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TERMS OF REFERENCE

In a letter to the Commission received on 16 September 2004, the Attorney General, the Hon R J Debus MP required the Commission:

1. To inquire into and report on the operation and effectiveness of the rules and procedures governing expert witnesses in New South Wales.
2. In undertaking this inquiry, the Commission should have regard to:
   - recent developments in New South Wales and other Australian and international jurisdictions in relation to the use of expert witnesses, including developments in the areas of single or joint expert witnesses, court-appointed expert witnesses, and expert panels or conferences;
   - current mechanisms for the accreditation and accountability of expert witnesses for the purposes of court proceedings, including the practice of expert witnesses offering their services on a "no win, no fee" basis;
   - the desirability of sanctions for inappropriate or unethical conduct by expert witnesses; and any other related matter.
3. The Commission to report no later than 31 March 2005.

PARTICIPANTS

Pursuant to s 12A of the Law Reform Commission Act 1967 (NSW) the Chairperson of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

The Hon Justice Michael Adams*

Professor Richard Chisholm

Dr Duncan Chappell

Hon Justice David Kirby

Hon Gordon Samuels AC CVO QC

Professor Michael Tilbury

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SUBMISSIONS

The Commission invites submissions on the issues relevant to this review, including but not limited to the issues raised in this Issues Paper.

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The closing date for submissions is Friday 11 February 2005.

Confidentiality and use of submissions

In preparing further papers on this reference, the Commission will refer to submissions made in response to this Issues Paper. If you would like all or part of your submission to be treated as confidential, please indicate this in your submission. The Commission will respect requests for confidentiality when using submissions in later publications.

Copies of submissions made to the Commission will also normally be made available on request to other persons or organisations. Any request for a copy of a submission marked "confidential" will be determined in accordance with the Freedom of Information Act 1989 (NSW).

Other publication formats

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LIST OF ISSUES

Refer to the pages indicated below for a discussion of the issues listed.

ISSUE 2.1 (page 9)

The Commission invites submissions on the extent of partisanship or bias on the part of expert witnesses, and the value of the measures considered in Chapter 2 in reducing such a problem.

ISSUE 2.2 (page 10)

The Commission would welcome comments on the contents and effectiveness of codes of conduct for expert witnesses, and on other ways in which to convey guidelines and principles to expert witnesses, litigants, and lawyers.

ISSUE 2.3 (page 11)

The Commission invites comments on the existence and operation of any accreditation schemes in New South Wales or other jurisdictions relating to the role of expert witnesses and on their effectiveness and desirability.

ISSUE 2.4 (page 12)

The Commission invites comments on the extent to which 'no win no fee' arrangements are currently used, and whether any of the measures indicated, or other measures, would be desirable.

ISSUE 2.5 (page 12)

How serious is the problem of inappropriate or unethical conduct by experts? Again, the Commission would welcome comments, both on the extent of the problem and on ways in which it might be sanctioned or controlled.

ISSUE 3.1 (page 14)

The Commission would welcome any submissions on the effectiveness of current measures relating to expert witnesses that are designed to increase transpaency and any issues that they are seen to raise.

ISSUE 4.1 (page 16)

It is the Commission's impression that rules requiring experts to consult are generally seen as desirable. The Commission would welcome submissions on this topic.

ISSUE 4.2 (page 17)

The Commission invites submissions on the experience with the use of different methods of receiving expert evidence, and on whether the rules should generally make provision for such methods to be available in suitable cases.

ISSUE 5.1 (page 22)

The Commission would welcome comments on the experience of appointing (non-exclusive) Court Experts, and the advantages and disadvantages of this measure.

ISSUE 5.2 (page 25)

The Commission invites submissions on the experience to date with rules providing for appointment of single experts, and the advantages and disadvantages of this measure. In particular, the Commission invites comments on the following:

(a) To what extent can it be said that existing problems relating to expert witnesses make it necessary or appropriate that the courts (or some courts) should have the power to appoint a Single Expert?

(b) Is it objectionable in principle (because it is contrary to the adversary system or to justice), that the Court should ever be able to appoint a Single Expert?

(c) Are rules providing for single experts authorised by a legislative rule-making power relating to 'practice and procedure', or is it necessary that there be a clearer statutory basis?

(d) If the Court is to have power to appoint a Single Expert, what guidelines should the rules provide as to the circumstances in which a Single Expert should be appointed? Should the rules merely provide that it is one of the options available to the court, or provide lists of factors to be taken into account, or go further and create a presumption favouring (or disfavouring) the appointment of a single expert?

(e) How should the appointment be made? Is it generally appropriate for the rules to provide for an appointment based on the parties' consent, or, where there is no consent, on the Court's own motion? How is the appointment best managed within case management rules?

(f) How is the single expert to be instructed? What version of the facts should be given? If the facts change between the report and the trial, what is to happen? What communications can there be between the parties and the expert leading up to the hearing? Can a party object to something in a report, or have the expert consider a possible error, before the hearing? Can the expert seek further information, or raise some issue about the nature of his or her brief?

ISSUE 6.1 (page 28)

The Commission would welcome comments on the use of assessors, referees and expert assistants, on their effectiveness and acceptability, and on whether they are particularly appropriate in particular types of cases.

