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# RESPONSE TO EXAMINING THE USE OF EXPERT WITNESSES APPEARING IN THE COURTS IN NORTHERN IRELAND

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## **Introduction**

The Law Society of Northern Ireland (the Society) is a professional body established by Royal Charter and invested with statutory functions primarily under the Solicitors (NI) Order 1976 as amended. The functions of the Society are to regulate responsibly and in the public interest the solicitor's profession in Northern Ireland and to represent solicitors' interests.

The Society represents over 2,600 solicitors working in some 530 firms, based in over 74 geographical locations throughout Northern Ireland and practitioners working in the public sector and in business. Members of the Society thus represent private clients in legal matters, government and third sector organisations. This makes the Society well placed to comment on policy and law reform proposals across a range of topics.

Since its establishment, the Society has played a positive and proactive role in helping to shape the legal system in Northern Ireland. In a devolved context, in which local politicians have responsibility for the development of justice policy and law reform, this role is as important as ever.

The solicitor's profession, which operates as the interface between the justice system and the general public, is uniquely placed to comment on the particular circumstances of the Northern Irish justice system and is competent to assess the practical out workings of policy proposals.

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## **The Role of Expert Witnesses- Statement of Principle**

### ***Value for Money and the Interests of Justice***

- 1.1 The instruction of experts in court proceedings is designed to serve the interests of justice by providing informed opinion on matters of particularly technical or specialist knowledge. In this regard, expert testimony informs the deliberations of the judge by providing a detailed and comprehensive picture of the issues involved. The appropriate engagement of expert witnesses is beneficial to the interests of justice, clarifying disputed facts and narrowing the issues for decision, acting as a 'clearing house' of detail. Expert witnesses should be appropriately deployed, adequately qualified and sufficiently remunerated to serve the functions for which they are engaged.
- 2.1 In that context, the DOJ recognise in the Consultation Paper the importance of the governance arrangements around the deployment of expert witnesses. The Society appreciates that value for money and the proportionate use of public monies is required in the engagement of expert witnesses in legal aid cases. However, there is an overriding responsibility to ensure that effective access to justice is served by guaranteeing legal aid clients the same rights as those reasonably available to privately funded litigants. Although it is appropriate that the use of resources may be taken into account when determining whether the instruction of an expert witness is necessary and proportionate, there should not be a 'two tier' system at play where litigants who can afford to pay are placed at an advantage.

### ***Identifying Cost Drivers***

- 3.1 One of the difficulties in terms of producing an informed response to the consultation is the lack of empirical evidence as to how the current rules are operating in relation to expert witnesses. In particular, questions of pertinence relate to the broad trends in terms of expenditure on expert witnesses and their impact on the complexity and duration of civil and criminal proceedings. The Consultation Paper mentions at paragraph 1.4 that the judiciary have generally noted that costs are increasing and that such evidence is increasing in complexity, but the degree to which this is true cannot be gauged. In addition, there is no empirical evidence provided to identify whether there are differential cost pressures arising from particular types of expert evidence or aspects of the court rules. We would encourage the Department to ensure that this data is collected going forward in order to provide a clearer picture of the position in respect of expert witnesses.

## **Controls Over the Instruction of Experts**

### ***Supply of Expert Witnesses and Sequential Fees***

- 4.1 The Society agrees with the need for transparency and effective controls over the qualifications and instruction of expert witnesses. However, we caution that any new arrangements governing their remuneration must not be such as to discourage the supply of experts to the courts. Broadly speaking, the wider the pool of experts available for instruction, the greater the opportunity for achieving value for money. In that respect, the Department should be conscious of the potential for unintended consequences when designing any new remuneration structures.
- 5.1 A sequential system of fees based on a diagnostic fee and the early identification of additional costs due to the need for further expert advice is sound in principle. However, diagnostic fees should be set at a level which would make the taking of such instructions viable and attractive for professionals already often working full-time. This would ensure that a balance is struck between greater transparency of costs at an early stage and the importance of encouraging a wider market for expert witness services.
- 6.1 The Society agrees in principle that an expert should be proportionately remunerated for examining the request and deciding that it lay outside his competence. Such cases would of course be subject to a reduced fee in line with the lower proportion of work undertaken, but nevertheless this fee should be available to avoid discouraging expert witnesses from coming forward. In addition, the introduction of any additional steps in terms of authorisation should be closely scrutinised to ensure that they do not impose additional administration which may undermine any savings achieved. This is not least because legal aid fees should adequately reflect the time and skill in terms of preparation by lawyers preparing such reports.

