



Department of

Justice

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Consultation Document:

Examining the use of Expert Witnesses
appearing in the Courts in Northern
Ireland

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1.0 Introduction

- 1.1 The purpose of this consultation is to consider the deployment and remuneration arrangements for those expert witnesses in the justice system in Northern Ireland who are funded from the legal aid budget. It is part of a wider legal aid reform programme and flows from a specific recommendation in the Access to Justice Review.
- 1.2 A number of steps have been taken in recent years to improve the controls over the use and cost of experts, but there is a shortage of empirical evidence about the impact. This consultation invites comments on how the current arrangements might be strengthened to ensure that expert testimony can make the most useful and appropriate contribution and is cost effective.

Background/Context

- 1.3 The majority of cases that come before the courts in Northern Ireland require the parties involved to give evidence in support of their case. Sometimes it will be necessary for expert evidence to be provided on a particular subject in support of the arguments being made by the parties. For example, such evidence could be from an engineer giving evidence about defective equipment or a doctor explaining the extent of harm caused to a personal injury litigant.
- 1.4 There is no specific qualification for, or definition of, an expert witness. An expert witness can give evidence on the basis of his or her training, experience or knowledge of a specific subject. It is a matter for the court to determine whether a person should be allowed to give evidence as an expert. However, it is also the position that a litigant's legal representative is responsible for 'directing their own proofs'. That is, a legal representative in a case would normally be allowed to call whatever evidence he believes best supports his client's case. In practice, this means that in some cases the evidence of two, or even more, experts may be provided to the court and it will be a matter for the court to determine whose evidence is the most compelling.

The judiciary has noted that the use of experts is increasing and that this not only makes cases more costly, but makes some of them unduly complex and time consuming. However, the Department recognises that attempts to control or limit the evidence that can be given in support of a litigant or defendant may be challenged from an access to justice perspective.

- 1.5 It has not been possible to accurately assess the overall spend from the legal aid budget in relation to the use of expert witnesses as specific figures are not recorded by the Legal Services Commission (the Commission). Experts' fees are paid as disbursements and are recorded as part of the overall costs of the case in a general file along with costs associated with other expenses such as travel or waiting time. However, overall disbursements make up around 8% of the total amount spent on legal aid amounting to some £8m per annum. From our analysis of that £8m, it is estimated that just less than half of the payments on disbursements relate to experts, approximately £3m. This is in essence around 3% of the total spend on legal aid.

Engaging an expert witness

- 1.6 The engagement and use of expert witnesses is established practice within the courts in Northern Ireland and there have been significant improvements in recent years.
- 1.7 The courts have made a number of practical changes to how experts are used and issued a number of protocols regarding the steps to be followed by practitioners in retaining experts. For example, practitioners are required to consider whether the appointment of a joint expert would suffice, they are required to ensure that the use of experts is both necessary and appropriate and, where separate experts are necessarily involved, they are required to give consideration to agreeing on any elements of the evidence which does not conflict so as to ensure only those areas of conflict are required to be considered by the courts. The Family Proceedings Rules (Northern Ireland) 1996 precludes the examination, by an expert, of a child without leave of the

court. All of these initiatives have contributed significantly to reducing the number of occasions when an expert is required.

- 1.8 The Commission has developed the way in which it manages the provision of funding for experts. It now operates a system which permits a solicitor to engage an expert in circumstances where the solicitor is satisfied that expert evidence is necessary to support his client's case (where necessary, with the approval of the court) and the cost of engaging the expert is below certain thresholds as set out in the General Authorities published by the Commission. These General Authorities cover areas such as obtaining general medical records or engineers' reports and are subject to a series of set fees. However the cost thresholds published in these General Authorities are relatively low and the majority of requests for the use of an expert fall outside this process. The main purpose of the General Authorities is to ensure the effective running of the courts processes and reduce delay by removing requests for minor amounts of expenditure from the Commission's decision making process.
- 1.9 Expert evidence with a cost above the thresholds set out in the General Authorities requires the solicitor to demonstrate the need for expert evidence and obtain the prior approval of the Commission before engaging the expert. In these circumstances, the solicitor is required to obtain three quotations from relevant experts and the Commission decides whether to approve the request and the level of funding to be provided. If the Commission considers the request for expenditure to be excessive it may choose to reduce the number of hours requested or reduce the hourly rate that it would be prepared to pay. Most cases of this nature will be remunerated on an hourly rate basis, as cases involving the more expensive experts tend not to follow a standard pattern in terms of overall cost. This is mostly due to the fact that the number of hours worked in each case varies significantly depending on the specific circumstances. The Commission's challenge function in relation to the number of hours sought, or the cost involved, is intended to ensure that the expenditure authorised is appropriate and proportionate to each individual case.