1. Introduction

BACKGROUND TO THE REFERENCE

1.1 This reference appears to have been stimulated by expressed concerns about the widespread use of expert witnesses, the costs involved, possible bias and other associated problems. These concerns are shared by some members of the judiciary as well as the Legal Services Commissioner who has received complaints about the use of expert witnesses.

1.2 The reference also co-incides with world-wide reassessment and change relating to the management of court business generally and expert witnesses in particular.

Recent developments overseas

1.3 In England, the Woolf Report in 1996 identified problems with the existing system and recommended major changes. In relation to the system generally, Lord Woolf wrote: [1]

> The defects I identified in our present system were that it is too expensive and that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under-resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants. Above all it is too fragmented in the way it is organised since there is no one with clear overall responsibility for the administration of civil justice; and too adversarial as cases are run by the parties, not by the courts and the rules of court, all too often, are ignored by the parties and not enforced by the court.

1.4 In relation to expert evidence, Lord Woolf said that one of the major generators of unnecessary cost in civil litigation was uncontrolled expert evidence. As summarised by a leading expert: [2]

> He said that a large litigation support industry, generating a multi-million pound fee income, had grown up among professions such as accountants, architects and others, and new professions had developed such as accident reconstruction and care experts. This went against all principles of proportionality and access to justice. In his interim report, he had recommended that the calling of expert evidence should be under the complete control of the court. Within that framework, he had argued for a wider use of "single" or "neutral" experts. He recorded that most respondents

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1. The Right Hon. The Lord Woolf Final Report to the Lrd Chancellor of the Civil Justice System in England and Wales (July 1996)
2. ATK...May, "The English High Court and Expert Evidence (2004) 6 *The Judicial Review* 353, 363.

> to his interim report had favoured retaining the full scale adversarial use of expert evidence and had resisted proposals for wider use of single experts. As to the full "red blooded" adversarial approach, this was only appropriate if questions of cost and time were put aside. The existing system worked well for lawyers and judges, but ordinary people were being kept out of litigation. The basic premise of his new approach was that the expert's function was to assist the court. There should be no expert evidence at all unless it will help the court, and no more than one expert in any one speciality unless this is necessary for some real purpose.

1.5 Lord Woolf's recommendations were generally adopted, and were implemented in the Civil Procedure Rules of 1998. They feature active case management by the Court. The Rules expressly provide that 'the court may control the evidence' by giving directions on such matters as 'the issues on which it requires evidence' and 'the nature of the evidence which it requires to decide those issues'.[3] In relation to expert evidence, the rules provide that it 'shall be restricted to that which is reasonably required to resolve the proceedings'. Parties need the Court's permission to lead expert evidence at all,[4] and the Court may direct that evidence on an issue is to be given by one expert only, known as a 'single joint expert'.[5]

Australian experience

1.6 In Australia, there has also been a trend towards active case management, and some Australian courts have introduced new rules influenced by the English developments.

1.7 The Commission will be considering the English experience and, especially, the recent experience in Australian jurisdictions relating to expert witnesses, both in those jurisdictions that have introduced new measures, and in those that have not.

SCOPE OF THE REFERENCE

1.8 The Reference requires the Commission to assess the rules governing expert witnesses in courts and tribunals in New South Wales. Especially in the light of the deadline of 31 March 2005, it is obviously impossible to conduct a comprehensive review of each jurisdiction, or in the final Report to recommend what particular rules should apply in each jurisdiction.

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3. CPR (UK) r 31.1.
4. CPR (UK) r 35.4(1).
5. CPR (UK) r 35.7.

1.9 The Commission intends, however, to review the various measures and issues set out in the Terms of Reference. The final Report will review the relative merits of the various measures, and make recommendations intended to assist each jurisdiction in formulating suitable rules for its particular circumstances.

Rules and procedures

1.10 The Commission understands the phrase 'rules and procedures' in the Terms of Reference to refer to rules of court and matters of practice and procedure, rather than to the law of evidence as such.

1.11 Rules and guidelines about these matters are generally made by the judges of each court, rather than by the legislature. Typically, the governing Act will have a provision to the effect that the judges of the court may make rules of court on matters of practice and procedure. Rules of court made in this way regulate the proceedings of the court. They are usually quite detailed, and are usually amended relatively frequently.

1.12 In addition to rules of court, guidelines are sometimes contained in Practice Directions, generally made by the most senior judge of the jurisdiction (no doubt after consultation within the Court). In this Issues Paper, the word 'rules' will generally be used to refer both to rules of court and to practice directions.

1.13 In a court that has different divisions, such as the Supreme Court of New South Wales, the rules may provide that some rules are specific to some of its divisions, or particular lists,[6] as well as rules that apply to all proceedings in the Court.

1.14 It is always possible for the court to depart from the rules in a particular case, where their application would be unjust or inappropriate. Thus the rules constitute a framework for the ordinary processes of the court, guiding litigants, but they do not generally prevent the court from making procedural rulings that are tailored for the particular case.