### ***Problems with a Blanket Prohibition on Further Instruction***

- 7.1 The Society is opposed to a prescriptive approach with a blanket prohibition on the instruction of further experts in a case as required. The Society believes that flexibility is required to serve the interests of justice and the judiciary should be provided with the discretion to take decisions in relation to witnesses in line with their broader case management duties. This reflects the

fact that not all of the relevant issues may be ascertained at the point of first instruction and it would be unreasonable to restrict the capacity to instruct experts in circumstances where new considerations emerge during the process of litigation.

- 8.1 A blunt prohibition could lead to injustice in cases of particular complexity and the Society is of the view that the accountability for the use of expert witnesses will be retained where the judiciary are tasked with scrutinising the appropriateness of their instruction. The adoption of such a prohibition would undermine the incentives designed to be created by the diagnostic fee which is to have an objective appraisal of the need for expert instruction at the earliest possible stage. The creation of incentives for experts to stretch the limits of their competence should be avoided at all costs and the combination of the diagnostic fee and judicial controls on instruction should contain this risk.
- 9.1 The principle of equality of arms comes into play whereby one party to proceedings can afford to pay for the services of additional experts whilst legally aided clients might be placed at a disadvantage if overly restrictive rules are put in place concerning the engagement of expert witnesses. It is in that regard that rules should concentrate on focusing on the narrowing of issues in dispute at an early stage as a means of controlling costs rather than attempting to strip out flexibility to allow for expert evidence in appropriate circumstances.

### ***A Register of Experts***

- 10.1 Any proposal to introduce an accredited scheme of experts and the maintenance of a register needs to be carefully weighed against the potential for a disproportionate expansion of administration and monitoring to maintain this approach. Given that the Department state that expert witnesses constitute approximately 3% of current legal aid spending and are not reporting systemic problems with how the system currently operates, reforms should be modest in scope.
- 11.1 The administrative demands on a register relates to the fact that in order to be meaningful and accountable, it would require to carry out audits of performance and report against these. At the moment the NILSC on occasion require practitioners in legal aid cases to obtain three separate quotations. Opportunity is also afforded in cross-examination for the professional credentials of experts to be appropriately explored. As a result, it is difficult to

see how such a register would add value to the process to justify the costs incurred.

- 12.1 On this basis, the Society would advocate the use of court guidelines and protocols to govern the quality of expert witnesses, thereby ensuring that decisions on competence rests ultimate with the independent judiciary. The complexity of designing any administration and quality-assurance processes in relation to expert witnesses can be appreciated as they come from a variety of different disciplines depending on the evidential needs of individual cases.
- 13.1 Furthermore, the concern expressed earlier about avoiding any disincentives to providing expert evidence apply to the proposal to make the register self-funding by requiring experts to pay registration fees. Accordingly, the requisite professional bodies and qualifying authorities for particular experts should form the basis of the court's decisions and should be scrutinised by the presiding judge. This approach represents the most cost-effective and proportionate method to assess the quality and relevance of expert evidence.
- 14.1 Furthermore, the maintenance of a register by the Department would be constitutionally inappropriate, particularly in respect of criminal cases whereby the State is a party to proceedings. The importance of the expert being both independent and objective in practice and in the eyes of those who come in to contact with the justice system cannot be overstated.

### ***Standard Fees and Hourly Rates***

- 15.1 The Consultation Paper consults on a number of possible options regarding the structure of fees for expert witnesses. Paragraph 5.8 acknowledges that there is a "considerable differential" in the number of hours worked across different cases with different expert disciplines. The Society would argue that this demonstrates the importance of hourly rates to deliver remuneration commensurate with the amount of work undertaken.
- 16.1 Often this is not predictable in advance and standard fees should only be used in situations of consistent predictability where the amount of work involved is not particularly variable and can be foreseen at an early stage in proceedings. Moreover, an hourly rates structure accounts for the fact that fees need to be set at a level to attract talented professionals to discharge the functions of an expert witness. An important consideration in terms of forecasting and greater predictability of costs lies in the ability of an expert to

provide early estimates of hours required to help discern patterns across cases and evidence types.

