unlawful and were, in any event, wrongly applied in his case.

> *Apparent no-platform policy for experts critical of Government*

The tracking scheme, according to on-line newspaper *The Independent*, was set up by Jacob Rees-Mogg and is entitled *'Due Diligence and Impartiality – Protecting our Diversity Networks'*. It came into the public domain following *The Observer* report, and it directs civil servants to:

> *'... carry out due diligence checks on all external speakers invited to events... to avoid any invitations being issued to individuals or organisations who have provided adverse commentary on government policy, political decisions, approaches or individuals in government that could undermine our position on impartiality and create reputational damage. Commentary may have been made on social media or other outlets.'*

A spokesperson for the Government said that '*taxpayers' money should not unwittingly be used to pay for speakers linked to abhorrent organisations or individuals who promote hate or discriminatory beliefs.*' He denied, however, that the Government maintained a central register of experts for this purpose.

Judicial review of the blacklisting

In a pre-action letter sent to the Cabinet Office, lawyers for the expert asked for confirmation that he was not considered to '*fall within the category of "abhorrent organisations or individuals who promote hate or discriminatory beliefs"* '.

From what has come to light so far, it does appear that the dossiers are not limited to abhorrent organisations or individuals. They include a large number of people who are experts in their field and have not shared extreme views of any kind. It's hard to avoid the conclusion that the main criterion for the blacklisting is simply that some people might have been critical of government policy.

Lawyers for the expert have disclosed that he is a member of the Liberal Democrat party and that any political views or other opinions he has held could not conceivably be described as promoting 'hate or discriminatory beliefs'. There can, they said, be no justification in barring him from speaking. In any event, it is difficult to see what possible relevance his political views might have to the subject matter of the conference.

The pre-action letter includes claims that (i) the policy amounts to discrimination on grounds of belief, contrary to the Equality Act, and (ii) the policy breaks Human Rights Act provisions on the freedoms of thought and expression.

Commenting on the revelations, Caroline Wilson Palow, of Privacy International, stated that her firm had been investigating social media monitoring by the Government for many months. She said: '*If the Government is blacklisting people for using their right to free expression in a very valid way, then that is very dangerous.*'

While the blacklisting of experts would, in the eyes of many, be unacceptable, it is the process of monitoring these experts that is the more unsettling aspect for us.

The Cabinet Office is understood to have temporarily withdrawn the guidance to '*prevent any misinterpretation of the rules*', and a review of the policy is in progress. Government departments have declined to comment further because of the ongoing legal process.

Given the Government's much-trumpeted appointment of Arif Ahmed as the new Free Speech Tsar, its actions here appear to be quite extraordinary. The expert at the centre of the case said that there were many experts who were potentially affected by this. He added, however, that most of the experts who have been the subject of social media surveillance and the Government's 'secret files' will be entirely unaware of it.

Pro bono experts

The right to legal aid is enshrined in the European Convention on Human Rights (ECHR). Article 6(3)(c) of the Convention guarantees the:

- right to legal aid where the defendant does not have the means to pay for it, and
- right to free legal aid 'where the interests of justice so require'.

Article 6 also enshrines the right to 'practical and effective' legal assistance, allowing those who have insufficient financial resources to be able to defend themselves or to cover legal costs. However, it does not explicitly guarantee a right to legal aid in civil proceedings or outside judicial proceedings. In its case law, the European Court of Human Rights has established that **State authorities must provide any person within their jurisdiction with the assistance of a lawyer in civil cases where this is indispensable for effective access to the court or where the absence of such assistance would deprive a person of a fair trial**.

UK alone in eroding access to legal aid

The UK is a signatory to the ECHR and has adopted it in its domestic law. However, it is extraordinary that, of the 49 European States, the UK is unique in steadily eroding access to legal aid. This is not an accident of circumstance, but is a deliberate political policy.

The legal aid system, like the National Health Service, social housing policies and unemployment benefits, is part of what is collectively known as 'The Welfare State', a term that has acquired much political baggage. Consequently, legal aid in the UK is a political issue governed by one or other mantra of conflicting ideologies.

Some experts, solicitors and barristers enjoy a relatively high level of remuneration from their work in the courts. At the same time, many recognise that the justice system in its current format is unbalanced and needs redress. Those wishing to give a little back may occasionally act *gratis*. Others, purely out of a sense of altruism or social conscience, seek to volunteer their services in cases where a party would otherwise be unable to afford them and where the interests of justice would be better served.