1.15 Sometimes, the rules contain principles and objectives, indicating what they are intended to achieve.

Jurisdictions covered by the reference

1.16 The Commission's Terms of Reference are not limited to any particular jurisdiction, or even to courts as distinct from tribunals.

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6. An example is Pt 14C Professional Negligence List, of the SCR, and Practice Note 104, Professional Negligence List, which includes a code of conduct for experts appearing in that list.

1.17 Although the Terms of Reference are not expressly limited to civil law, the Commission considers that it was unlikely that the reference was intended to include criminal law. The developments referred to in paragraph 2 of the Terms of Reference all relate to developments in the area of civil law. The Commission is not aware of any similar rules in criminal law, and on the face of it they would be inappropriate in criminal law. Nor is the Commission aware of any precedents for such measures in criminal law, or of any views that they should be introduced to criminal law. For these reasons the Commission does not anticipate that the Report will deal with criminal law matters.

THE COMMISSION'S PROPOSED ACTION PLAN

1.18 Since receiving this reference in September 2004, the Commission has commenced the process of writing to the many individuals and organisations known to have an interest in the issues, seeking their comments and assistance.

1.19 The publication and distribution of this Issues Paper is intended to indicate some of the major issues, and to encourage people to make submissions on any aspect of the Reference, including any issues that they think important but may not have been addressed in this Issues Paper.

The structure of this Issues Paper

1.20 Broadly speaking, measures relating to expert witnesses are intended to enable expert evidence to be made available in a way that minimises bias and avoids unnecessary delays, and private and public costs. In this Issues Paper, the discussion is organised by reference to the more specific purposes of the various measures to be considered. Each of these matters will be considered in turn, describing the existing situation and inviting comments and submissions on the numbered issues for consideration.

1.21 Chapter 2, entitled "Measures to enhance the objectivity and accountability of experts", considers measures that are designed to ensure so far as possible that experts adopt an unbiased approach, even if they are called on behalf of one party. These measures tend to stress that experts' task is to assist the Court. One prominent measure of this kind is the Code of Conduct. This chapter also considers mechanisms for the accreditation and accountability of expert witnesses for the purposes of court proceedings, and the problem of expert witnesses offering their services on a 'no win, no fee' basis. Finally, in this chapter, we consider the desirability of sanctions for inappropriate or unethical conduct by expert witnesses.

1.22 Chapter 3, "Measures to increase transparency", deals with measures such as requirements that experts spell out the basis on which they are acting, requiring the disclosure of expert reports prior to the hearing, and restricting private communications between parties and the experts.

1.23 Chapter 4, "Measures for the efficient use of experts", focuses on measures designed to avoid duplication and time wasting, and to ensure that the Court's time is used to deal with issues really in dispute. These measures include requirements that experts consult in advance and identify the matters on which they agree and those on which they disagree, and also techniques involving experts giving evidence in court at the same time.

1.24 Chapter 5, "Measures to limit the number of experts", deals with measures designed to reduce the number of experts and to eliminate or reduce the use of experts called by each party. The most important of these are provisions for a Court Expert, or a Single Expert (in which case the parties are not allowed to call other expert evidence on the topic in question).

1.25 Chapter 6, "Alternatives to experts", considers measures designed to provide technical assistance to the Court other than through the use of experts. These include the use of assessors and referees.

2. Measures to enhance the objectivity and accountability of experts

INTRODUCTION

2.1 The measures to be considered in this chapter are intended to ensure, as far as possible, that experts give honest and impartial evidence. The measures are intended to reduce problems of bias and partiality that are often thought to arise, particularly in the context of the adversary system.

Partisan Pressures

2.2 It is commonplace in the literature that where experts are engaged directly by the parties in relation to litigation, there are pressures on them to adopt a partisan position. Thus Justice Sperling of the New South Wales Supreme Court has written:[7]

> The actual role of the expert witness, particularly in major litigation, is that the expert is part of the team. He - it usually is a "he" - contributes to the way the case is framed and indirectly to decisions as to what evidence is to be got in to provide a basis for his opinion. His report is honed in consultation with counsel. Then, when it comes to the trial, he is a front line soldier, carrying his side's argument on the technical issues under the fire of cross-examination.
>
> Natural selection ensures that expert witnesses will serve the interests of their clients in this way. If the expert measures up he will be kept on and he will be used again by the same client, the same solicitors and others. If he does not measure up, he will be dropped from the case or never used again by anyone. He then disappears from the forensic scene.

2.3 Although they may represent a minority of instances, there are numerous examples of judges finding that in particular cases expert witnesses have lacked objectivity. In a recent Australian survey, about 1 in 4 of the judges who responded said they encountered bias often, and about 2 in 5 said that partisanship was a significant problem for the quality of fact-finding.[8]

Differences of opinion may be legitimate

2.4 It is not obvious, however, that even a universal replacement of partisanship with objectivity would eliminate all differences between experts. It

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7. H D Sperling, "Expert Evidence: The Problem of Bias and Other Things" (speech to the Supreme Court of NSW Annual Conference, Terrigal, Australia, 3-4 September 1999). Similarly, the Review of the Law of Negligence Report has referred to "a widespread perception that, in many instances, expert witnesses consciously or sub-consciously slant their testimony to favour the party who retains them": Australia, Review of the Law of Negligence Final Report (September 2002) at para 3.74.
8. Sperling, above, citing I Freckelton, P Reddy, H Selby, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* (Australian Institute of Judicial Administration Inc, Carlton, 1999) ("the Freckelton report").