2.0 The Purpose of the Consultation

2.1 The Access to Justice Review (the Review) which was published in September 2011, made the following recommendation in respect of expert witnesses:

“that the Department of Justice allocates a dedicated resource to the development and implementation of a strategy for securing expert witness evidence for the courts on a basis that secures value for money, consulting with stakeholders as appropriate.”

2.2 The Minister of Justice accepted this recommendation and approved the initiation of the “Legal Aid Expert Witness” project, which is being taken forward as part of the Access to Justice Reform Programme by a project team within the Department’s Public Legal Services Division. This consultation forms part of that project.

2.3 The Review suggested that in addressing this recommendation consideration should be given to:

(a) the process by which the need for added value from expert evidence is identified and by which experts are appointed – and the circumstances where one independent expert appointed by the court would meet the requirements of justice (as opposed to experts being appointed by each party);

(b) a framework of fixed fees to be paid for experts in publicly funded cases, taking account of market conditions and fee levels set in England and Wales;

(c) the arrangements for remunerating experts in legally aided cases in a timely fashion;

(d) the development of registers of suitably qualified experts – working with the Law Society and other jurisdictions;

(e) the use of video links, IT and written reports to reduce the costs associated with securing expert evidence from outside the jurisdiction;

(f) liaising with other jurisdictions in the United Kingdom and with the Republic of Ireland to develop complementary policies and systems on these matters;
and

(g) the recoverability of the costs of experts as between the parties and ensuring that the legal aid fund is not unduly exposed.

3.0 Remuneration of expert witnesses

Information on the use of expert witnesses

- 3.1 Full information on expert witnesses is not currently available as, historically, the Commission did not routinely collect information on the use and payment of expert witnesses in legally aided cases. This is currently being addressed, and in the meantime the project had available to it an extract of information taken from criminal cases. In addition the project team examined some 2,400 civil and Children Order case files and through this was able to confirm that expert witnesses in civil and family cases charge for their services on the same basis as in criminal cases. This indicated that the rates charged by experts in civil and family cases and in criminal cases were broadly equivalent.
- 3.2 An examination of the data available from the Commission, shows a significant spread in terms of expert types used in the courts and a wide range in the total fees claimed by expert type, whilst the hourly rates applied by expert type tends to be more consistent in criminal cases. In addition, there is a significant proportion of expert types which have been used only once or on a small number of occasions.

The position in England and Wales

- 3.3 In England and Wales specified fees for experts in legal aid cases are set out in the Civil Legal Aid (Remuneration) (Amendment) Regulations 2013 and the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2013. These rates apply to any cases funded through the civil, family and criminal legal aid schemes in England and Wales, as appropriate. They consist of a number of fixed fees and hourly rate fees that apply to different types of services, including those where factual evidence is required, for example a DNA test or the provision of a report from GP records, and those where an expert, such as a psychiatrist, is providing a professional opinion. The specified rates are payable to any relevant expert, regardless of their experience and can be

exceeded in specified circumstances. These circumstances are where the evidence is key to the client's case and either the material is of such a specialised and unusual nature that only very few experts are available or the complexity of the material is such that a more senior expert is needed.