### ***Court Appointed or Single Joint Experts***

- 17.1 Further to the point expressed in relation to equality of arms at paragraph 9.1, comments made in the Campbell Review of the Civil Justice in Northern Ireland in 2000 about single joint experts are instructive:

*“Moreover the Group is aware of the risk that some or all of the parties would feel that their case might not be adequately presented by an imposed expert, and considers that the dissatisfaction that could give rise to is not in the interests of justice....the Group is also concerned that wealthy parties would retain an independent expert, regardless of the unrecoverable cost, in order to undermine the evidence of the single expert....”<sup>1</sup>*

- 18.1 The extract above underlines the importance of flexibility and fairness in the rules governing expert witnesses. It is often the case that in matters of particular complexity, there may be a range of professional opinion in which it is in the interests of justice to explore. There is a risk that single joint experts, whilst attempting to contain costs and serve impartiality, actually create an unintended advantage for parties with greater means.

- 19.1 This supports the view that achieving economy in respect of expert witnesses is better served by the early resolution of issues than by attempts to place rigid controls on the grant of funding. Single experts are particularly unacceptable in criminal cases, for example where the prosecution already has access to expertise through the Forensic Science Laboratory. An appropriate adversarial system will not unnecessarily extend proceedings, but rather will be managed to ensure all of the relevant facts are in place to achieve justice.

- 20.1 Lord Neuberger, President of the Supreme Court, recently recapped the benefits of adversarial proceedings in seeking to achieve impartiality and credibility in expert evidence:

*“I also think that equality of arms as between the experts is also a factor which helps ensure a higher quality of impartiality. The fact that an expert witness, witness 1, knows that he has to face an expert witness, witness 2, on the*

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<sup>1</sup> The Civil Justice Reform Group, *Review of the Civil Justice System in Northern Ireland, Paragraph 119 (5)*.

*other side, and that witness 2 will presumably be briefing the advocate who is to cross-examine witness 1, should help concentrate the mind of witness 1 on ensuring that his evidence is at least credible. Unless there is equality of arms when it comes to expert witnesses, witness 1 will be sorely tempted, sometimes sub-consciously no doubt, to over-egg his evidence, or at least not to take quite as much care as he might have done if he knew that there was someone as expert as he was testing and challenging his evidence. It is for that reason that I am a little nervous about a single joint expert.”<sup>2</sup>*

21.1 Dr Chris Pamplin, editor of the UK Register of Expert Witnesses Survey, has recently drawn attention to the declining number of registered experts who have been instructed as single joint experts (following the Supreme Court’s 2011 decision<sup>3</sup> to abolish the immunity arising from the preparation and presentation of evidence for court proceedings previously enjoyed by experts). The 2013 survey reported that 57% of experts had been so instructed, compared to 73% in 2011. Dr Pamplin attributes this decline to the view among experts that because ‘working for both parties in a dispute may well lead to a disgruntled instructing party’ taking instructions of this sort exposes them to a greater risk of negligence claims. Experts once supportive of being instructed as single joint experts are now unwilling to accept such instructions for this reason. Accordingly, the Society encourages the Department to take this growing trend into account when considering any proposal to achieve greater use of this model. We would warn against imposing any rules which would be likely to inhibit the availability of a wide market of experts, given the obvious effects on competitive costing this could inadvertently cause.

22.1 It is for these reasons that the Society has considerable concerns about the use of single joint experts as a matter of principle and any discussion should consider the interests of justice in the first instance. It may be the case that in certain forms of proceedings a single joint expert is more suitable, for example in family proceedings. These different considerations require that appropriate controls on the use of expert witnesses should reside with the judge as part of the overall case management function.

## **Conclusion**

23.1 The Society is not opposed to an exploration of how to achieve efficiency and economy in the use of expert witnesses in court proceedings. However, any reforms should be mindful that the interests of justice require equality of arms

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<sup>2</sup> Address to the annual Bond Solon Expert Witness Conference, 7 November 2014.

<sup>3</sup> *Jones v Kaney* [2011] UKSC 13.



and flexibility to avoid manifest injustice. The early resolution of issues is not incompatible and indeed is often served by an adversarial process and this is where focus should be directed. Flexibility relates to the supply of experts in terms of remuneration and to the challenge of experts in circumstances where this is integral to the outcome of a case.