seems likely that sometimes experts will take different views not because any of them are lacking in diligence, objectivity or expertise, but simply because there is room for genuine differences of opinion among qualified experts in the relevant discipline. When the views of a particular expert are known, the expert may be selected by a party who knows that the expert's genuinely held views are likely to accord with that client's case. For example solicitors regularly representing injured plaintiffs in compensation matters may choose expert witnesses from among medical practitioners whose opinions are such that their evidence is likely to benefit the plaintiff's case. If so, there may well be situations in which the views of each side's expert are predictable and favour the party calling the expert, but in which there is no lack of objectivity on the part of either of the experts. It may be misleading to use phrases such as 'hired guns', or to suggest bias, in relation to experts whose views are predictable only because those calling them are aware of the witnesses' views on professional issues relevant to the case.[9]

2.5 It would seem that the measures discussed in this chapter would have no impact on such situations. They may, however, reduce problems of bias, whether conscious or unconscious.

ISSUE 2.1

The Commission invites submissions on the extent of partisanship or bias on the part of expert witnesses, and the value of the measures considered in this chapter in reducing such a problem.

FORMULATION OF STANDARDS; CODES OF CONDUCT

2.6 From early times, courts have on occasion expressed concerns about the quality and objectivity of expert witnesses, and the cases abound with judicial exhortations that experts should be unbiased, notwithstanding that they have been called by one party. For example, Lord Wilberforce said in 1981:[10]

> While some degree of consultation between experts and legal advisers is entirely proper, it is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation …

9. G Davies distinguishes between 'polarisation of opinions' and 'adversarial bias' in 'Court Appointed Experts' (paper to Annual Supreme and Federal Court Judges' Conference, Aukland, NZ, 29 January 2004.)
10. *Whitehouse v Jordan* [1981] 1 WLR 246 at 256-257.

2.7 More elaborate statements have followed, in one case the court referring to:[11]

> a duty to express only opinions genuinely held and which are not biased; a duty not to mislead by omission; and a duty to consider all the material facts and not to omit to consider material facts which could detract from the concluded opinion.

2.8 In more recent times, a number of courts have published codes of conduct for expert witnesses. For example, the Supreme Court's Code of Conduct for expert witnesses[12] provides that an expert witness has 'an overriding duty to assist the Court impartially on matters relevant to the expert's area of expertise' and that the expert witness's 'paramount duty' is to the Court, not to the person retaining the expert. The code also deals with the contents of the expert's report and conferences with other experts directed by the court.

ISSUE 2.2

The Commission would welcome comments on the contents and effectiveness of codes of conduct for expert witnesses, and on other ways in which to convey guidelines and principles to expert witnesses, litigants, and lawyers.

ACCREDITATION OF EXPERTS

2.9 Normally, expert witnesses have professional qualifications and accreditations, and the Court would of course take these into account when considering the admissibility of the expert's evidence, and the weight to be given to it. It might be expected that these matters would also be considered by parties when selecting expert witnesses, since they would want the evidence to impress the Court favourably.

2.10 The Commission understands the reference to accreditation in the Terms of Reference to refer to experts being accredited, by the Court, specifically as expert witnesses.

2.11 At this stage, the Commission is aware of some examples of courts having a panel of experts in a particular field, from which it can select a court expert in particular cases,[13] but this seems unusual.

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11. Cazalet J in *Re J* [1991] FCR 193, 226. Perhaps the best known is the 10-paragraph code of conduct formulated by Creswell J in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd* (the "Ikarian Reefer") [1993] 2 Lloyd's Rep 68, 81-82, endorsed by Stuart-Smith LJ on appeal: *National Justice Cia Naviera SA v Prudential Assurance Co Ltd (the "Ikarian Reefer")* [1995] 1 Lloyd's Rep 455, 496. See also Garland J in *Polivitte Ltd v Commercial Union Assurance* [1987] 1 Lloyd's Rep 379, 386; Evans LJ, in *Vernon v Bosley* (No 1) [1997] 1 All ER 577, 601.
12. Schedule K to the Supreme Court Rules since January 2000.
13. A Cannon, "Courts using their own experts" (2004) 13 JJA 182-194 (panel of building experts, to assist the SA Magistrates Court on technical issues).

2.12 No doubt such schemes might have the advantage of improving the quality of expert evidence available to the Court, and, in some areas, reducing the difficulty of finding available and competent experts.

2.13 There may however be concerns about such a process.[14] For example, it might be thought inappropriate for the Court to have such a role, lest accredited experts be given an unfair advantage over well-qualified experts who have not been accredited by the Court. If, for example, the only experts who were accredited took a particular view of some matter that was controversial within the discipline, the criticism might be made that the process would undermine the Court's impartial role, since a litigant whose expert witness took a different view, and was not accredited, might be seen as unfairly disadvantaged. Apart from this, the Court may not have the resources or expertise to maintain a list of accredited experts.