The position in Scotland

- 3.4 Currently the system for engaging expert witnesses in Scotland is very similar to Northern Ireland. A solicitor seeking to employ an expert must apply to the Scottish Legal Aid Board (SLAB) in order to have the use of that expert sanctioned. If the cost of the expert is over a certain limit the solicitor must seek three quotations from different experts to conduct the work. There are currently no fixed fees payable in Scotland and the amounts paid are negotiated. SLAB is currently progressing a project with the objective of developing a better understanding of the use and remuneration of experts.

The position in the Republic of Ireland

- 3.5 The Legal Aid Board has published a set of guideline hourly rates for the remuneration of expert witnesses in the Republic of Ireland. A particular hourly rate is applied to a particular type of expert, for example consultant medical practitioners receive €120 per hour, forensic scientists, psychiatrists and accountants receive €100. Other routine technical reports are remunerated at €70 per hour. The published rates are not comprehensive and are not prescriptive. However, if a solicitor wishes to engage an expert at a higher rate he must first seek prior approval to do so from the Board. Furthermore, where an expert produces a report, and that report is not used by the client's solicitor, the cost of a second report by the same or a different expert witness on the same topic will not be reimbursed under the scheme.

4.0 Use of multiple expert witnesses

- 4.1 Where experts are required to meet the interests of justice, it is important to ensure that their use is proportionate. There are a number of circumstances in which it is not clear that this test is met. It has been suggested that in some circumstances where an expert is instructed, upon examination of the client/patient, they may suggest that someone else with a particular specialism may be more appropriate to provide the necessary evidence. This can be due to issues regarding the “*designated competence*” of the expert involved. Effectively, an expert is retained to provide evidence in a particular, and often very defined, area; however it becomes clear that the issues are outside their particular area, requiring the instruction of a different expert whose competence is better suited to the specific issue that has arisen. This can occasionally lead to situations where multiple experts are instructed in the same case. It has also been suggested that it can be the case that a report from a particular expert does not support the client’s case strongly enough and that additional reports are sought in an attempt to provide stronger evidence in support of the case at hand.
- 4.2 The appointment of multiple experts paid for by the public purse where the value for money test is not met is wasteful and is unsustainable. However, it is accepted that neither the solicitor nor the first instructed expert can be responsible for a situation where a previously unknown element may require a change of expert. The Department is therefore seeking views on how such circumstances should be addressed.
- 4.3 We would welcome respondents’ views on whether remuneration should be made available in these circumstances. For example, should consideration be given to the payment of a fixed ‘diagnostic fee’ to facilitate the initial assessment of a client/patient with a recommendation as to what type, or level, of specialist would be best placed to provide the substantive report? In addition, should a fee be payable where an expert felt they were unable to provide an opinion on the most appropriate next steps or provide the required report?

- 4.4 In considering the appropriateness of a 'diagnostic fee' a number of factors could influence the outcome. For example, should only one further expert be paid in the case? Would such an approach put undue pressure on the solicitor or could it lead to experts providing reports in cases which were on the extremities of their competence? Or would this provide more effective access to justice with solicitors ensuring an emphasis was placed on greater liaison with experts in the early stages to ensure that unnecessary work was not undertaken only to be redone by another expert. The Department would welcome consultees' views on how the relationship between the expert and the instructing solicitor could be better managed to avoid circumstances where experts could find themselves outside their "designated competence" requiring the instruction of an additional expert. For example, should a protocol be introduced to require the expert to identify such issues at the earliest opportunity?
- 4.5 Any new approach should be designed in such a way to avoid situations where multiple experts complete separate but very similar reports or where multiple reports are obtained in order that the most suitable report can be selected for submission to the court. There may of course be the potential for additional expense to the legal aid fund if a diagnostic fee was introduced, however these costs could possibly be balanced against savings produced by the restrictions on additional expert reports.