In the past, this approach has been largely *ad hoc*, with some experts, solicitors and barristers' chambers establishing a reputation for pro bono work. The focus has often been in a few specialist areas, such as human rights, immigration, discrimination, employment and workers' rights. This is, however, by no means an exclusive list.

Pro bono expert witness

Over the past year there has been a growing recognition that the demand for pro bono services is likely to increase and the provision of these services will meet a very urgent need. Consequently, two charities, the National Pro Bono Centre and Pro Bono Connect, have cooperated to launch Pro Bono Expert Support (PBES), with the help of the *UK Register of Expert Witnesses*. It has been described as the UK's first pro bono litigation support service, and aims to bring together experts who are willing to provide pro bono services with like-minded barristers, solicitors and costs lawyers. With access to *Register* experts who opt in, PBES can draw from a wide range of disciplines.

Emily Sherratt, project manager of Pro Bono Expert Support, has stated that the aim is to enable lawyers working pro bono to '*know who is out there and what they can offer*'.

PBES was officially launched at the Supreme Court during pro bono week on 9 November 2023. The initiative has already garnered the support of several prominent members of the judiciary, including Justice of the Supreme Court, Lady Rose and Mr Justice Knowles. Lady Rose expressed her delight at being able to support PBES, which she said would give those who require legal support '*the best chance of progressing their case in the most effective way*'.

Experts who already undertake pro bono work, or those who have merely thought about it, can join the scheme simply by letting us know – just send an email to *probono@jspubs.com* and we will make sure the relevant tick box is checked.

The usual rules of court still apply

For all those involved in pro bono work in the courts, it is crucial to bear in mind that all the rules and duties governing the conduct and procedures to be adopted by expert witnesses still apply. The overriding duty remains to the court, not the party. As always, experts should not act as 'hired guns', and they should stick rigidly to commenting only on areas within their expert field.

The courts will not treat pro bono experts any differently or regard pro bono work as a form of 'cut-price' litigation. In fact, we suspect that the court will be even more vigilant in pro bono cases to ensure that the expert has abided by the procedural rules and relevant guidance, and devotes sufficient time, attention and care in the discharge of their duties.

While pro bono work is undoubtedly laudable, it can, like other forms of charitable funding and voluntary work, have an undesired effect. Ensuring access to justice should be the responsibility of the State and should be properly and adequately funded by the taxpayer. A marked increase in pro bono services may result in even less public spending on the justice system on the grounds that someone else will step in to pick up the tab.

Access to legal aid eroded by State cutbacks

Pro bono expert work carries all the usual duties and risks

Services for registered experts

Expert witnesses listed in the *UK Register of Expert Witnesses* have exclusive access to our bespoke professional indemnity insurance scheme. Offering cover of, for example, £1 million from around £275, the Scheme aims to provide top-quality protection at competitive rates. Point your browser to *www.jspubs.com/pii* to find out more.

Expert witness members of the *UK Register of Expert Witnesses* have access to a range of services, the majority of which are free. Here's a quick run down on the opportunities you may be missing.

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First published in 1995 and now at well over 100 issues, *Your Witness* was the first newsletter dedicated to expert witnesses. All quarterly issues are freely available to members.

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Unique to the *UK Register of Expert Witnesses* is our range of factsheets (currently 77). All are available and searchable on-line. Topics covered include expert evidence, terms and conditions, getting paid, training, etc.

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Now exceeding 100 issues, our condensed e-wire is our fast link to you. Containing shortened articles, as well as conference notices and details of urgent changes that could impact on your work, it is free to all members.

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Distilled from more than three decades of working with expert witnesses, our *Little Books* offer insights into different aspects of expert witness work. To find out more, point your browser at *www.jspubs.com/books*.

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Full access to the complete *ICLR case law library* for Professional service level members (call us on 01638 561590 for access codes). Basic reports on some key cases available to all in our library.

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We operate a general helpline for experts seeking assistance in any aspect of their work as expert witnesses. Call 01638 561590 for help, or e-mail helpline@jspubs.com.

Re-vetting

You can choose to submit yourself to regular scrutiny by instructing lawyers in a number of key areas to both enhance your expert profile and give you access to our dated logo. The results of re-vetting are published in summary form in the printed *Register*, and in detail on line.

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Lawyers have free access to more detailed information about our member experts. At no charge, you may submit a **profile sheet** or a **CV**.

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