2.14 Another approach would be that the relevant professional association would have a form of accreditation specifically relating to the role of expert witnesses, as distinct from accreditation to practice in the relevant area of expertise.

ISSUE 2.3

The Commission invites comments on the existence and operation of any accreditation schemes in New South Wales or other jurisdictions relating to the role of expert witnesses and on their effectiveness and desirability.

'NO WIN NO FEE' ARRANGEMENTS

2.15 A 'no win no fee' arrangement refers to an arrangement where a party to litigation engages an expert witness on the basis that the expert will be paid only if the case succeeds. According to press reports, this practice has appeared among some doctors, accountants, engineers and property valuers.

2.16 There is an obvious difficulty with such arrangements, since they would create a financial incentive for the witness to give evidence favouring the litigant who engaged him or her, contrary to the principle that the expert witness should seek to assist the Court in an objective way.[15] Some professional associations are

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14. A R Abadee, "The Expert Witness in the New Millennium" (paper delivered to the General Surgeons Australia, 2nd Annual Scientific Meeting, 2 September 200, Sydney), agreeing with the views of Justice Williams: "Accreditation and Accountability of Experts" (paper delivered to Medico-Legal Conference, Gold Coast, Queensland, 5 August 2000.)
15. Chief Justice Spigelman has been quoted as expressing concern, in this connection, that the expert 'then has a financial interest in the success of the case and is then unlikely to be impartial': Jonathon Pearlman, "Professional Witness Alarm', *Newcastle Herald* (6 September 2004) at 2.

reported to have rules against such practices, and it seems that they have been widely prohibited in the USA.[16]

2.17 On this view, it might be suggested that the law should prohibit or discourage such arrangements. There might be a number of ways this could be done. For example:

- Such arrangements could be treated as contempt of court or an abuse of process.
- The relevant code of conduct could expressly forbid such arrangements.
- The Court could decline to receive evidence of an expert witness who had been shown to have made such an arrangement.
- The making of such arrangements could be expressly stated to be unprofessional conduct by lawyers. (Although such a rule would not apply to unrepresented litigants).
- If there were to be some form of accreditation, such behaviour could disentitle the expert to be accredited.

ISSUE 2.4

The Commission invites comments on the extent to which 'no win no fee' arrangements are currently used, and whether any of the measures indicated, or other measures, would be desirable.

SANCTIONS FOR INAPPROPRIATE OR UNETHICAL CONDUCT BY EXPERT WITNESSES

2.18 The measures just mentioned, in relation to 'no win no fee' arrangements, could also be considered in relation to expert witnesses who engaged in other forms of inappropriate or unethical conduct. The most obvious example of such conduct would be a deliberate attempt to mislead the court by giving evidence that the witness knows to be untrue or misleading.

ISSUE 2.5

How serious is the problem of inappropriate or unethical conduct by experts? Again, the Commission would welcome comments, both on the extent of the problem and on ways in which it might be sanctioned or controlled.

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16. American Bar Association, *Model Rules of Professional Conduct*, 2003 at 80-81.

3. Measures to increase transparency

3.1 It is now common practice that judges and other judicial officers exercise control over the preparation of cases for trial through systems of 'case management'. Such systems attempt to reduce what is often called 'trial by ambush' and to encourage the parties at an early stage to identify the real issues, and to achieve a realistic view of the case, in order to maximise the chance of early resolution.

3.2 Consistently with this, there are a number of common provisions relating to expert witnesses that seem designed to increase transparency. These may be briefly summarised as follows.

a. Providing the other party with advance copies of any reports to be used in the case.

b. Disclosing any expert reports that a party obtains, whether or not to be used in the case.

c. Disclosure of instructions to expert (normally contained in expert's report anyway).

d. Disclosure of all communications between the party and the party's expert.

3.3 Such measures are to be found, variously expressed, in the rules of a number of jurisdictions. The detailed rules generally form part of the case management systems of each jurisdiction.

ISSUE 3.1

The Commission would welcome any submissions on the effectiveness of current measures relating to expert witnesses that are designed to increase transparency, and any issues that they are seen to raise.

4. Measures for the efficient use of experts

REQUIREMENTS FOR EXPERTS TO CONSULT, AND/OR REPORT ISSUES

4.1 In many jurisdictions, there are now rules to the effect that the Court may require experts to consult with each other before the hearing, and produce for the court a statement setting out the matters on which they agree and those on which they disagree.[17] The purpose of such rules is to assist the parties to identify misunderstandings and assist the experts to adopt reasonable positions, thereby maximising the chances of settlement and, in the cases that do not settle, reducing the time spent at the trial.[18]

ISSUE 4.1

It is the Commission's impression that rules requiring experts to consult are generally seen as desirable. The Commission would welcome submissions on this topic.

METHODS OF RECEIVING EXPERTS' EVIDENCE

4.2 Commonly, expert evidence is contained in a written form (for example, a report or affidavit) and filed on behalf of the each of the parties before the hearing. Ideally, this process gives each party the opportunity to consider the issues and consult with their own expert, before the hearing, maximising the chance that agreement may be reached. Typically, the rules provide for this process.[19] At the hearing, the experts are normally available for cross-examination. In addition, it is generally open to the court to direct that their evidence in chief may be given orally rather than in writing, and it is not uncommon for experts to give brief oral evidence in chief of an updating kind, before cross-examination commences, as for example where a valuer gives oral evidence of some relevant event that has happened since the written report was filed.

