

The Role of Legal Advisers in Preparing Expert Reports

By John Arneil, Group Executive of Unisearch – Master of Arts UNSW

The preparation of Expert Opinion is governed by the various expert codes, court directions and civil procedure rules of the relevant court and jurisdiction. The admissibility of the report is also subject to the provisions of Section 76 and 79 the Uniform Evidence Act.

It is commonly understood that the instructing lawyer's duty is to inform the expert of their obligations and provide a copy of the [relevant code](#).

On occasion some of our experts and legal firm clients raise concerns about the manner and intent of instructions, advice and suggestions during the process of preparing the report.

This is a complex interaction which can be fraught with confusion and misunderstanding. Opinion varies from one extreme where the expert asserts that beyond the Letter of Instruction, the lawyer has no role in the process and any suggestion is perceived as interference and advocacy that could affect the objectivity of their opinion.

At the other extreme, some lawyers, who may also have significant expertise in a sector (e.g. construction industry), will seek to influence the expert along certain paths of inquiry and avoid the analysis of evidence that is detrimental to their client's case.

In reality, legal advisers and experts both have a role in preparing the report.

In the first instance, the legal adviser must provide precise instructions and clearly define the questions in respect of which the expert opinion is sought. This may require the expert and legal adviser to consult closely to narrow the issues to those of direct relevance.

In *Jango v Northern Territory (No.2)*⁵¹ Sackville J said:

"It is difficult to avoid the conclusion that this apparently very large investment of time in the preparation of expert reports is attributable, at least in part, to a failure to define their task with precision and due regard to the laws of evidence."

In the second instance it is the responsibility of the legal adviser, not the expert, to ensure that any written report is both relevant and in an appropriate form to be tendered into evidence.

In *Harrington-Smith v Western Australia*, Lindgren J said:

Lawyers should be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed.

Finally, there may be valid reasons for the lawyer to request an expert to amend their report. The expert may have drifted into irrelevancies outside the brief, or their chain of reasoning leading to their opinion may be incomprehensible to the reader. As long as the substance and integrity of the Expert's opinion is clearly preserved, this is entirely permissible.

In *Queen v Coroner Maria Doogan* [2005] ACTSC 74 at [119] it was noted:

"... the mere fact that some editing of the [expert reports] occurred does not demonstrate any impropriety on the part of the lawyers in question or provide any valid ground for concern ... [however, counsel assisting the inquiry were still required] to ensure that the reports conveyed the author's opinions in a comprehensible manner, that the basis of those opinions was properly disclosed and that irrelevant matters were excluded. It has not been established that any of the lawyers assisting the first respondent sought to change passages in the reports conveying opinion or information, so the prosecutors complaints seemed to be based upon the editing of passages that were, at best, of marginal relevance."

Unisearch

Expert Opinion Services

The Expert, Legal Adviser and indeed Unisearch have a common goal and responsibility to the client in ensuring that the opinion is contained in a well presented and comprehensible report that meets the admissibility requirements of the relevant jurisdiction. As long as the substance of the opinion is upheld, the task should be undertaken cooperatively in a practical, not paranoid manner.

To find out about how Unisearch can help you in sourcing an expert, please visit our website <https://www.unisearch.com.au/find-expert/how-we-help> or call us on 1800 676948.

[John Arneil is Group Executive of Unisearch Expert Opinion Services. Unisearch is Australia's largest provider of Expert Opinion Services to the legal fraternity, government sector agencies and commerce & industry. Unisearch case manages over 900 expert opinion and consulting matters each year ranging from expert opinions, testing services and consulting on major projects in over 2000 discrete areas of expertise.]

Unisearch Expert Opinion Services PO Box 6666 UNSW Sydney NSW 1466 Australia

T: +61 2 9385 5555 | F: +61 2 9385 6555 | E: experts@unisearch.com.au | W: www.unisearch.com.au

Unisearch Expert Opinion Services is a business group of UNSW Global Pty Limited, a not-for-profit provider of education, training and advisory services and a wholly owned enterprise of the University of New South Wales. UNSW Global Pty Limited ABN 62 086 418 582