Multiple experts in criminal cases

- 4.6 The civil courts in England and Wales, and to a lesser extent in this jurisdiction, operate a system based on the use of a single expert, where possible, agreed between the parties. In April this year the Commission introduced a protocol which sought to encourage the use of joint experts in multiple defendant criminal cases. While this initiative was aimed primarily at reducing the number of defence experts in multiple defendant cases, it may be the case that situations exist where a single joint expert could be used in a wider context.

- 4.7 The Department is keen to seek the views of consultees on their experience of this approach in the criminal courts and whether there are opportunities to manage that system more efficiently. In addition we would welcome views on how effectively this approach has operated in the civil courts. In what circumstances would the use of joint experts not be appropriate?

Court Appointed Experts

- 4.8 It is recognised that there may be challenges, in certain circumstances, in briefing a single expert to provide testimony to meet the needs of both parties in a dispute. The overriding duty of an expert witness is to assist the court in determining its findings in a particular case. This raises the possibility of the court being responsible for the appointment of an expert, where the court is satisfied that expert evidence is required. The expert would take instructions from both applicant and respondent and provide expert evidence to the court while remaining available for cross examination by both sides where necessary. We would welcome views on when such an approach would be appropriate, and when it might not meet the interests of justice.

Register of Experts

- 4.9 The Access to Justice Review Report recommended that the Department give consideration to the development of registers of suitably qualified experts. This would involve a significant exercise across a wide range of experts, not all of whom would be involved in delivering legally-aided work. One option would involve a requirement for experts to register to undertake legally-aided work, and those not so registered could not undertake this work. It may be that an unintended consequence would be to reduce the pool of experts available to provide testimony in Northern Ireland. Before embarking on such an exercise, we would welcome views on the value that such a register would provide and the challenges associated with it. By way of context, the Law Society has already undertaken significant work in this area in recent years and maintains its own register of experts. Additionally there are a number of

UK wide online registers that extend to Northern Ireland on which experts can enrol.

- 4.10 The Department would therefore welcome consultees' views on this issue, specifically what purpose a Departmental register would have, or what additional value such a register would bring. If the purpose is to require experts to register to undertake legal aid work in Northern Ireland, would they be prepared to pay a fee to cover the cost of the necessary audits and professional checks that were undertaken? If an expert from a particular specialism was not registered, how would testimony be obtained? If this is simply a directory of experts, what additional value would it bring?

Increased use of IT and Video Links

- 4.11 In recent years the Department has invested heavily in the use of IT and the use of video link technology is now commonplace. There is a presumption that, where court evidence can reasonably be provided via video link, that should be the default approach. There are significant benefits in the use of technology particularly in reducing costs, for example for waiting time, and the more effective running of the courts. There could also be significant reductions to disbursements paid to experts from outside this jurisdiction in terms of travelling and accommodation costs; this could also apply to those travelling across Northern Ireland. While technology is commonly used, the Department would be keen to hear whether, and how, current processes could be improved upon and whether there are any impediments, particularly in relation to the delivery of expert witness evidence, to increased use of technology to reduce cost and delay in this area. For example, should there be a presumption that evidence by experts from outside the jurisdiction should be delivered by video link? In addition we would welcome views on any challenges that may exist to the greater use of technology, or cases that would not be suitable for the delivery of expert witness evidence using this approach.

Recovery of Costs between parties

- 4.12 The Review recommended that consideration be given to “the recoverability of the costs of experts as between the parties and ensuring that the legal aid fund is not unduly exposed”. The Department believes that this principle should apply to unnecessary costs generally and is not specific to expert witnesses. The Department will consider this recommendation in that context in due course. However, the Department would welcome any comments in this area as part of this consultation.