4.3 At the hearing, the usual approach has been that each expert in turn gives any oral evidence in chief and is then cross-examined. In recent years, however, there has been some interest in modifying this approach, so that the relevant experts in a particular area are all sworn in at one time and remain together in court. They then give their evidence by way of answering questions on particular topics, rather than the evidence of each expert being

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17. See eg Supreme Court Rules (NSW) Pt36 r13CA(1), and Practice Note 121, "Joint Conferences of Expert Witnesses"; Federal Court Rules, O34Ar3.
18. Under the NSW Land and Environment Court's *Expert Witness Practice Direction 2003*, where the experts in a joint report specify a matter on which they agree, a party may not lead evidence on that matter without the Court's leave: see especially paragraph 6(6).
19. Some rules deal with such matters in detail. For example, the Federal Court rules provide for obtaining the factual evidence before the experts give evidence, and for the experts to indicate whether their views have changed because of certain evidence: see O34Ar3(2)(c) and (d).

taken separately.[20] Such methods, sometimes beguilingly called 'hot-tubbing', are seen as having merits in some situations, making it easier for the court to understand the issues quickly.

4.4 Rules that deal with these matters usually provide that the court may make directions for evidence to be given in such ways. The Commission is not aware of any rule that requires evidence to be given in this way, or that such methods have become a routine or usual practice.

ISSUE 4.2

The Commission invites submissions on the experience with the use of different methods of receiving expert evidence, and on whether the rules should generally make provision for such methods to be available in suitable cases.

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20. For example, under the Federal Court rules (O34Ar3(e), (f), (g), (h), (i)), the court can order that each expert be sworn one immediately after the other; that when giving evidence witnesses are not necessarily in the box; each can give opinion on issue and on other experts; manner and sequence of cross-examination can be organised. An illustration of the process is *Re Queensland Independent Wholesalers Ltd* (1995) ATPR 41-438 at 40,925 (Lockart J). The process is also used, with as many as six experts sworn in at the same time, by the NSW Land and Environment Court: P McClennan, "Problems with Evidence" (Speech for the Government Lawyers' Annual Dinner, NSW Parliament House, 7 September 2004).

5. Measures to limit the number of experts

INTRODUCTION

5.1 Arguably, all the measures considered so far are consistent with what is referred to as the 'adversary system', in that the parties alone put the evidence before the Court. The measures affect the way the evidence is handled, but – with the possible exception of a panel of Court-accredited experts - do not involve the Court playing any part in the selection of evidence. By contrast, the measures to be considered in this section do involve the court playing a part in deciding what expert evidence is to come before it.

5.2 Some of these measures, such as referees and assessors, and the court's power to call its own witnesses, have long been part of the law, although in many jurisdictions they have been little used. Others, however, notably rules that limit the parties' ability to call as many experts as they wish, and rules that provide for a single expert, are more recent. They have been introduced as part of an effort to reduce costs and delay, and, to some extent, to reduce or eliminate what have been seen as unsatisfactory aspects of the existing practice. These measures have sometimes been controversial.

THE (NON-EXCLUSIVE) COURT EXPERT

5.3 We use the term 'Court Expert' to refer to an expert called by the Court, in circumstances where there is no restriction on the parties' rights to call their own expert evidence on the topic.[21]

5.4 Although such a power has existed for many years, its use, while by no means unknown, has generally been sparing.[22] There would seem to be a number of possible reasons for this.

5.5 First, once a hearing has begun, it will generally be difficult for the court to make arrangements for the appointment of its own expert without adjourning the case, with unwanted consequences of delays and increased costs, both for the parties and for the court. It would seem that for practical reasons, the

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21. The existence of a power in the court to call its own expert does not of itself preclude the parties from calling their own experts. And sometimes their power to do so is made explicit. Thus the Federal Court rules expressly provide that where there is a court expert, any party may adduce evidence of one other expert on the same question, if the party has given notice to the other parties of intention to do so. See O34 rr 2, 6.
22. The Freckelton Report, above. In the United States, as early as 1952, the rules of the Supreme Courts of the Bronx and New York provided for the appointment of an impartial doctor from panels of willing eminent doctors supplied by the local medical societies. The doctor would examine the patient, file a report, and be available for cross-examination. The rules were said to have had some success in encouraging settlement and discouraging fraudulent or exaggerated claims. See P F Rothstein, *Federal Rules of Evidence* (updated to December 2003), Article VII, Opinions and Expert Testimony; Rule 706: Court Appointed Experts.

appointment of a court expert will often be possible only if the court engages in fairly intensive case management, such that a judicial officer will be able to form the view that a court expert is needed, and take the necessary steps, well before the trial commences. Broadly speaking, intensive case management is a relatively modern phenomenon, and thus until recent times it may have usually been impracticable for courts to appoint their own expert.

5.6 Secondly, the court may often consider that calling a court expert would be likely to complicate the hearing, and increase costs and delay, without evident advantage in the particular case.

