

**LSC response to Law Commission Consultation Paper no 190 –
“The admissibility of expert evidence in criminal proceedings in England and
Wales”**

Introduction

1. The Legal Services Commission (LSC) is a non-departmental public body sponsored by the Ministry of Justice (MoJ). The LSC is the biggest single purchaser of legal services in England and Wales and, indeed the world, with an annual spend of £2.1 billion; we are responsible for the delivery of civil and criminal legal aid and the development of community legal services.
2. As a major, though indirect purchaser of expert witnesses we have an interest in the quality, access and provision of forensic science for the Criminal Justice System. We contract with solicitors who where appropriate instruct expert witnesses to support their clients’ case. In criminal proceedings in 07/08 we spent approximately £65 million on disbursements, which includes the use of experts.

General Comments

3. The LSC broadly welcomes the proposals for improving admissibility and understanding of expert evidence in criminal proceedings.
4. Our response to this paper links with our response supporting a more robust approach to the accreditation and regulation of expert witnesses whether the prosecution or defence calls them. Please see our response (**Annex 1**) to the Forensic Science Regulator’s consultation paper “a review of options for the accreditation of forensic practitioners”.
5. The LSC’s long-term aim is to arrive at a position where all experts, who are regularly instructed in legal aid cases, are accredited. This however is a long-term plan and there is still debate about compulsory accreditation, which will need much greater exploration.

Legal Aid Impact Assessment

6. We are concerned that the proposals outlined in the consultation paper may have a significant cost impact on the legal aid budget. Two main areas of concern are the commissioning of expert reports - whether the new proposals would require more information to be provided in the report and therefore increase costs. The other main area would be increased time to the overall court proceedings and therefore increased solicitors and barristers’ costs, which would have a direct impact on the legal aid budget.
7. In our view full Legal Aid & Justice Impact Test¹ would need to be undertaken before the implementation of any proposals.

¹ The Legal Aid Impact Test is now the Legal Aid & Justice Impact Test, covering downstream legal aid costs and impact on the workload of the courts, Tribunals Service or the judiciary.

8. This impact assessment would need to include an assessment of experts' fees, any increase in costs due to extension of court time taken and/or length of trials due to time allowed for assessing experts evidence, or if experts have to be called to court more often to provide evidence may lead to increased legal aid costs.
9. However, we do recognise that a positive impact of the admissibility test if unreliable evidence is challenged or rendered in admissible at an early stage could decrease wasted court time and may have a positive impact on the legal aid fund.
10. Our view is that publishing of clear guidelines in the first instance may prevent inadmissible evidence being submitted. This could avoid an unnecessary payment by us for expert opinion, which had no consequence positive outcome for the client or progress of the case.
11. We would welcome opportunity to work with you on these proposals and contribute to an LAJIT to ensure impacts on the legal aid fund are mitigated.

I hope you will find this response useful. If you have any queries about its contents, please do not hesitate to contact Sonya Mahoney, Senior Manager for Whole Systems Initiatives, at Sonya.Mahoney@legalservices.gov.uk.

Yours sincerely

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Chief Executive
Legal Services Commission

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Annex1

LSC response to Forensic Science Regulator's consultation paper 'a review of the options for the accreditation of forensic practitioners'.

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General Comments

3. The LSC welcomes the developments with regard to quality assurance of forensic science practitioners and the role of the regulator in that. It is our view that regulation should operate in the best interest of the public and have the capability to support an open and competitive market.
4. It is a regulatory function to establish and assure minimum standards, and the responsibility of each and every provider to ensure that the services they deliver are of the highest quality in line with those standards. Equally procurers should be able to rely on the regulators' assurance systems when specifying the level of quality they require, and deciding the evidence that will satisfy them.

Quality Assurance

5. The framework for quality assurance proposed by the Forensic Science Regulator (FSR) appears comprehensive; dealing with the individual, organisations and the methods employed.
6. We agree that individual competence is as much a product of organisational culture and standards as is individual ability. This reflects our approach to legal aid, where we contract with the firm rather than the individual. The majority of our contract and quality management systems apply across the whole organisation. However we also specify standards for individuals for example competence requirements for legal aid category supervisors or individual accreditation in certain categories of law.
7. A combination of management standards and individual competence requirements should ensure that providers of forensic services deliver a high quality service. The introduction of a framework for all practitioners should encourage parity, allow benchmarking and most importantly ensure that the end user receives a good service regardless of the individual or organisation they use.

8. International Standards Organisational (ISO) is considered a basic quality requirement both in the public and private sector, and is proven to deliver more efficient business practices, improve competition and improve standards. The LSC recognises the importance of quality standards as a foundation to ensure the provision of quality services. We have developed and implemented a range of quality standards for those involved in the legal advice sector including the Specialist Quality Mark (SQM), a standard designed to ensure that an organisation is well run and able to offer excellent client care. Compliance with the SQM is a requirement of the legal aid contract.
9. The FSR should consider the inclusion of requirements relating to the effective supervision of staff as part of any quality assurance framework. We believe that effective tailored supervision plays a vital role in ensuring the delivery of a quality service and or product. All legal aid practitioners, regardless of their experience or qualifications, are required to be supervised and their work reviewed by a competent individual.
10. We have found that where issues relating to quality of advice are discovered as part of a direct quality assessment these can often be traced back to failures in supervision. Whilst these findings are based on reviews of legal work the principles can equally be applied to any area of work.

Accreditation

11. Accreditation schemes can play an important role in improving and assuring the quality of work conducted by individual practitioners.
12. We view the accreditation of forensic practitioners as extremely beneficial as it will create a panel of currently competent experts, which would be a valuable resource for all procurers of forensic practitioner services.
13. We understand that there has been reluctance in some areas to join the existing Council for the Registration of Forensic Practitioners (CRFP) scheme and that the assessment process has been questioned. It would be helpful if there was a robust and simple process for accreditation. We would discourage unnecessary duplication between accreditation schemes.
14. At present the FSR's remit extends only to evidence tendered by the prosecution, but it is feasible that this could be extended, by legislation, to cover defence experts. In any event, once an overarching and agreed scheme has been developed we would look into making it a criterion for determining whether the LSC should make public funds available to pay for an expert witness called by the defence. However this is a long-term aim and will be considered as part of our wider work relating to expert witnesses.

Open and competitive market

15. We know that driving quality standards is as much about encouraging competition, new entrants and innovation, as it is about individual quality assurance tools. The FSR will have to be careful that the quality assurance framework and the way that it is applied does not freeze the market from new entrants and developments. Careful consideration will need to be given as to how the standard will apply to new start-ups, and the impact on small agencies and sole traders.

16. The cost of assessment process will obviously be an important factor for organisations. Costs must be proportionate and affordable. The LSC agrees that the regulator should work closely with UKAS to develop an appropriate charging framework that would mean that costs of accreditation were not prohibitive for individual practitioners or small businesses.