5.0 Alternative remuneration methods

- 5.1 The Access to Justice Review noted that work was being done in other jurisdictions to codify fees paid to experts, and suggested that consideration should be given to the development of a framework of fixed fees. The empirical evidence required to fully develop a fixed fee arrangement is not yet available but is currently being gathered. In the interim we would welcome views on a number of options.
- 5.2 In considering the possible approaches, it is clear that a lot of expert testimony is similar in nature, and, to the extent to which it can be considered to be routine, will follow a fairly standard format. In these situations, it should be possible to set out the average amount of time required to research the issue, prepare a report and provide oral evidence as required. This would form the basis of a standard approach in routine cases, for which a standard fee could be struck to deliver predictability and simplify administration. Where the expert considered that the standard fee was not appropriate, it would be for the expert to demonstrate why a different fee might be appropriate. This approach would allow a framework to be developed into which hourly rates might be applied. We would welcome views on the extent to which this would simplify the current arrangements and meet the needs going forward.
- 5.3 The project team has identified three approaches for setting fees in a standard fee approach namely, standard fees based on the available Northern Ireland experts' data; fixed hourly rates (with some standard fees, where appropriate) based on the available Northern Ireland experts' data; and fixed hourly rates (with some standard fees) replicating the system in England and Wales. These approaches will be refined when more accurate management information becomes available.

Standard Fees based on available Northern Ireland experts' data

- 5.4 This approach involves setting a single standard fee for each expert type. This approach provides the most effective way of controlling the cost of expert witnesses. Such a system is administratively easy to implement, monitor and adjust in future, if necessary.
- 5.5 The standard fees would be based on the mean figure of the total bill submitted by each expert over a set period of time. Analysis of the data currently available shows that the numbers of hours worked, in the majority of cases, are evenly distributed throughout and that there is no specific point on the scale at which a standard fee would be any more appropriate.
- 5.6 A disadvantage of this approach is that a large proportion of experts (up to 35%) would be paid more than they are at present while a similar number of experts would receive lower remuneration for the work.
- 5.7 Implementing this approach using the mean figures should have no impact on overall costs. While not delivering any savings, this would standardise the rates paid for each area in which an expert's opinion has been sought.

Fixed hourly rates based on available Northern Ireland experts' data

- 5.8 This approach is similar to the system that is currently operating in England and Wales. It would introduce a system of fixed hourly rates based on the mean hourly rates currently being paid in Northern Ireland. An examination of the bills submitted by experts shows a considerable differential in the number of hours' work involved in each case and, as a result, the total cost of each case. This option would remunerate experts on the basis of the number of hours of effort undertaken to provide the expert evidence. Once a structure has been established consideration needs to be given to how to establish the appropriate rates.

- 5.9 The rates charged in Northern Ireland by expert type tend to vary slightly between experts. This option would ensure parity of remuneration between experts in the same field. It has been noted in England and Wales that it appears that the number of hours claimed increased when the hourly rates were capped.
- 5.10 As in England and Wales, there will always be a number of cases where it would not be possible to obtain an expert witness at the proposed rates because of the unique nature of the work and/or the unusual complexity of the case. In those circumstances, the Commission would become involved in negotiating individual hourly rates.
- 5.11 Implementing this option using the mean figures should have no impact on overall costs.

Fixed hourly rates replicating England and Wales

- 5.12 This approach would involve using the existing fixed hourly rates and standard fees which have already been established in England and Wales. This approach has the benefit of bringing our rates into line with England and Wales, helping to ensure value for money and perhaps increasing the opportunities to secure expert evidence from outside the jurisdiction.

6.0 Consultation questions

6.1 The Department would like to obtain the views of as many consultees as possible on the proposed options to change the remuneration of expert witnesses generally, but would be particularly interested to receive views on the questions set out below.

- Q1. Are there more effective means by which expert evidence can be sourced and provided which would avoid the need to appoint additional experts and how should the “diagnostic” effort be remunerated?
- Q2. Has there been any impact on experts arising from the increased development of protocols and court directions?
- Q3. What are your views on the use of a single joint expert in criminal and other cases? In what circumstances might a single joint expert, whether appointed by the court or chosen by agreement by the parties, be sufficient in delivering expert witness services? In what circumstances would this not be appropriate?
- Q4. Is there scope to utilise a single court appointed expert? When would this be appropriate? In what circumstances would a single court appointed expert not be appropriate and why?
- Q5. Presently there is little or no uniformity to fees paid to experts performing similar functions. Is it appropriate to set fixed fees for expert witness services under legal aid?
- Q6. Is it appropriate to remunerate expert witnesses at a fixed hourly rate under legal aid? Is additional flexibility required in setting appropriate fee rates?
- Q7. It has been suggested that experts can find themselves outside their area of designated competence. How can such circumstances be avoided? Are there circumstances where a diagnostic report (and

specific fee) would be more appropriate than commissioning a full report in the first instance, perhaps where designated competence may become an issue?