5.7 Thirdly, the court may consider it inappropriate in adversary proceedings to call its own expert. It may consider that the parties are the best judge of what evidence to lead, and that justice will most likely be done by the court adjudicating on the evidence the parties choose to put before it. Perhaps, too, the court may feel that the decision to call an expert, and to identify that expert, could be seen as indicating a degree of pre-judgment or bias on its part.

5.8 Justice Sperling has summarised the arguments for not appointing a Court Expert as follows:[23]

> It has been said that the appointment by the court of its own expert witness is contrary to the fundamental premise of the adversarial system; that the parties have the right to present their own case and to call witnesses of their own choice to support that case; that a court appointed expert may be unable to deal satisfactorily with a situation where more than one acceptable expert view of the matter in question is held in the professional community; that the court might place undue reliance on the evidence of the court expert, with the result that it will be the expert rather than the judge who decides the case; that, if the parties are permitted to call their own experts in order to reduce that concern, the appointment of a court expert may cause delay and an increase in costs without any countervailing benefit; and that, even if parties are precluded from calling their own experts, they would still have to incur the cost of retaining experts to advise on the likely outcome of the proceedings and to assist in preparation for cross-examination of the court expert, so that the saving in costs might be less than anticipated.

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23. Sperling, above, citing *Re Saxton* [1962] 1 WLR 968 per Lord Denning MR at 972; *Kian v Mirro Aluminium Co* 88 FRD 351 at 356 (Mich 1980); *Woolf, Access to Justice* (Final report to the Lord Chancellor on the Civil Justice System in England and Wales, HMSO, London, July 1996) at p.186, (Interim report to the Lord Chancellor, HMSO, London, June 1995) at p.142; Australian Law Reform Commission, *Experts* (Review of the Adversarial System, Background Paper 6, Jan 1999) at pp.47-49; R Chesterman, "Dealing with Expert Witnesses" (1998) 36 *Law Society Journal* 50; Editorial, "Expert Evidence" (1991) 59 *Medico-Legal Journal* 67; V Plueckhahn, "Legal Dilemmas in the Use of 'Expert Medical Evidence'" (1982) *Australian Journal of Forensic Sciences* 158.

5.9 There may, however, be reasons for appointing a court expert, and the Commission will be studying the occasions in which such appointments have been made. For example, it might be thought in a particular case that the appointment of a Court Expert would be likely to help the parties resolve the issue, or provide the Court with evidence that is more objective, or more satisfactory, than that provided by the parties. Again, the appointment of a Court Expert may perhaps offset an unequal situation between the parties.[24]

ISSUE 5.1

The Commission would welcome comments on the experience of appointing (non-exclusive) Court Experts, and the advantages and disadvantages of this measure.

THE SINGLE EXPERT

5.10 The term 'Single Expert' is used in this Issues Paper to refer to the following:

- An expert (the Single Expert) is appointed by the Court; and
- Parties are not permitted to call their own expert evidence on the same subject-matter.

5.11 The literature also speaks of a 'Joint Expert'. This term indicates that the Expert may be appointed jointly by the parties. Indeed, rules providing for a Single Expert normally provide that the appointment may be made on the basis of the parties' agreement, although if the parties cannot agree the appointment can be made by the Court. For the purpose of this issues Paper, the term Single Expert is preferred, because it indicates the distinctive feature of this measure, namely that the Court appoints one person and permits no other person to give expert evidence on the particular subject matter.

5.12 The appointment of a Single Expert may be considered a stronger or more drastic step than the mere appointment of a Court Expert, because it limits the expert evidence that the parties can call. Not surprisingly, it seems to have been the most controversial of the measures discussed in this Issues Paper.

5.13 Some Australian jurisdictions, influenced by the Woolf reforms in England, have recently adopted this kind of approach.[25] In Queensland, there is provision for the parties jointly to appoint an expert, or for the Court to do it of its own motion. The main expressed purposes of the provisions include:[26]

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24. See Jonathon Pearlman, "Doctors wary of being caught in web of litigation" *Sydney Morning Herald* (6 September 2004) at 11, reporting that solicitors acting for injured parties in medical negligence cases complain about the difficulty in finding medical experts willing to testify against other doctors.
25. Queensland, Uniform Civil Procedure Rules, Part 5 – *Expert Evidence*.
26. Rule 423.

(b) [To] ensure that, if practicable and without compromising the interests of justice, expert evidence is [to be given by the single expert] ...; and

(c) avoid unnecessary costs associated with the parties retaining different experts; and

(d) allow, if necessary to ensure a fair trial of a proceeding, for more than 1 expert to give evidence on an issue in the proceeding.