Q8. Would there be any additional benefits to be derived from the Department developing an additional register of experts? If not, are there ways in which the current register might be improved upon?

Q9. Regarding the use of technology in the delivery of expert witness services, are there opportunities to improve the take up of this service and are there any ways to improve the existing system? Are there any particular challenges to increased utilisation of video link technology for the delivery of expert evidence?

6.2 All comments in relation to this document and the draft Impact Assessment questionnaire are welcome.

7.0 How to Respond

- 7.1 We would welcome your views on the proposals in this consultation and we would invite you to send your comments, in whatever format you choose, to:

Consultation Co-ordinator
Public Legal Services Division
Access to Justice Directorate
Department of Justice
Massey House
Stormont Estate
Belfast
BT4 3SX
Email: publiclegalservicesdivision@dojni.x.gsi.gov.uk
Tel: 028 9016 9516
Text phone: 028 9052 7668
Fax: 028 9041 2357

Closing date

- 7.2 Responses must be received by 16.00 on Friday 20 February 2015.
- 7.3 When responding, please state whether you are making a submission as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

8.0 Additional Copies and Alternative Formats

- 8.1 An electronic version of this document is available to view and download from the Department's website (www.dojni.gov.uk). You may make copies of this document without seeking permission. Hard copies will be posted on request. The text phone contact details are set out above. Copies in other formats, including Braille, large print, audio cassette, computer disc etc may be made available on request. If it would assist you to access the document in an alternative format or a language other than English, please let us know and we will do our best to assist you.

9.0 Confidentiality of Responses

- 9.1 At the end of the consultation period, copies of responses received by the Department may be made publicly available. The information will also be published in a summary of responses which will be made available on the Department's website. If you do not want all or part of your response or name made public, please state this clearly in your response. Any confidentiality disclaimer that may be generated by you or your organisation's IT system or included as a general statement in your fax cover sheet, will be taken to apply only to information in your response for which confidentiality has been specifically requested.
- 9.2 Any personal data which you provide will be handled in accordance with the Data Protection Act 1998. Respondents should also be aware that the Department's obligations under the Freedom of Information Act 2000 may require that responses not subject to specific exemptions in the Act may be communicated to third parties on request.
- 9.3 Please contact Public Legal Services Division at the address at paragraph 7.1 to request copies of responses. An administrative charge may be made to cover photocopying of the responses and postage costs.

10.0 Equality

- 10.1 Section 75 of the Northern Ireland Act 1998 requires all public authorities in Northern Ireland to have due regard to equality of opportunity between the nine equality categories and have regard to promote good relations between persons of different religious belief, political opinion or racial group. Public Authorities are also required to meet legislative obligations under the Disability Discrimination Order, particularly in the formation of public policy making.
- 10.2 The Department is fully committed to fulfilling its Section 75 obligations on the promotion of equality of opportunity, good relations and meeting legislative requirements in Northern Ireland. Whilst the Department's Section 75 screening exercise indicated that a full equality impact assessment was not necessary, the Department has decided to issue a Section 75 questionnaire to seek further information on whether its proposal could have an adverse impact on any of the categories. The Department will then conduct a further screening exercise in light of the responses to the questionnaire.

11.0 Consultation process

- 11.1 If you have any queries about the information provided in this document please contact Public Legal Services Division (details listed at paragraph 7.1). However, if you have any queries or concerns about the way in which the consultation exercise has been handled, you may raise these with the Departmental Consultation Co-ordinator at the following address:

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Central Management Unit
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