5.14 Unless the Court otherwise orders, the expert is to be the only expert to give evidence on the issue. [27] Somewhat similar rules have been formulated in the Family Court of Australia.[28]

5.15 In New South Wales, the Land and Environment Court has used its rules to appoint experts, and since March 2004 'has imposed a presumption that in relation to any issue requiring expert evidence, a court expert will be appointed'. Where there is a court expert, a party needs leave to call an expert retained by that party. The Chief Judge of the Court has written:[29]

> Generally, provided the Court is satisfied that the additional expert will add useful information to the discussion, leave is granted. Experience has shown that the court expert's opinion is not always accepted by the judge or commissioner but that in every case the integrity of the decision made has been significantly enhanced.
>
> … it would appear that in cases where a court expert has been appointed, many have settled without the need for a hearing and others have taken significantly les time for the hearing to be completed…
>
> The consistent comment from the judges, commissioners and legal practitioners is that the evidence from persons appointed as court experts reflects a more thorough and balanced consideration of the issues than was previously the case…

5.16 The appointment of a Single Expert has been seen as having a number of advantages. First, by preventing other expert evidence on the matter in question, the appointment of a Single Expert is seen as reducing the time of the hearing, and thus saving public and private costs. Some would say, however, that such savings are not as evident as might be thought. They would point to the costs, both public and private, of the pre-trial processes that are required for the appointment of the Single Expert. They would also argue that each party

27. Rule 429N.
28. *Family Law Rules* 2004, Part 15.5. See generaly Family Court of Australia, *The Changing Face of the Expert Witness* (2002).
29. P McClennan, 'Problems with Evidence' (Speech for the Government Lawyers' Annual Dinner, NSW Parliament House, 7 September 2004).

will often need to engage an expert to advise them on the assessment of the evidence to be given by the Single Expert, and to assist in the preparation of cross-examination of the Single Expert. In some cases at least, they would argue that it might be cheaper for the parties each to have one expert than to have to pay for the Single Expert and also for their own 'shadow' experts. They might add that if the Single Expert were to be discredited in cross-examination at the trial, there would then be no expert evidence and there would need to be an adjournment, causing increased delays and costs.

5.17 Secondly, the appointment of a Single Expert is supported as providing more objective evidence than would otherwise be available. The argument is that this will assist the parties in attempting to resolve the matter (because the outcome will be more predictable) and will also provide more reliable evidence for the Court if the matter goes to a hearing.

5.18 On the other hand, some would argue that such an appointment may (or on one view, does) undermine the essential function of the Court: that the appointment of a particular Single Expert may involve a pre-judgment (eg that a particular view among experts is the correct one), and that the Single Expert's evidence, being unchallenged by other experts, would be so persuasive as to undermine the decision-making role of the Court.

5.19 The above paragraphs are not intended to be a comprehensive account of the issues raised by the Single Expert, but only to indicate some of the differences that have arisen. There are other issues, some of them detailed and technical, relating to the Single Expert.

ISSUE 5.2

The Commission invites submissions on the experience to date with rules providing for appointment of single experts, and the advantages and disadvantages of this measure. In particular, the Commission invites comments on the following:

(a) To what extent can it be said that existing problems relating to expert witnesses make it necessary or appropriate that the courts (or some courts) should have the power to appoint a Single Expert?

(b) Is it objectionable in principle (because it is contrary to the adversary system or to justice), that the Court should ever be able to appoint a Single Expert?

(c) Are rules providing for single experts authorised by a legislative rule-making power relating to 'practice and procedure', or is it necessary that there be a clearer statutory basis?

(d) If the Court is to have power to appoint a Single Expert, what guidelines should the rules provide as to the circumstances in which a Single Expert should be appointed? Should the rules merely provide that it is one of the options available to the court, or provide lists of factors to be taken into account, or go further and create a presumption favouring (or disfavouring) the appointment of a single expert?

(e) How should the appointment be made? Is it generally appropriate for the rules to provide for an appointment based on the parties' consent, or, where there is no consent, on the Court's own motion? How is the appointment best managed within case management rules?

(f) How is the single expert to be instructed? What version of the facts should be given? If the facts change between the report and the trial, what is to happen? What communications can there be between the parties and the expert leading up to the hearing? Can a party object to something in a report, or have the expert consider a possible error, before the hearing? Can the expert seek further information, or raise some issue about the nature of his or her brief?

6. Alternatives to experts

THE ROLE OF ASSESSORS, REFEREES, EXPERT ASSISTANTS

6.1 There has long been provision for courts to be assisted by assessors, referees, or expert assistants (a recent term). The role of such persons is in some ways similar to that of witnesses, in that they provide information and opinions that the Court takes into account. Sometimes a panel is used, sometimes an individual. However although they may provide a report to the Court, they do not give evidence, and they are not subject to cross-examination.

6.2 A recent example of this approach can be found in the Federal Court. Under the rules of that Court, an 'Expert Assistant' may be appointed to assist the Court. The Expert Assistant must give a report, and may at the Court's direction make other comments. The Expert Assistant must give the report to each party. The Court must give each party reasonable opportunity to comment and to adduce evidence on the issue, but not to examine or cross-examine the expert assistant. The parties are not to communicate with the Expert Assistant without leave. The Expert Assistant may not give evidence.

6.3 The Commission's preliminary inquiries suggest that measures of this sort are relatively uncommon, but that in some jurisdictions they are used for particular sorts of specialised problems.

ISSUE 6.1

The Commission would welcome comments on the use of assessors, referees and expert assistants, on their effectiveness and acceptability, and on whether they are particularly appropriate in particular types of cases.